

AFFIRMATIVE REFRACTION:  
*GRUTTER v. BOLLINGER* THROUGH THE  
LENS OF *THE CASE OF THE SPELUNCEAN*  
*EXPLORERS*\*

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What can a fifty year-old hypothetical about human cannibalism concocted by the late Lon Fuller<sup>1</sup> teach us about the Supreme Court's recent foray into the affirmative action debate in twenty-first century America?<sup>2</sup> Indeed, what can a tax law professor and a labor law professor add to the cacophony of voices of leading constitutional law scholars on the Court's most important pronouncement on race in a generation?<sup>3</sup> We make a rather modest claim, based on teaching both of these cases in our one-week *Introduction to Law* classes for incoming first year students,<sup>4</sup> that a helpful way to view *Grutter v. Bollinger*<sup>5</sup> is through the lens of *The*

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1. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

2. This Article focuses on the case involving the use of race in law school admissions policies at the University of Michigan, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and not the companion case involving the use of race in undergraduate admissions policies at Michigan, *Gratz v. Bollinger*, 539 U.S. 244 (2003).

3. We come to this task not entirely unequipped: one of us has recently taken an unorthodox tack in writing about a legal issue of great public interest, Paul L. Caron, *The Federal Tax Implications of Bush v. Gore*, 79 WASH. U. L.Q. 749 (2001), while the other has plumbed some of the jurisprudential underpinnings of this Article, Rafael Gely & Leonard Bierman, *Labor Law Access Rules and Stare Decisis: Developing A Planned-Parenthood-Based Model of Reform*, 20 BERKELEY J. EMP. & LAB. L. 138 (1999); Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT. L. REV. 89 (1998). See also Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEXAS L. REV. 1483 (2004).

4. The course is designed to equip incoming students with the analytical tools and framework needed for success in the first year of law school. See [www.law.uc.edu/courses](http://www.law.uc.edu/courses).

5. 539 U.S. 306 (2003).

*Case of the Speluncean Explorers*.<sup>6</sup> Legal scholars have issued dozens of new “opinions” on the hypothetical legal issue in that case to take into account contemporary legal theories developed in the past fifty-five years.<sup>7</sup> This Article is the first to take the opposite approach<sup>8</sup> and view a real-life legal issue through the eyes of the fictional Justices in *The Case of the Speluncean Explorers*. This Article also is the first to consider the applicability of Fuller’s hypothetical outside the context of statutory construction.

We argue that the various opinions in *Grutter* find their intellectual forebears in the opinions in *The Case of the Speluncean Explorers*. For all the heat generated by *Grutter*, the opinions merely mark another way station in the centuries-old debate among competing philosophies of the role of law and government. By examining the *Grutter* opinions in the context of this rich jurisprudential tradition, we hope to elevate much of the current debate about the case, in which labels like “liberal” and “conservative” are hurled about like epithets, toward a more sophisticated understanding of how the various Justices’ approaches embody alternative views of the proper judicial function in our democracy.

Parts I and II of this Article describe the facts and opinions in *The Case of the Speluncean Explorers* and *Grutter*. Part III then draws some rather surprising connections between these very different cases by using what we call a “jurisprudence of humility.” We explain how the disparate opinions in *Grutter* can be understood in the context of the issues addressed by the mythical justices in *The Case of the Speluncean Explorers* over half a century ago. Although a jurisprudence of humility does not make it any easier to decide difficult issues like the constitu-

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6. Fuller noted that his hypothetical could be used to “bring[] into common focus certain divergent philosophies of law and government.” Fuller, *supra* note 1, at 645.

7. See PETER SUBER, *THE CASE OF THE SPELUNCEAN EXPLORERS: NINE NEW OPINIONS* (1998); Anthony D’Amato, *The Speluncean Explorers—Further Opinions*, 32 STAN. L. REV. 467 (1980) (three new opinions); Symposium, *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1834-1923 (1999) (six new opinions) [*hereinafter Harvard Speluncean Symposium*]; Symposium, 61 GEO. WASH. L. REV. 1731-1811 (1993) (seven new opinions) [*hereinafter George Washington Speluncean Symposium*].

8. Cf. J.B. Ruhl, *The Case of the Speluncean Polluters: Six Themes of Environmental Law, Policy, and Ethics*, 27 ENVTL. L. 343 (1997) (using *The Case of the Speluncean Explorers*, with seven opinions by different hypothetical judges deciding hypothetical legal issue in a futuristic mythical jurisdiction, to explore contrasting jurisprudential theories of environmental law); Alexander M. Sanders, Jr., *Newgarth Revisited: Mrs. Robinson’s Case*, 49 S.C. L. REV. 407 (1998) (using *The Case of the Speluncean Explorers*, with five opinions by different hypothetical judges, to decide a hypothetical case involving the title character in Paul Simon’s song *Mrs. Robinson*).

tionality of racial classifications in university admissions or the applicability of a murder statute to stranded cave explorers who kill and eat a colleague, this framework illuminates how different theories of the proper role of courts affect the decisions made by judges. A better appreciation of these theories, in turn, will help inform lawyers who practice before those judges and law professors who write about them.

### I. THE CASE OF THE SPELUNCEAN EXPLORERS

In the faraway year of 4299 in the mythical jurisdiction of Newgarth,<sup>9</sup> five members of an amateur society of cave-explorers (the Speluncean Society) are trapped after a landslide covers the opening of a cave they are exploring.<sup>10</sup> A frantic rescue effort is launched,<sup>11</sup> but the explorers' provisions will be depleted before the rescuers can reach them. On the twentieth day of the ordeal, rescuers make radio contact and tell the explorers that it will take at least ten days to free them. Medical experts inform the explorers that there is "little possibility" they will survive the ten days without food. When asked by Richard Whetmore, one of the explorers, the experts report that four of them could survive if they kill and eat the flesh of the fifth member of the group. When Whetmore asks whether they should draw lots to pick the explorer to be killed and eaten, the medical experts refuse to answer, and Whetmore's requests for guidance from judges, government officials, and clergy go unheeded. Three days later, Whetmore is killed and eaten by the other four explorers after they draw lots by throwing dice.<sup>12</sup>

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9. Fuller chose this year because "the centuries which separate us [in 1949] from the year 4300 [the year of the Newgarth Supreme Court's decision in the case] are roughly equal to those that have passed since the Age of Pericles." Fuller, *supra* note 1, at 645 (Trucpenny, C.J.).

10. *The Case of the Speluncean Explorers* is drawn from two famous old cases: *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884) (after twenty days at sea on a lifeboat, defendants kill and eat youngest person on boat; defendants convicted of murder but death sentences commuted); and *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (defendant crew member of ship that sank threw several passengers out of life boat; defendant convicted of manslaughter and sentenced to six months' imprisonment).

11. The rescue was difficult because of the cave's location in a remote and isolated region. The rescue work was slowed by several new landslides, one of which killed ten of the rescuers. Fuller, *supra* note 1, at 616.

12. Although Whetmore first raised the prospect of cannibalism and proposed choosing the unlucky person by drawing lots, he later changed his mind and preferred to wait another week "before embracing an expedient so frightful and odious." *Id.* at 618. The other explorers considered this a breach of faith on Whetmore's part and proceeded to cast the dice. One of them threw the dice on behalf of Whetmore, who stated that he did not object to the fairness of the throw. *Id.*

After the four survivors are rescued nine days later, they are indicted and tried for murder under a statute providing in its entirety: "Whoever shall willfully take the life of another shall be punishable by death."<sup>13</sup> The jury issues a special verdict finding the facts as outlined above, and the trial judge finds the defendants guilty under the statute and imposes a mandatory death sentence.<sup>14</sup> The jury and trial judge join in requesting the Chief Executive of Newgarth to commute the defendants' sentences to six months' imprisonment.<sup>15</sup> Defendants appeal to the five-member Supreme Court of Newgarth while the clemency request is pending.

#### A. JUSTICES VOTING TO AFFIRM THE CONVICTIONS

##### 1. Chief Justice Truepenny

Chief Justice Truepenny votes to uphold the verdict because the statute "permits of no exception applicable to this case, however our sympathies may incline us to make allowance for the tragic situation in which these men found themselves."<sup>16</sup> But the Chief Justice also urges the Court to join in the clemency petition to the Chief Executive.<sup>17</sup> In this way, "justice will be accomplished without impairing either the letter or spirit of our statutes and without offering any encouragement for the disregard of law."<sup>18</sup>

##### 2. Justice Keen

Justice Keen provides the second vote to affirm the convictions. At the outset of his opinion, Justice Keen quickly disposes of two issues that he says are not the province of the Court: (1) executive clemency<sup>19</sup> and (2) morality—"whether what these men did was 'right' or 'wrong.'" Instead, the sole issue is one of statutory construction, and Justice Keen concludes that "any candid observer, content to extract from these words their natu-

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13. *Id.* at 619.

14. A death sentence is mandatory in Newgarth for the crime of murder. *Id.*

15. *Id.*

16. *Id.* at 619 (Truepenny, C.J.).

17. Chief Justice Truepenny notes that there is "every reason to believe" that the clemency requests will be heeded by the Chief Executive. *Id.*

18. *Id.*

19. Although Justice Keen rejects the call for executive clemency, he notes that if he were the Chief Executive rather than a Supreme Court Justice, he would go further than the six-months' imprisonment sought in the clemency petition and instead "pardon these men altogether, since I believe that they have already suffered enough to pay for any offense they may have committed." *Id.* at 632 (Keen, J.).

ral meaning, would concede at once that these defendants did 'willfully take the life' of Roger Whetmore."<sup>20</sup> Justice Keen chastises his colleagues for their "failure to distinguish the legal from the moral aspects of this case."<sup>21</sup> He "bluntly" accuses his fellow Justices of subordinating "the law of the land" to their own "conceptions of morality."<sup>22</sup>

Justice Keen recounts the civil war fought in Newgarth centuries earlier as a result of "an unseemly struggle for power" between the judicial branch and the legislative and executive branches, which established the supremacy of the legislature.<sup>23</sup> He, like Justice Tatting, sharply criticizes Justice Foster for disregarding the clear language of the statute in order to further its purported purpose of deterrence. According to Justice Keen, the statute at issue here, like most if not all statutes, has multiple purposes. It is thus, a canard to argue that courts may fill in the gap in the statute or make corrections in the legislative design. Instead, the Court's role is to interpret the statute "in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice."<sup>24</sup>

Justice Keen also takes issue with Justice Foster and Justice Tatting's reliance on an exception to the murder statute, created by an earlier decision of the Court on the theory that a defendant who acts in self-defense does not act "willfully." Justice Keen contends that the exception is not relevant here because it applies only when the defendant resists a threat to his own life, and "Whetmore made no threat against the lives of these defendants."<sup>25</sup> Justice Keen concludes that his approach provides the best result in this case and leads to the sounder administration of justice in the long run. "[W]e would have inherited a better legal system from our forefathers if [these] principles had been observed from the beginning. For example, with respect to the excuse of self-defense, if our courts had stood steadfast on the language of the statute the result would undoubtedly have been a legislative revision of it."<sup>26</sup>

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20. *Id.*

21. *Id.*

22. *Id.* at 632.

23. *Id.* at 633.

24. *Id.*

25. *Id.* at 636.

26. *Id.* at 637.

## B. JUSTICES VOTING TO REVERSE THE CONVICTIONS

## 1. Justice Foster

Justice Foster first criticizes Chief Justice Truepenny's exhortation to seek clemency as "an expedient at once so sordid and so obvious":

I believe something more is on trial in this case than the fate of these unfortunate explorers; that is the law of our Commonwealth. If this Court declares that under our law these men have committed a crime, then our law is itself convicted in the tribunal of common sense. . . . For us to assert that the law we uphold and expound compels us to a conclusion we are ashamed of, and from which we can only escape by appealing to a dispensation resting within the personal whim of the Executive, seems to me to amount to an admission that the law of this Commonwealth no longer pretends to incorporate justice.<sup>27</sup>

Justice Foster then offers two independent justifications in support of his view that the law does not compel "the monstrous conclusion that these men are murderers."<sup>28</sup> First, the statute and related case law do not apply because the explorers' horrendous circumstances placed them in a "state of nature," and the explorers thus were subject only to natural law. Under the natural law precept of freedom of contract, the explorers' compact was justifiable to enable the four to survive at the cost of the one.<sup>29</sup> Second, the statute must be interpreted in light of its purpose of deterring murder, and this purpose is not served in convicting the defendants because they were justified in taking Whetmore's life to ensure their own survival.<sup>30</sup>

Although Justice Foster professes fealty to the principle that the Court is bound by statutes and is thus subservient to the duly expressed will of the legislature, he distinguishes "intelligent" from "unintelligent" obedience.<sup>31</sup> Justice Foster emphasizes that "[n]o superior wants a servant who lacks the capacity to read between the lines."<sup>32</sup> Justice Foster offers two examples: "The stupidest housemaid knows that when she is told 'to peel the soup

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27. *Id.* at 620.

28. *Id.*

29. *Id.* at 620-23.

30. *Id.* at 624-25.

31. *Id.* at 625.

32. *Id.*

and skim the potatoes' her mistress does not mean what she says. She also knows that when her master tells her to 'drop everything and come running' he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel. Surely we have a right to expect the same modicum of intelligence from the judiciary."<sup>33</sup> He thus concludes that the "correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective."<sup>34</sup>

## 2. Justice Handy

Justice Handy takes a pragmatic, common-sense approach in providing the second vote to reverse the convictions. Justice Handy notes that he has become "more and more perplexed at men's refusal to apply their common sense to problems of law and government."<sup>35</sup> The question on appeal, he writes, is one of "practical wisdom, to be exercised in a context, not of abstract theory, but of realities."<sup>36</sup> He chides his colleagues for throwing "an obscuring curtain of legalisms" at what is at bottom a simple case. For example, he criticizes the "learned disquisitions on the distinction between positive law and the law of nature, the language of the statute and the purpose of the statute, judicial functions and executive functions, judicial legislation and legislative legislation."<sup>37</sup> Justice Handy reminds his colleagues of the danger of getting "lost in the patterns of our thought and forget that these patterns often cast not the slightest shadow on the outside world."<sup>38</sup> In Justice Handy's view, courts derive their legitimacy by bending to popular will, and the Court here should follow the poll reporting that 90 percent of the public believes that the defendants should be pardoned or given a token punishment. Justice Handy latches onto Justice Foster's statutory purpose argument to provide the legal rationale for this result.<sup>39</sup>

Justice Handy concludes his opinion with two lessons drawn from his personal experience. First, he dismisses the possibility of clemency based on gossip from his wife's niece, who is a

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33. *Id.* at 625-26.

34. *Id.* at 626; *see also id.* at 624 ("[A] man may break the letter of the law without breaking the law itself.").

35. *Id.* at 643.

36. *Id.* at 637-38 (Handy, J.).

37. *Id.* at 637.

38. *Id.* at 642.

39. *Id.* at 640.

friend of the Chief Executive's secretary.<sup>40</sup> According to Justice Handy, he shared this information with his colleagues. This explained Chief Justice Truepenny's "flap[ping] his judicial robes" to encourage the Chief Executive to grant clemency, "[Justice] Foster's feat of levitation by which a whole library of law books was lifted from the shoulders of these defendants," and "[Justice] Keen emulat[ing] Pooh-Bah in the ancient comedy by stepping to the other side of the stage to address a few remarks to the Executive 'in my capacity as a private citizen.'"<sup>41</sup> Second, Justice Handy compares this case to the first case he heard as a trial judge, in which he was "widely approved by the press and public opinion" for employing his common sense and avoiding the many "perplexing" legal issues raised in the case.<sup>42</sup>

### C. THE DECIDING VOTE: JUSTICE TATTING

With the Court deadlocked, the deciding vote falls to Justice Tatting. His initial opinion is written after the first opinions to affirm (Chief Justice Truepenny) and reverse (Justice Foster). He finds himself "torn between sympathy for [the defendants] and a feeling of abhorrence and disgust at the monstrous act they committed."<sup>43</sup> He had hoped to be able to "put these contradictory emotions to one side as irrelevant, and to decide the case on the basis of a convincing and logical demonstration of the result demanded by our law."<sup>44</sup> But he is not convinced by the arguments on either side.

Justice Tatting rejects both of Justice Foster's rationales for reversing the convictions. The question of the boundary of a state of nature is intractable, and in any event Justice Tatting is unpersuaded that the law applicable in such a state should permit the law of contracts to override the law of murder.<sup>45</sup> The purposive analysis is unavailing where, as here, there are several purposes served by the criminal statute (retribution and rehabilitation in addition to deterrence).<sup>46</sup> Moreover, the self-defense rationale is flawed because the defendants here acted willfully and deliberately in planning and executing Whetmore's killing. Justice Tatting invokes the case of Jean Claude Valjean of *Les*

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40. *Id.* at 642.

41. *Id.* at 642-43.

42. *Id.* at 643-44.

43. *Id.* at 626 (Tatting, J.).

44. *Id.*

45. *Id.* at 627-28.

46. *Id.* at 628-29.



*Misérables* in arguing that impending starvation neither excuses Valjean's stealing of a loaf of bread nor the defendants' killing of Whetmore.<sup>47</sup> Justice Tatting envisions "a quagmire of hidden difficulties" if the self-defense exception is applied.<sup>48</sup> Justice Tatting ultimately rejects Justice Foster's arguments in favor of reversal as intellectually unsound and approaching mere rationalization.<sup>49</sup>

Yet Justice Tatting also is repelled at the prospect of affirming the convictions. He complains: "[T]he more I examine this case and think about it, . . . [m]y mind becomes entangled in the meshes of the very nets I throw out for my own rescue. I find that almost every consideration that bears on the decision of the case is counterbalanced by an opposing consideration leading in the opposite direction."<sup>50</sup> After expressing regret that the prosecutor did not simply refuse to indict the defendants, Justice Tatting takes the "unprecedented" step of withdrawing from the case.<sup>51</sup>

After the second opinions to affirm (Justice Keen) and reverse (Justice Handy) are proffered, Chief Justice Truepenny asks Justice Tatting to reconsider. Justice Tatting declines: "[A]fter hearing these opinions I am greatly strengthened in my conviction that I ought not to participate in the decision of this case."<sup>52</sup> As a result, the Court is evenly divided, the convictions are affirmed, and the executions are set for April 2, 4300.<sup>53</sup>

## II. *GRUTTER v. BOLLINGER*

In the not-so-distant year of 1992 in the non-mythical state of Michigan, the dean of the University of Michigan Law School charged a faculty committee with crafting a written admissions policy to implement the goals of attracting "a mix of students with varying backgrounds and experiences who will respect and learn from each other"<sup>54</sup> while complying with the Supreme Court's *Bakke* decision.<sup>55</sup> The policy developed by the committee, and later unanimously approved by the Law School faculty, combined an assessment of academic ability "with a flexible as-

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47. *Id.* at 629-30.

48. *Id.* at 630.

49. *Id.* at 631.

50. *Id.* ("My brother Foster has not furnished to me, nor can I discover for myself, any formula capable of resolving the equivocations that beset me on all sides.")

51. *Id.*

52. *Id.* at 644.

53. *Id.* at 645.

54. *Grutter v. Bollinger*, 539 U.S. 306, 314 (2003).

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

assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'"<sup>56</sup> The policy directed admissions officials to consider, as predictors of academic success, the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score. Admissions officials, however, also were directed to "look beyond grades and test scores" to other criteria that the Law School deemed important.<sup>57</sup> These so-called "soft" variables included "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection."<sup>58</sup>

To meet its goals of achieving "that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts,"<sup>59</sup> the policy did not restrict the type of diversity contributions that could be considered by the admissions officers. However, the admissions policy reaffirmed the Law School's commitment to "racial and ethnic diversity."<sup>60</sup> In particular, the Law School sought to enroll a "critical mass" of underrepresented minority applicants, "who without the Law School's commitment might not be represented in [the] student body in meaningful numbers."<sup>61</sup> The underrepresented groups included African-Americans, Hispanics, and Native-Americans.<sup>62</sup>

In 1996, Barbara Grutter, a white Michigan resident with a 3.8 GPA and 161 LSAT score, applied and was denied admission to the Law School.<sup>63</sup> Grutter filed suit in federal district court, alleging that the Law School discriminated against her on the basis of race in violation of the Fourteenth Amendment by using race as a predominant factor in admissions. The U.S. District Court for the Eastern District of Michigan found in favor of Grutter, concluding that the Law School's use of race was unlawful.<sup>64</sup> The district court held that the Law School's interest in assembling a racially diverse class was not a compelling state interest and that the Law School had not "narrowly tailored its use of race to further that interest."<sup>65</sup> The U.S. Court of Appeals for

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56. 539 U.S. at 315.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 316.

61. *Id.*

62. *Id.*

63. *Id.*

64. 137 F. Supp. 2d 821 (E.D. Mich. 2001).

65. *Id.* at 872.

the Sixth Circuit, sitting en banc, reversed in a contentious 5-4 vote on both grounds, holding that diversity constituted a compelling state interest under *Bakke* and that the Law School's policy was narrowly tailored to achieve that compelling interest because race was only used as a "potential 'plus' factor."<sup>66</sup> The Supreme Court granted certiorari to decide "a question of national importance: Whether diversity is a compelling interest that can justify the narrowly-tailored use of race in selecting applicants for admission to public universities."<sup>67</sup>

#### A. JUSTICES VOTING TO UPHOLD THE LAW SCHOOL'S ADMISSIONS POLICY

##### 1. Justice O'Connor<sup>68</sup>

Justice O'Connor wrote the majority opinion, holding that the Law School's admissions policy satisfied strict scrutiny by advancing a compelling state interest in using race as one of the factors to be considered in the admission process and by demonstrating that the use of race was narrowly tailored to achieve this compelling interest. She began by reviewing the *Bakke* decision, in which only Justice Powell believed that the attainment of a diverse student body could be a compelling interest. Substantial confusion existed in the lower courts on whether a rationale set forth in an opinion not joined by any other Justice constituted "binding precedent."<sup>69</sup> Justice O'Connor did not need to resolve this question because the Court was ready to "endorse Justice Powell's view that student body diversity is a compelling state interest which can justify the use of race in university admissions."<sup>70</sup>

Justice O'Connor then turned to the doctrinal test to be used in evaluating the Law School's admissions policy: racial classifications only may be used "for the most compelling reason," and only if they are narrowly tailored to further those rea-

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66. 288 F.3d 732 (6th Cir. 2002) (en banc).

67. 539 U.S. 306, 322 (2002).

68. Justices Stevens, Souter, Ginsburg, and Breyer joined the majority opinion. *Grutter*, 539 U.S. at 322. Justices Scalia and Thomas joined only with respect to two points: (1) that unequal treatment among underrepresented minority groups is unconstitutional; and (2) that in 25 years, the practices upheld by the majority will be illegal. *Id.* at 344-45 (Thomas & Scalia, JJ., concurring in part and dissenting in part).

69. *Id.* at 321. In *Marks v. United States*, 430 U.S. 188, 193 (1977), the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds."

70. 539 U.S. at 325.

sons.<sup>71</sup> The use of “strict scrutiny” when the government employs racial classifications is necessary, according to Justice O’Connor, to “smoke out’ illegitimate uses of race.”<sup>72</sup> Justice O’Connor softened this stern description of strict scrutiny with two caveats. First, “[s]trict scrutiny is not ‘strict in theory, but fatal in fact.’”<sup>73</sup> Second, the context in which a racial classification is used matters in evaluating the governmental action. She pointed out that “not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the government decisionmaker for the use of race in that particular context.”<sup>74</sup>

Justice O’Connor defined the purported compelling interest advanced by the Law School and set the stage for application of the strict scrutiny analysis. The Law School advanced “only one justification for their [sic] use of race in the admission process: obtaining ‘the educational benefits that flow from a diverse student body.’”<sup>75</sup> Justice O’Connor again cast the case in a light favorable to the Law School by making two additional qualifications. First, none of the affirmative action cases decided by the Court in the 25 years since *Bakke* “either expressly or implicitly” foreclosed the Law School’s argument.<sup>76</sup> Second, given that “universities occupy a special niche in our constitutional tradition,” and in keeping with the Court’s practice in disputes involving complex educational judgments, the Court would grant a wide berth to the Law School’s decisions.<sup>77</sup>

Justice O’Connor described the educational benefits that “diversity is designed to produce.”<sup>78</sup> After a brief reference to the trial court’s findings that “the Law School’s admissions policy promotes ‘cross racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races,’”<sup>79</sup> she relied exclusively on statements from amicus briefs to support the conclusion that the Law School had a compelling interest in utilizing race in its admissions decisions. Representing the educational community, the

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71. *Id.* at 326.

72. *Id.* (quoting *Richmond v. Croson*, 488 U.S. 469, 493 (1989)).

73. *Id.*

74. *Id.* at 327.

75. *Id.* at 328.

76. *Id.*

77. *Id.* at 330.

78. *Id.*

79. *Id.* at 330.

American Educational Research Association noted that “diversity promotes leaning outcomes, and better prepares students for an increasingly diverse workforce and society.”<sup>80</sup> From the business community, General Motors asserted that diversity is necessary to develop the skills needed by workers to complete in an “increasingly global marketplace.”<sup>81</sup> The U.S. military added that “a highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.”<sup>82</sup> If the military needs affirmative action to fulfill its mission, “it requires only a small step from this analysis to conclude that our country’s most selective institutions must remain both diverse and selective.”<sup>83</sup> Finally, the Association of American Law Schools wrote that diversity in law schools is essential to cultivating leaders who are seen by the citizenry as legitimate, because a large proportion of elected political offices in the country are occupied by individuals with law degrees.<sup>84</sup>

Justice O’Connor then discussed the narrow tailoring prong of the strict scrutiny test. Again giving deference to the Law School’s educational judgment, she found that the flexible use of race in admissions decisions satisfied this prong.<sup>85</sup> The Law School’s admissions policy was “highly individualized,” involving a “holistic review of each applicant’s file” and giving “serious consideration” to the multiple ways in which an applicant’s background might contribute to a diverse educational environ-

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80. *Id.*

81. *Id.*

82. *Id.* at 331.

83. *Id.*

84. *Id.* at 332. Among the dozens of amicus briefs submitted in support of the University of Michigan were those from the American Association for Higher Education, American Civil Liberties Union, American Council on Education, American Educational Research Association, American Law Deans Association, American Sociological Association, Association of American Colleges and Universities, Association of American Law Schools, Association of American Medical Colleges, Clinical Legal Education Association, Coalition of Bar Associations of Color, Coalition for Economic Equality, Committee of Concerned Black Graduates of ABA Accredited Law Schools, Executive Leadership Council, Family Members of Murdered Civil Rights Activists, Graduate Management Admission Council, Hispanic National Bar Association, Law School Admission Council, The Lawyers’ Committee for Civil Rights Under Law, Minority Business Enterprise Legal Defense and Education Fund, National Center for Fair and Open Testing, National Partnership for Women and Families, National Women’s Law Center, Society of American Law Teachers, and Veterans of the Southern Civil Rights Movement, as well as various law school deans, law schools, law student groups, state bar associations, law school alumni associations, and associations of minority lawyers.

85. “[A]n admissions program must be ‘flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according to the same weight.’” *Id.* at 334 (quoting *Bakke*).

ment.<sup>86</sup> Justice O'Connor dismissed the argument that the Law School's policy was not narrowly tailored because race-neutral means exist to achieve the educational benefits derived from a diverse student body.<sup>87</sup> Justice O'Connor considered but ultimately rejected a lottery system<sup>88</sup> and Florida and Texas's "percentage" plans<sup>89</sup> as unworkable in the graduate/professional school context.

Justice O'Connor concluded that "race conscious admissions policies must be limited in time."<sup>90</sup> Because of the inherent risk that racial classifications will be used more broadly than needed to accomplish compelling goals, they should have "a logical end point."<sup>91</sup> Justice O'Connor established the "logical end point" at 25 years. Given that "the number of minority applicants with high grades and test scores has indeed increased" during the 25 years that have passed since *Bakke*, Justice O'Connor anticipated that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>92</sup>

## 2. Justice Ginsburg

In a short concurrence joined by Justice Breyer, Justice Ginsburg focused primarily on Justice O'Connor's 25-year sunset. Justice Ginsburg agreed that a sunset is appropriate, citing as support international law documents addressing the elimination of racial discrimination.<sup>93</sup> She challenged the notion, however, that enough progress has been made on racial issues in the United States in the 25 years since *Bakke* to be able to "firmly forecast, that over the next generation's span, progress toward

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86. *Id.* at 337.

87. *Id.* at 339.

88. Justice O'Connor argued that a lottery system would not allow the school to achieve other educational values, such as selectivity. *Id.* at 339-40.

89. These "percentage plans" guarantee undergraduate admission at state universities to all students above a certain class rank in every high school in the state. *Id.* at 340.

90. *Id.* at 342.

91. *Id.*

92. *Id.* at 343.

93. *Id.* at 344 (Ginsburg, J., concurring). Justice Ginsburg refers to the International Convention on the Elimination of All Forms of Racial Discrimination, Annex to G.A. Res. 2106, 20 U.N. GAOR Res. Supp. (No. 14) 47, U.N. Doc. A/6014, Art. 2(2) (1965), and the Convention on the Elimination of All Forms of Discrimination Against Women, Annex to G.A. Res. 34/180, 34 U.N. GAOR Res. Supp. (no. 46) 194, U.N. Doc. A/34/46, Art. 4(1) (1979).

nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."<sup>94</sup>

## B. JUSTICES VOTING TO REJECT THE LAW SCHOOL'S ADMISSIONS POLICY

### 1. Justice Scalia<sup>95</sup>

Justice Scalia concurred in only two aspects of the majority's holding,<sup>96</sup> and the remainder of his short opinion took the majority to task on several points. He noted that the majority failed to address the central arguments raised in dissent by Chief Justice Rehnquist and Justice Thomas. Justice Scalia then concentrated his fire on the likely effects of the majority's decision.

Justice Scalia first addressed the relevance of the majority's ruling for future cases. He restated the educational benefit the Law School sought as including "cross-racial understanding," and a "better prepar[ation of] students for an increasingly diverse workforce and society."<sup>97</sup> But this benefit is not "uniquely relevant" to the Law School, or "uniquely 'teachable' in a formal educational setting."<sup>98</sup> Accordingly, this interest cannot be limited to the University of Michigan Law School but instead arguably is appropriate for other public institutions, such as Michigan's civil service system, and for private employers who seek to "teach" good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring."<sup>99</sup> Troubled by this possibility, Justice Scalia sneered that "[t]he nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand."<sup>100</sup>

Justice Scalia then accused the majority of prolonging litigation in this area. He listed a number of issues in which further litigation is likely to be sparked by what he characterizes as the "*Grutter-Gratz* split double header."<sup>101</sup> Such future litigation likely will arise in resolving whether there has been enough evaluation of a candidate as an individual, in determining

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94. 539 U.S. at 346 (Ginsburg, J., concurring).

95. Justice Thomas joined Justice Scalia's opinion. *Id.* at 344.

96. *See supra* note 68.

97. *Grutter*, 539 U.S. at 347 (Scalia, J., concurring in part & dissenting in part).

98. *Id.*

99. *Id.* at 348.

100. *Id.*

101. *Id.*

whether a university has exceeded the bounds of a “good faith effort,” and in assessing the educational benefits flowing from racial diversity.<sup>102</sup>

## 2. Justice Thomas<sup>103</sup>

Justice Thomas also concurred with only two aspects of the majority’s holding<sup>104</sup> and rebuked the majority on several points. Justice Thomas’s opinion developed two themes: doctrinal and personal.

The doctrinal discussion focused on strict scrutiny jurisprudence and its application to this case. In the past, the Court rejected as a compelling state interest the use of racial classifications to provide minority teachers as role models,<sup>105</sup> to remedy general societal discrimination,<sup>106</sup> and to further the best interests of children in custody disputes.<sup>107</sup> According to Justice Thomas, these prior cases mandated a very limited definition of a compelling state interest: “only those measures the State must take to provide a bulwark against anarchy, or to prevent violence.”<sup>108</sup> Justice Thomas argued that the interest the Law School sought to advance—“to obtain ‘educational benefits that flow from student body diversity,’”<sup>109</sup>—is no more than an interest in improving “marginally the education it offers without sacrificing too much of its exclusivity and elite status.”<sup>110</sup> Unlike the other dissenting opinions, which focused primarily on a few aspects of the majority’s opinion, Justice Thomas launched a frontal assault on the majority opinion’s development of the compelling interest and the narrow tailoring prongs of the strict scrutiny test.

As to the compelling interest prong, Justice Thomas argued that the state has no “pressing public necessity” in maintaining a public law school or in the marginal improvements in legal education that arguably derive from using racial classifications in the admissions process.<sup>111</sup> In support of this conclusion, he argued that the Law School’s purported compelling interest does little “to ad-

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102. *Id.*

103. Justice Scalia joined Justice Thomas’s opinion. *Id.* at 349.

104. *See supra* note 68.

105. *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 275-76 (1986).

106. *Richmond v. Croson*, 488 U.S. 469, 496-98 (1989) (plurality opinion).

107. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

108. *Grutter*, 539 U.S. at 353.

109. *Id.* at 354.

110. *Id.* at 355-56.

111. *Id.* at 356-57.



vance the welfare of the people of Michigan or any cognizable interest of the State of Michigan.”<sup>112</sup> Because the Law School “trains few Michigan residents and overwhelmingly serves students, who, as lawyers, leave the State of Michigan,” the Law School failed to identify any sufficiently compelling interest.<sup>113</sup> As to the narrow tailoring prong, Justice Thomas criticized the majority for selectively relying on social science evidence and for deferring to the Law School’s use of racial classifications to solve a problem that the Law School itself created.

The second, more personal theme of Justice Thomas’s opinion is reflected in a quotation from an 1865 speech by Frederick Douglass, which argued that African-Americans and other non-whites do not need the government’s help. “Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators.”<sup>114</sup> Justice Thomas asserted that the majority failed to advance any evidence showing that the Law School’s policy benefits students admitted as a result of it. There is no evidence these students “prove themselves by performing at (or even near) the same level as those students who receive no preferences.”<sup>115</sup> The majority also offered no social science research disproving the notion that affirmative action “engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government’s use of race.”<sup>116</sup> Ultimately, he argued, the race-conscious policy stigmatizes as undeserving all minority students admitted to the Law School.<sup>117</sup>

### 3. Chief Justice Rehnquist<sup>118</sup>

Chief Justice Rehnquist criticized the majority for “an unprecedented display of deference under our strict scrutiny analysis.”<sup>119</sup> In particular, the Chief Justice focused on the “critical mass” concept: “stripped of its ‘critical mass’ veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.”<sup>120</sup>

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112. *Id.* at 360.

113. *Id.*

114. *Id.* at 350.

115. *Id.* at 371.

116. *Id.* at 373.

117. *Id.*

118. Justices Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist’s dissenting opinion. *Id.* at 378.

119. *Id.* at 387 (Rehnquist, C.J., dissenting).

120. *Id.* at 379.

Chief Justice Rehnquist argued that the majority's application of the strict scrutiny test was contrary to the Court's precedents. The majority applied a more lenient review than that required under strict scrutiny. Neither the fact that the Law School uses racial classifications in "good faith" nor the fact that the defendant is an institution of higher education justified the majority's lax approach.<sup>121</sup>

In disputing the "critical mass" concept, Chief Justice Rehnquist noted that the Law School failed to explain why the numbers of individuals who constitute a "critical mass" vary from minority group to minority group. According to Chief Justice Rehnquist, "the Law School's admissions practices with respect to [underrepresented minority groups] differ dramatically and cannot be defended under any consistent use of the term 'critical mass.'"<sup>122</sup> He pointed out that the number of students who constitute a critical mass was larger for African-Americans than for other underrepresented minorities. For example, from 1995-2000, the Law School admitted 13-19 Native-Americans, 91-108 African-Americans, and 47-56 Hispanics.<sup>123</sup>

The Chief Justice also challenged the majority's assertion that the Law School did not try to ensure admission to "some specified percentage" of a minority group because of its race. He argued that "the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying 'some attention to numbers.'"<sup>124</sup> Chief Justice Rehnquist concluded that the Law School offered admission to members of underrepresented minority groups in proportion to their statistical representation in the applicant pool, a "patently unconstitutional" practice.<sup>125</sup>

#### 4. Justice Kennedy

Like the Chief Justice, Justice Kennedy also faulted the majority for failing to apply the strict scrutiny test as developed in prior cases. Although Justice Kennedy agreed in principle with Justice Powell's view in *Bakke* that racial diversity among stu-

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121. *Id.* at 379-80.

122. *Id.* at 381.

123. *Id.*

124. *Id.* at 383.

125. *Id.*

dents could be a compelling interest, the Law School failed to make that showing in this case.<sup>126</sup>

Justice Kennedy argued that the critical mass concept is inconsistent with the principle that applicants must be given individual consideration in the admissions process. Eighty to eighty-five percent of the spaces in the entering class are given to applicants in the upper range of the quantitative criteria (GPA and LSAT scores). “[T]he competition becomes tight” in the remaining 15 to 20 percent, where “race is likely outcome determinative for many members of minority groups.”<sup>127</sup> Justice Kennedy argued that individual consideration of an applicant’s file, which according to the majority is critical in finding that the program is constitutional, did not take place within the Law School’s program. Like the Chief Justice, Justice Kennedy found troubling the “narrow fluctuation band” in the percentage of enrolled minority students at the Law School.<sup>128</sup> Justice Kennedy was particularly disturbed by the fact that admissions officers at the Law School consulted the daily reports indicating the racial composition of the incoming class.<sup>129</sup>

Justice Kennedy concluded by lamenting the most serious consequence of the Court’s ruling: relieving university administrators from their obligation to devise “new and fairer ways to ensure individual consideration”<sup>130</sup> and reducing the incentives that now exist “to make the existing minority admissions schemes transparent and protective of individual review.”<sup>131</sup> This, in turn, would “perpetuate the hostilities that proper consideration of race is designed to avoid.”<sup>132</sup>

### III. AFFIRMATIVE REFRACTION: THE CASE FOR A JURISPRUDENCE OF HUMILITY

At one level, of course, these two cases could not be more different. In *The Case of the Speluncean Explorers*, the court below imposed murder convictions and death sentences on four explorers who killed and ate a colleague in order to survive after they were trapped by a landslide in a cave. In *Grutter*, the Sixth

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126. *Id.* at 392 (Kennedy, J., dissenting).

127. *Id.* at 389.

128. *Id.* at 390.

129. *Id.* at 391.

130. *Id.* at 393.

131. *Id.* at 394.

132. *Id.*

Circuit rejected a constitutional challenge by a white applicant denied admission to the University of Michigan Law School. Yet in deciding these cases, the judicial composition of the highest courts in the respective lands is surprisingly similar.

Both courts are divided into “liberal,” “conservative” and “swing” camps. Justices Foster and Handy comprised the liberal camp of the Newgarth Supreme Court, with Justices Breyer, Ginsburg, Souter, and Stevens playing the same role in the United States Supreme Court. At the opposite end, the conservative bloc of the Newgarth Supreme Court included Chief Justice Truepenney and Justice Keen, while Chief Justice Rehnquist and Justices Scalia and Thomas represent the conservative faction in the Supreme Court. Finally, Justice Tatting and Justices Kennedy and O’Connor represented the swing votes in the Newgarth Supreme Court and the United States Supreme Court, respectively. We recognize, of course, that these are rough, imperfect groupings, and that the manner in which we interpret these terms in 2004 likely is very different from their interpretation in 1949 when Lon Fuller wrote *The Case of the Speluncean Explorers*.<sup>133</sup>

Moreover, both courts grapple with several common jurisprudential themes. Indeed, strands of all five opinions in *The Case of the Speluncean Explorers* can be found in the majority and dissenting opinions in *Grutter*.

In bridging the span between these two cases, we employ what we call a “jurisprudence of humility.” We argue that this approach is neither liberal nor conservative, but rather evinces

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133. The division of the current Supreme Court into these three camps nevertheless has much support in the literature. For a few of the many explicit references to Justices Kennedy and O’Connor as the Court’s “swing” Justices, see Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 ST. LOUIS UNIV. L.J. 773, 782 n.39 (2003); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1514 (2003); Richard G. Wilkins & Scott Worthington et al., *Supreme Court Voting Behavior: 2000 Term*, 29 HASTINGS CONST. L.Q. 247, 303 (2002); cf. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS UNIV. L.J. 569, 587 (2003) (noting that the Court “is divided into two camps, in which two Justices (O’Connor and Kennedy) are somewhat more weakly attached to the majority than are the other three members”); Erwin Chemerinsky, *October Term 2002*, 6 GREEN BAG 2D 367, 368 (2003) (“[L]awyers who handle cases before the Court long have felt that they must focus primarily on an audience of one or two, with the outcome likely depending on the votes of Justices Sandra Day O’Connor and/or Anthony Kennedy”); Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63 (1996) (naming Justices Kennedy and O’Connor as the “most dangerous” Justices of the 1994 and 1995 Terms); Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 MINN. L. REV. 131 (2001) (naming Justice Kennedy as the “most dangerous” Justice of 1994-2000 terms).

an appreciation that judges and lawyers hold no monopoly on wisdom and that institutions other than courts may be better positioned in certain situations to resolve a particular issue. A jurisprudence of humility neither freezes the status quo nor casually substitutes judges' views for those of other institutional players, but instead encourages, in Franklin D. Roosevelt's words, "bold, persistent experimentation."<sup>134</sup> Indeed, humility in judging has long been regarded a desired attribute<sup>135</sup> across the political spectrum.<sup>136</sup> Such humility manifests itself in several ways, including a recognition that not all dumb statutes are unconstitutional or need to be rewritten by judicial fiat. Indeed, one marker of a humble judge is that she not infrequently implements laws she neither would have passed (as a member of the legislative branch) nor would have enforced (as a member of the executive branch) in the first instance.

Three scholars recently have made eloquent pleas for a greater recognition of the importance of humility in judging. Michael McConnell states it well in a 1997 article:<sup>137</sup>

[A]n essential element of responsible judging is a respect for the opinions and judgments of others, and a willingness to suspend belief, at least provisionally, in the correctness of one's own opinions, especially when they conflict with the decisions

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134. Franklin D. Roosevelt, *Address at Oglethorpe University* (May 23, 1932), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 639, 646 (Samuel D. Rosenman ed., 1938).

135. See, e.g., Learned Hand, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (Irving Dilliard ed., 3d ed. 1960) (describing the "spirit of liberty" as "the spirit which is not too sure that it is right"); Felix Frankfurter, *Chief Justices I Have Known*, 39 *VA. L. REV.* 883, 905 (1953) ("What is essential in [Supreme Court Justices is] . . . first and foremost, humility and an understanding of the range of the problems and of their own inadequacy in dealing with them . . .").

136. See, e.g., Paul Gewirtz, *On "I Know It When I See It,"* 105 *YALE L.J.* 1023, 1034-35 (1996) ("But one element that helps to accommodate judicial review and democratic values is a feeling and attitude—a judge's feeling of humility, an internalized sense that he is not the sole repository of constitutional truth, an attitude of restraint that is an aspect of temperament."); Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1372 (1997) ("[T]ranslators struggle with a tension that defines the tension confronted by the judge: If translation requires creativity—if there is no such thing as 'mechanical' translation—then some counsel the translator to a kind of humility. Humility means this: to avoid translations that the translator believes make the text a better text; to choose instead translations that will carry over a text's flaws as well as its virtues."); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 *HARV. L. REV.* 1733, 1749 (1995) ("[I]ncompletely theorized agreements have the advantage, for ordinary lawyers and judges, of humility and modesty: they allow past judgments to be treated as given and make it unnecessary to create the law anew in each case.").

137. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269 (1997).

of others who have, no less than judges, sworn an oath to uphold and defend the Constitution. We have heard a lot about “principle” and “the correct standard” and “integrity.” I think we need to hear more about judicial humility.<sup>138</sup>

Judge McConnell concludes that the various constraints on judicial discretion can be understood as means of “tempering judicial arrogance by forcing judges to confront, and take into account, the opinions of others—whether they be the Framers of the Constitution (text and original understanding), the representatives of the people (the presumption of constitutionality), the decentralized contributors to longstanding practice (tradition), or judges in earlier cases (precedent).”<sup>139</sup> Judge McConnell notes that hard cases occur where these sources are in conflict. In contrast, “where all of these sources of wisdom are united—where the decision of the representatives of the people is not manifestly inconsistent with constitutional text, original understanding, longstanding practice, or governing precedent—it is time for judges to recognize their own fallibility.”<sup>140</sup>

The following year, Brett Scharffs<sup>141</sup> accepted Judge McConnell’s invitation “to hear more about judicial humility.”<sup>142</sup> Professor Scharffs argues that “practical wisdom” is the best model through which to understand judicial decisionmaking<sup>143</sup> and that judges, like Anthony Kronman,<sup>144</sup> should embody certain virtues

138. *Id.* at 1292.

139. *Id.* Interestingly, Judge McConnell is sharply critical of RONALD DWORKIN, *THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996), yet Professor Dworkin closed an earlier work by arguing that his ideal judge with infinite time, resources, and intellect—Judge Hercules—nevertheless should “decide hard cases with humility.” Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1109 (1975).

140. McConnell, *supra* note 137, at 1293.

141. Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127 (1998).

142. McConnell, *supra* note 137, at 1292.

143. Scharffs, *supra* note 141, at 145-47. For discussions of practical wisdom and practical reasoning, see generally Robert John Araujo, *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 MISS. L.J. 225 (1998); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); Michael Livingston, *Practical Reason, “Purposism,” and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677 (1996); Lynda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647 (1998); Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994); David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 TUL. L. REV. 775 (1991).

144. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEAS OF THE LEGAL PROFESSION* 319-20 (1993).

of character in exercising practical wisdom. According to Professor Scharffs, Dean Kronman's focus on the virtues of sympathy and detachment ignores the role that humility can play in mediating conflicts between these virtues, much as humility can bridge the gap between mercy and justice in individual cases.<sup>145</sup> Appropriate judicial humility thus "lies in a mean between undesirable extremes"<sup>146</sup>—neither underdone (resulting in "pride, arrogance, or vanity"<sup>147</sup>) nor overdone (resulting in "worthlessness, subjugation, or servility"<sup>148</sup>). Professor Scharffs notes that "[a] judge is more likely to err on the side of having too little humility than too much."<sup>149</sup> Finally, Professor Scharffs contends that proper humility also will have other salutary effects on the judicial process. Humble judges respect the sources of authority that constrain and guide their behavior. They resist revolutionary change and judicial activism, do not abuse their power or parties that appear before them, and have open minds.<sup>150</sup>

Most recently, Suzanna Sherry<sup>151</sup> has extolled the virtue of humility in judging. Professor Sherry observes at the outset that "[t]he proposition that judges should be humble rather than arrogant hardly needs stating."<sup>152</sup> Professor Sherry acknowledges the difficulty of mediating the duality between humility and courage, like the difficulty of mediating other dualities in the law.<sup>153</sup> In the end, Professor Sherry eschews rules and guidelines in favor of examples from the Supreme Court of excessive humility at one extreme<sup>154</sup> and insufficient humility at the other extreme,<sup>155</sup> as well

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145. Scharffs, *supra* note 141, at 145-47.

146. *Id.* at 159.

147. *Id.*

148. *Id.*

149. *Id.* at 164; see also Thomas A. Wiseman, Jr., *What Doth the Lord Require of Thee?*, 27 TEX. TECH. L. REV. 1403 (1996) ("Most lawyers I know would say that a humble federal judge is an oxymoron; and they are probably right.")

150. Scharffs, *supra* note 141, at 186-98.

151. Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793 (2003).

152. *Id.* at 799.

153. Other dualities include the countermajoritarian dilemma of majority rule versus minority rights, liberty versus equality, establishment versus free exercise of religion, and governmental power versus accountability. *Id.* at 795.

154. *Id.* at 805-09 (citing as examples *Poe v. Ullman*, 367 U.S. 497 (1961) (declining to reach merits of constitutional challenge to Connecticut statutory ban on sale or use of contraceptives, which was declared unconstitutional four years later in *Griswold v. Connecticut*, 381 U.S. 479 (1965)); *Koromatsu v. United States*, 323 U.S. 214 (1944) (approving constitutionality of internment of Japanese-Americans during World War II); and *Hirabayashi v. United States*, 320 U.S. 81 (1943) (approving constitutionality of curfews imposed on Japanese-Americans during World War II)). For a discussion of the dangers of excessive judicial humility spawning passivity, see Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343.

155. *Id.* at 800-03 (citing as examples *Bush v. Gore*, 531 U.S. 98 (2000) (holding un-

as instances in which she thinks the Court struck the proper balance.<sup>156</sup> Of course, one can (and we do) take issue with the placement of certain decisions along the humility-courage continuum, but we agree with Professor Sherry that “judges who are inclined both to doubt themselves and to risk being wrong are more likely to reach a happy medium than are judges who are too strongly inclined toward arrogance or humility.”<sup>157</sup> The jurisprudence of humility equips us to draw some rather surprising connections between *The Case of the Speluncean Explorers*<sup>158</sup> and *Grutter*<sup>159</sup> and to span the gulf in the legal literature between statutory and constitutional interpretation.

#### A. THE MAJORITY OPINION IN *GRUTTER*

The surprise is nowhere starker than in an analysis of Justice O'Connor's majority opinion, joined by the four members of the Court's liberal bloc. Just as Chief Justice Truepenney and Justice Keen in *The Case of the Speluncean Explorers* felt constrained by their institutional role to defer to the Legislature's overly broad statute in affirming the defendants' murder convictions, Justice O'Connor deferred to Michigan's thin diversity rationale in sanctioning the use of race in admissions. In so doing, Justice O'Connor enshrined Justice Powell's *Bakke* opinion as the Court's majority position, despite considerable evidence that

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constitutional Florida's recount procedures in 2000 Presidential election); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (upholding constitutionality of separate but equal racial classifications)).

156. *Id.* at 804-11 (citing as examples *Dickerson v. United States*, 530 U.S. 428 (2000) (refusing to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding unconstitutional admission of confession obtained without apprising criminal defendant of various constitutional rights)); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (refusing to overrule *Roe v. Wade*, 410 U.S. 113 (1973) (holding unconstitutional various state restrictions on abortion)); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling *Nat'l League of Cities v. Usery* (1976) (holding unconstitutional federal regulation of wages and hours of employees of state and local governments)); *United States v. Nixon*, 418 U.S. 683 (1974) (rejecting constitutional challenge to release of tape recordings of Presidential conversations); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding unconstitutional separate but equal educational facilities); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (upholding constitutionality of requiring students to salute American flag)); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (upholding constitutionality of national bank)).

157. *Id.* at 810.

158. For more detailed commentary on *The Case of the Speluncean Explorers*, see *supra* note 7.

159. For some of the early commentary on *Grutter*, see *A JURIST On-Line Symposium: The University of Michigan Affirmative Action Cases*, <http://www.jurist.pitt.edu/forum/symposium-aa>.



the other eight Justices in *Bakke* rejected Justice Powell's approach.<sup>160</sup> In finding that the educational benefits from a diverse student body constituted a compelling state interest, Justice O'Connor twisted precedent and unabashedly accepted Michigan's justification for the policy without requiring much supporting social science evidence. In other cases involving racial classifications, the Court has not been so quick to accept justifications proffered by state officials and has required much more evidentiary support for the classification.<sup>161</sup> Moreover, Justice O'Connor turned strict scrutiny doctrine on its head by holding that the enormous flexibility of Michigan's policy is what makes it narrowly tailored. In examining the Sixth Circuit's similar holding, Peter Schuck correctly noted that the appeals court jumped "off the rails" in its "brief analysis of the 'narrowly tailoring' that strict scrutiny demands."<sup>162</sup> Professor Schuck's characterization of the Sixth Circuit's holding applies with equal force to Justice O'Connor's majority opinion: "Reduced to its essentials, the majority's position is that diversity means what Michigan says it means and that any sincere effort by Michigan to achieve the critical mass satisfies the narrow tailoring test."<sup>163</sup>

Justice O'Connor's decision to sacrifice doctrine to achieve her desired outcome in *Grutter*<sup>164</sup> stands in marked contrast to her role in *Lawrence v. Texas*,<sup>165</sup> decided three days later. In *Lawrence*, Justice O'Connor pointedly did not join the majority opinion, written by Justice Kennedy (the Court's other swing

160. See, e.g., Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1185 (1996) ("Of course, the often-criticized 'rule' of [*Bakke*] was that universities may use race 'as a factor' in admissions, but may not create quotas. While this rule has played a crucial role in American society and American debate, it represented the view of Justice Powell alone. The other eight participating justices explicitly rejected that rule. Ironically, the case stands for a proposition that only one justice thought sensible.").

161. The most famous illustration, of course, is *Brown v. Board of Educ.*, 347 U.S. 483 (1954). In *Brown*, the Court relied in a footnote on various social science studies of the adverse effect of segregated schools on African-American children. *Id.* at 494 n.11. For different perspectives on the Court's use of social science evidence in *Brown*, see Kenneth C. Clark, *The Desegregation Cases: Criticism of the Social Scientists' Role*, 5 VILL. L. REV. 224 (1959); Harold B. Gerard, *School Desegregation: The Social Science Role*, 38 AM. PSYCHOL. 869 (1983); James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659 (2003); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999); Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002).

162. Peter H. Schuck, *Diversity*, AM. LAW., July 31, 2002, at 75.

163. *Id.* at 76.

164. Cf. Nat Hentoff, *What the Supreme Court Left Out*, VILLAGE VOICE, July 22, 2003, at 34 ("Justice Sandra Day O'Connor knew how she wanted [*Grutter*] to be decided.").

165. 123 S. Ct. 2472 (2003).

Justice) and joined again by the Court's four liberal Justices. The majority overruled *Bowers v. Hardwick*<sup>166</sup> and held that a Texas statute criminalizing sodomy violated the due process rights of two men engaged in a consensual act of sodomy at home. Justice O'Connor concurred separately and argued that the statute violated the defendants' equal protection rights because it proscribed homosexual sodomy but not heterosexual sodomy. Her reasoning thereby obviated the need to overrule *Bowers*.<sup>167</sup> Although Justice O'Connor displayed greater fealty to judicial precedent than the majority, still she refused to give the same deference to the Texas legislature in *Lawrence* that she gave to the University of Michigan in *Grutter*. Justice Handy's deployment of polling data in *The Case of the Speluncean Explorers* to conform the judicial outcome to popular will provides a helpful window through which to view Justice O'Connor's actions.

In both cases, Justice O'Connor championed the more politically popular result,<sup>168</sup> supported in *Lawrence* by the reduction in the number of states criminalizing sodomy (from twenty-five states at the time of *Bowers* to thirteen states today) and in *Grutter* by the vast number of amicus briefs from the likes of the U.S. military and General Motors in support of the diversity rationale.<sup>169</sup> But Justice O'Connor missed the chance to accomplish in *Grutter* what she accomplished in *Lawrence*: obtaining the outcome she sought without undermining the Court's legitimacy through dishonest manipulation of well-settled doctrine.

A more "humble" course of action for Justice O'Connor in *Grutter* would have been to follow the trail blazed by Justice Tatting in *The Case of the Speluncean Explorers*. Conflicted by

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166. 478 U.S. 186 (1986).

167. 123 S. Ct. at 2884-88 (O'Connor, J., concurring).

168. For charges that Justice O'Connor often falls victim to the "Greenhouse Effect," see Michael C. Dorf, *Fourth Annual Supreme Court Review: October 2002 Term*, PLI LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES NO. H0-00JA (2002) ("Conservative jurists appointed by Republican Presidents come to Washington and, the pundits charge, in an effort to impress such liberal establishment figures as New York Times reporter Linda Greenhouse, lose the courage of their convictions. The charge seems particularly apt in the case of O'Connor and Kennedy."). Thomas Sowell is credited with originating the phrase, which then was popularized by Judge Laurence Silberman. See Laurence Silberman, *Attacking Activism, Judge Names Names*, LEGAL TIMES, June 22, 1992, at 14; see also Max Boot, *How Judges Can Make Friends in Washington*, WALL ST. J., July 13, 1998, at A15; Martin Tolchin, *Press Is Condemned By a Federal Judge for Court Coverage*, N.Y. TIMES, June 15, 1992, at A13.

169. See *Attorneys at Law*, CNN, June 23, 2003 ("The biggest influence on Justice O'Connor in that opinion, you could tell, were the briefs from General Motors, from 3M, from Microsoft, from retired military officers, the establishment saying we embrace affirmative action. That's why she decided the way she did.") (statement of Jeffrey Toobin).

the arguments on both sides of the bench, Justice Tatting withdrew from the case and, with the Supreme Court of Newgarth deadlocked at 2-2, the result was to affirm the convictions and death sentences imposed by the trial court. As a consequence, the pressure shifted to the other branches of government to provide justice in both the current (through the Chief Executive's exercise of its power to grant clemency to the defendants) and future (through the Legislature's exercise of its power to amend the murder statute) cases.

One would have expected Justice O'Connor to have been similarly conflicted in *Grutter*. Yet her majority opinion reflects no hesitancy on her part in casting the deciding vote in favor of Michigan's policy. Had Justice O'Connor instead followed Justice Tatting's approach, the Supreme Court would have deadlocked at 4-4 and thus affirmed the decision below by the Sixth Circuit.<sup>170</sup> This approach is more consistent with a true jurisprudence of humility because it achieves the result Justice O'Connor sought in *Grutter*—permitting the use of race in law school admissions—without contorting the constitution. Such a split decision would have left the parties, education officials, federal and state governments, and other political branches to continue to work toward a colorblind society in which racial preferences will no longer be necessary.

Indeed, as Cass Sunstein noted in the context of an earlier affirmative action case,<sup>171</sup> “because the issue of affirmative action is not clearly settled by constitutional history or principle and is at the center of current political deliberations, the Court does well to avoid an authoritative judicial ruling.”<sup>172</sup> Justice O'Connor's majority opinion in *Grutter* is the “democratic disaster” feared by Professor Sunstein because it “foreclose[s] de-

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170. 288 F.3d 732 (6th Cir. 2002) (en banc). For a recent article applauding the Court's long-standing practice of affirming the lower court's judgment in cases where the Court is evenly divided, see Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643 (2002). Of course, a judge's failure to cast a deciding vote can be criticized as an abdication of her judicial responsibility, like “the example of Pontius Pilate, whose washing of hands has, for two thousand years, held central place as the condemnable paradigm of terminal leave of judgment.” Milner S. Ball, *THE WORD AND THE LAW* 138 (1993). Professor Ball's reference is to MATTHEW 27:24 (“When Pilate saw that he was getting nowhere, but that instead an uproar was starting, he took water and washed his hands in front of the crowd. ‘I am innocent of this man's blood,’ he said. ‘It is your responsibility!’”); see also Jim Chen, Filburn's *Legacy*, 52 EMORY L.J. 1719, 1768 n.376 (2003) (comparing Pilate's actions with Justice Tatting's “abdication” in *The Case of the Speluncean Explorers*).

171. *Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996) cert. denied, 518 U.S. 1033 (1996).

172. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (footnote omitted).

mocratic debate” by enshrining Michigan’s nebulous use of diversity.<sup>173</sup> In contrast, Justice Tatting’s approach would have been more consistent with Professor Sunstein’s ideal:

When a democracy is in moral flux, courts may not be the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in a system of democratic deliberation. It is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary. But the Court can certainly increase the likelihood that those solutions will be good ones. Sometimes the best way for the Court to do this is by leaving things undecided.<sup>174</sup>

One difficulty in reinstating the Sixth Circuit’s *en banc* decision to dispose of the case is the serious charge leveled by two of the dissenting judges that Chief Judge Martin manipulated the Sixth Circuit’s internal processes to obtain the 5-4 decision in favor of the University of Michigan. The dissent alleges that Chief Judge Martin withheld the *en banc* petition from the other members of the court for five months until two conservative judges took senior status and thus were no longer eligible to vote on the petition or sit on the *en banc* panel. The dissent also alleged that Chief Justice Martin inserted himself on the original panel despite an internal rule requiring the random assignment of judges to panels.<sup>175</sup>

Chief Judge Martin’s actions triggered judicial and congressional investigations. In January 2003, Judicial Watch, a public interest group that monitors government corruption, filed a complaint of judicial misconduct in the *Grutter* case (as well as in a death penalty case)<sup>176</sup> against Chief Judge Martin. Although the Acting Chief Judge to whom the complaint was referred found that the two allegations were not disputed, she dismissed the complaint. Because the Sixth Circuit was in the process of performing a comprehensive review of its internal procedures, it reportedly was “taking corrective action regarding all of the issues raised by the complainant.” Moreover, the Chief Judge’s term soon would be ending pursuant to 28 U.S.C.

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173. *Id.* at 93.

174. *Id.* at 101.

175. *Id.* at 773 (Boggs, J., dissenting); *id.* at 815 (Batchelder, J., dissenting).

176. *In re Byrd*, 269 F.3d 578 (6th Cir. 2002)

§ 45(a)(3)(A).<sup>177</sup> Judicial Watch and Chief Judge Martin separately appealed to the Judicial Council of the Sixth Circuit, which made “no findings of fact concerning the allegations of the complaint and expresse[d] no opinion with respect to its content” but concurred in the Acting Chief Judge’s finding and adopted her reasoning.<sup>178</sup>

The increased attention that Justice O’Connor’s withdrawal would have brought to the Sixth Circuit’s decision would have increased the public’s respect for the courts. Fidelity to doctrine and rigorous self-regulation are hallmarks of a strong, independent judiciary. In an extraordinary debate in the Sixth Circuit, the judges all agreed that the court’s legitimacy depends on the perception that judges engage in principled decisionmaking but disagreed on whether the public airing of the procedural irregularities in *Grutter* enhanced or harmed that legitimacy. Judge Moore took issue with the dissent’s “baseless argument” that “the *decisions* of this court are not grounded in principle and reasoned argument, but in power, and that the judges of this court manipulate and ignore the rules in order to advance political agendas.”<sup>179</sup> We think Judge Batchelder holds the better view, especially since the subsequent Sixth Circuit proceedings have borne out the substance of the dissent’s complaints of procedural irregularities:

In her separate concurrence, Judge Moore expresses her belief that by revealing [the procedural] history, Judge Boggs—and I, by concurring—undermine the legitimacy of the court and do harm to ourselves, this court and the nation. I believe that exactly the opposite is true. Public confidence in this court or any other is premised on the certainty that the court follows the rules in every case, regardless of the question that a particular case presents. Unless we expose to public view

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177. *In re* Complaint of Judicial Misconduct No. 03-6-372-07 (6th Cir. May 28, 2003).

178. *In re* Complaint of Judicial Misconduct No. 03-6-372-07 (6th Cir. Judicial Council, July 31, 2003); see also Michael I. Krauss, *Loading the Dice for the Ruling?*, WASH. TIMES, June 17, 2003, at A17; Charles Lane, *Court Dispute in Affirmative Action Case Ruled Moot*, WASH. POST, Aug. 1, 2003, at A2. The House Judiciary Committee also is investigating Chief Judge Martin’s conduct in the *Grutter* case. See *A Judiciary Diminished Is Justice Denied: The Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary*, Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 107th Cong., 2d Sess. 1-2 (2002) (statement of Steve Chabot, Chair, Subcomm. on the Constitution); *id.* at 41-42 (statement of Kay R. Daly, Coalition for a Fair Judiciary); see also Neil A. Lewis, *House Panel to Study Ruling on Law School Admissions*, N.Y. TIMES, July 4, 2002, at A10; Adam Liptak, *Order Lacking on a Court: U.S. Appellate Judges in Cincinnati Spar in Public*, N.Y. TIMES, Aug. 12, 2003, at A10.

179. 288 F.3d at 753 (Moore, J., concurring) (emphasis in original).

our failures to follow the court's established procedures, our claim to legitimacy is illegitimate.<sup>180</sup>

Justice O'Connor concluded her opinion with the prediction—not drawn from any evidence or arguments in the case—that the need for affirmative action in higher education will end within twenty-five years.<sup>181</sup> In the meantime, it may well be that the special problem of race in twenty-first century American law demands extraordinary redress from our legal institutions. Such redress is better for the country and for the judiciary when it can be achieved in ways that do not undermine the Court's legitimacy and that foster continued experimentation by the very officials and groups to which Justice O'Connor herself gives such a wide berth in *Grutter*.<sup>182</sup>

#### B. THE DISSENTING OPINIONS IN *GRUTTER*

When viewed through the lens of *The Case of the Speluncean Explorers*, the four dissenting opinions in *Grutter*, written by the Court's three conservative Justices as well as by Justice Kennedy, reveal a number of fascinating jurisprudential themes. Some of those themes are not surprising, such as the strong "textualist" approach to constitutional interpretation found in all four of the dissenting opinions, Justice Scalia's characteristic use of heightened rhetoric, and Justice Thomas's personal monologue about race. Still other themes catch us by surprise, such as Justice Kennedy's embrace of a "humble" approach to constitutional interpretation. All of these themes find their parallels in the mythical Supreme Court of Newgarth.

Perhaps the least surprising point of comparison between the dissenting opinions in *Grutter* and the two opinions voting to affirm the convictions in *The Case of the Speluncean Explorers* is the stated preference for a nonactivist judiciary. This preference is observed in the real-life conservative Justices' strong "textualist" and "originalist" approach to the reading of constitutions and statutes,<sup>183</sup> their advocacy for a stricter adher-

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180. *Id.* at 815 (Batchelder, J., dissenting).

181. Justice Ginsburg's separate concurring opinion agreed in theory with the use of a judicial sunset on racial preferences but refused to adopt a specific timetable. 539 U.S. 345-46 (Ginsburg, J., concurring).

182. For further views on Justice O'Connor's jurisprudence, see Symposium, *Justice O'Connor: Twenty Years of Shaping Constitutional Law*, 32 MCGEORGE L. REV. 821 (2001); Judith Olans Brown et al., *The Rugged Feminism of Justice O'Connor*, 32 IND. L. REV. 1219 (1999).

183. There are various shades of originalism reflected in *Grutter*, ranging from Chief

ence to precedent,<sup>184</sup> and the view that judges should play a limited role in the lawmaking process.<sup>185</sup> These themes are most strongly identified in the opinions of Chief Justice Truepenny and Justice Keen. For example, Chief Justice Truepenny made it absolutely clear that regardless of the Court's sympathies, the Newgarth statute permits no exceptions and that the only proper outcome is thus to affirm the convictions.<sup>186</sup> Hoping the Chief Executive would intervene and grant clemency, but unwilling to accomplish the same result indirectly, the Chief Justice evinced a preference for a literal reading of the text and for a constrained judiciary. Justice Keen adopted an even stricter stance, refusing to consider what the Chief Executive "may or may not do"<sup>187</sup> and reminding his colleagues that the "sole question" before the Court is "whether these defendants did, within the meaning of [the statute], willfully take the life of [another]."<sup>188</sup> In answering this question, Justice Keen put aside his "personal predilections"<sup>189</sup> and instead called for a faithful and honest adherence to the statute.

The preference for a nonactivist court is best illustrated by the discontent expressed in all four dissenting opinions in *Grutter* over the majority's unprincipled and flawed application of the Court's strict scrutiny standard. For example, Chief Justice Rehnquist criticized the majority for its lenient application of the strict scrutiny test, faulting the majority for failing to follow prior case law and instead giving "unprecedented deference" to the

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Justice Rehnquist and Justice Scalia's "conservative originalism" to Justice Thomas's "liberal originalism." See SCOTT D. GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999); John C. Eastman, *Taking Justice Thomas Seriously*, 2 GREEN BAG 2D 425 (1999) (reviewing SCOTT D. GERBER, *supra*); Joel Friedlander, *Justice Thomas: An Early Retrospective*, 17 DEL. LAW. 28 (Fall 1999).

184. Although generally associated with conservative judicial philosophies, adherence to stare decisis is not exclusively a conservative doctrine and is not reflexively embraced by conservative judges. See Earl M. Maltz, *No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis*, 25 RUTGERS L.J. 669 (1994) (arguing that in certain situations it is appropriate for conservative judges not to follow precedent); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Judicial Interpretation: Some Modest Proposals from the Twenty Third Century*, 59 ALBANY L. REV. 671, 679-81 (1995) (referring to stare decisis as "a hoax designed to provide cover for a particular outcome, not a genuine, principled ground of decision").

185. See David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1383 (1999) (describing the appropriate role of judicial review in a constitutional democracy as one in which judges follow democratically sanctioned legislative commands).

186. Fuller, *supra* note 1, at 619.

187. *Id.* at 632.

188. *Id.*

189. *Id.*

Law School.<sup>190</sup> The Chief Justice's criticism was twofold. First, the majority improperly redefined strict scrutiny in contrast with prior cases in which the Court had consistently rejected arguments that a more lenient application of strict scrutiny should be used in cases where the defendant has claimed racial classifications were being used in a benign way, or in cases involving "special" settings such as educational institutions.<sup>191</sup> Second, the majority's incomplete and faulty analysis of the data before the Court allowed the Law School to engage in the type of racial balancing that the Court itself has called "patently unconstitutional."<sup>192</sup> In particular, Chief Justice Rehnquist criticized the majority for ignoring the fact that the percentage of what constitutes a critical mass varied among the various minority groups and that the correlation between the percentage of the Law School's pool of applicants who were members of the various minority groups and the percentage of the admitted applicants who were members of those same groups was "too precise."<sup>193</sup> In the end, the Chief Justice equated the Law School's policy to a quota system.<sup>194</sup>

Given the stern nature of this criticism, it is curious to hear the same complaint lodged against Chief Justice Rehnquist regarding a decision he authored less than a month earlier. In *Nevada Department of Human Resources v. Hibbs*,<sup>195</sup> Chief Justice Rehnquist wrote for the majority that Congress has the power under section 5 of the Fourteenth Amendment to authorize suits against state governments for violating the Family and Medical Leave Act.<sup>196</sup> The outcome was surprising because in recent cases the Court has refused to allow lawsuits against nonconsenting states for violations of a variety of federal laws,<sup>197</sup> and any distinction between those cases and *Hibbs* is perplexing.<sup>198</sup> Chief Justice Rehnquist's opinion in *Hibbs* had the same "flaws" he attributes to the majority opinion in *Grutter*. First, by relaxing the showing

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190. 539 U.S. 306, 379-80 (2003).

191. *Id.*

192. *Id.* at 386.

193. *Id.* at 383.

194. *Id.* at 386.

195. 538 U.S. 731 (2003).

196. 29 U.S.C. §§ 2601-2654 (2000).

197. *See, e.g.*, Board of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) (Americans with Disabilities Act); Kimmel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); Boerne v. Flores, 521 U.S. 507 (1997) (Religious Freedom Restoration Act).

198. *See* Vikram David Amar, *The New "New Federalism": The Supreme Court in Hibbs (and Guillen)*, 6 GREEN BAG 2D 349, 350 (2003); Erwin Chemerinsky, *October Term 2002: Value Choices by the Justices, Not Theory, Determine Constitutional Law*, 6 GREEN BAG 2D 367, 374 (2003).



that Congress must make regarding the unconstitutional state conduct that warrants congressional action to permit lawsuits against nonconsenting states, the Chief Justice redefined the standard the Court had established in very recent cases. Second, the Chief Justice engaged in incomplete and faulty analysis of data: in deciding whether Congress had shown that the states were engaged in unconstitutional conduct, Chief Justice Rehnquist approved Congress's reliance on evidence of sex discrimination in the development of leave policies by private employers (as opposed to public employers), of discrimination regarding parental leave (as opposed to family leave), and of discrimination by other states (as opposed to the state involved in the dispute). This relaxation of the existing doctrine has been criticized for giving too much flexibility to Congress, contrary to clear precedent.<sup>199</sup>

At first glance, the Chief Justice's inconsistency in these two cases smacks of judicial arrogance. Why was he willing to manipulate the established constitutional standard in *Hibbs* (to allow Congress more flexibility in dealing with gender discrimination in family leave) but not in *Grutter* (to allow Michigan more flexibility in dealing with affirmative action in law school admissions)?<sup>200</sup> A short, often overlooked passage in *The Case of the Speluncean Explorers* provides a useful insight.

Justice Handy's opinion was based on two lessons drawn from personal experience. First, he dismissed the possibility of executive clemency based on gossip from his wife's niece (a friend of the Chief Executive's secretary). Second, he compared the explorers' case to the first case he heard as a trial judge, in which he was "widely approved by the press and the public opinion" for employing his common sense.<sup>201</sup> A similar dynamic may have been at work in *Hibbs*.

A recent *New York Times* article questioned the Chief Justice's "solicitude for the usefulness of the FMLA in erasing the per-

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199. See Amar, *supra* note 198, at 353-54.

200. The decision in *Hibbs*, although at odds with the Court's most recent federalism decisions, arguably is consistent with the Chief Justice's broader judicial philosophy. See Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 622 (1994) (describing the Chief Justice's underlying theory "as a species of pluralism," in which the political system is perceived "as one in which competing groups seek to advance private interests through bargaining and compromise"); cf. Mark V. Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1328 (1990) ("One could account for perhaps ninety percent of Chief Justice Rehnquist's bottom-line results by looking, not at anything in the United States Reports, but rather at the platforms of the Republican Party").

201. See Fuller, *supra* note 1, at 643-44.

vasive sex-role stereotype that caring for family members is women's work."<sup>202</sup> The article suggested that this newfound interest might have something to do with the Chief Justice's family situation: when his daughter experienced child-care problems, the Chief Justice often "left work early to pick up his granddaughters from school."<sup>203</sup> Unlike Justice Handy's candid reference to his personal experiences, the Chief Justice's motivation was not transparent; we likely will never know whether his firsthand experience with child-care affected his position in *Hibbs*. If humble judging involves "a willingness to suspend belief, at least provisionally, in the correctness of one's own opinions," perhaps we can hope that the Chief Justice's change of heart in *Hibbs* indicates a willingness to be a bit more humble, or at least a bit more human.<sup>204</sup>

In addition to his textualist critique in *The Case of the Speluncean Explorers*, Justice Keen also discussed the negative practical implications in future cases of reversing the convictions of the explorers. Justice Scalia raised similar concerns regarding the likely effects of the Court's decision in *Grutter*. He argued that the majority's subversion of the constitutional strict scrutiny standard is likely to generate much future litigation in racial preference cases.<sup>205</sup>

The most interesting connection between Justice Scalia and the justices of the Newgarth Supreme Court, however, relates not to substance, but to style. The academic commentary on Justice Scalia focuses almost exclusively on identifying his various theories of constitutional interpretation, statutory construction, or deference to administrative agencies.<sup>206</sup> Very little is made of the style of his judicial writings. Erwin Chemerinsky recently has

202. See Linda Greenhouse, *Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, § 4, at 3.

203. *Id.*

204. See McConnell, *supra* note 137, at 1292.

205. *Grutter v. Bollinger*, 539 U.S. 306, 348-40 (2003); see Zlotnick, *supra* note 185, at 1385 (noting that Justice Scalia has repeatedly warned the Court of the danger to the Court and the Constitution of letting judges implement their own values).

206. See generally J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19 (2000); Jay S. Bybee, Printz, *The Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269 (2001); Bradford C. Clark, *The Constitutional Structure and the Jurisprudence of Justice Scalia*, 47 ST. LOUIS. U. L.J. 753 (2003); Autumn Fox & Stephen R. McAllister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia*, 19 CAMPBELL L. REV. 223 (1997); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409 (1999); Symposium, *Reflecting on Justice Antonin Scalia's Religion Clause Jurisprudence*, 22 U. HAW. L. REV. 1 (2000); Symposium, *Justice Antonin Scalia*, 34 U. TOL. L. REV. 425 (2003).

taken Justice Scalia to task for his “frequent sarcasm and pointed attacks on his colleagues.”<sup>207</sup> Among the many examples cited by Professor Chemerinsky are Justice Scalia’s references to other Justices’ opinions as “nothing short of ludicrous,” “beyond absurd,” “entirely irrational,” “nothing short of preposterous,” “ridiculous,” and “so unsupported in reason and so absurd in application [as] unlikely to survive.”<sup>208</sup> Professor Chemerinsky argues that such rhetoric “sends exactly the wrong message . . . about what type of discourse is appropriate in a formal legal setting, and how it is acceptable to speak to one another.”<sup>209</sup>

In *Grutter*, Justice Scalia does not shy away from his characteristically combative rhetoric. He referred to the Law School’s “critical mass” justification as both “mystical”<sup>210</sup> and “fabled.”<sup>211</sup> The critical mass concept, he argued, when used as a justification for racial preferences “challenges even the most gullible mind.”<sup>212</sup> In yet more sarcastic language, Justice Scalia noted that the benefit the Law School allegedly derives from diversity—“cross racial understanding”—is not the kind of benefit on which law students are graded (“Works and Plays Well with Others: B+”)<sup>213</sup> or tested on bar examinations (“Q: Describe in 500 words or less your cross-racial understandings”).<sup>214</sup>

Although virtually overlooked, inflamed rhetoric and sarcasm found their way onto the Newgarth Supreme Court. For example, in a passage whose racial implications have been discussed by Paul Butler,<sup>215</sup> Justice Foster referred to the “stupidest housemaid.” In arguing that it is proper for judges to “read between the lines” when interpreting statutes, Justice Foster noted that the “stupidest housemaid knows that when she is told ‘to peel the soup and skim the potatoes’ her mistress does not mean what she says.”<sup>216</sup> Even more pointed Scalia-like language is found in other opinions. Justice Keen referred to Justice Foster’s opinion as “poetic,” but full of “fantasy.”<sup>217</sup> He argued that Justice Foster used

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207. Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 386 (2000).

208. *Id.* at 400.

209. *Id.* at 399.

210. *Grutter*, 539 U.S. at 346.

211. *Id.* at 347.

212. *Id.*

213. *Id.*

214. *Id.*

215. Paul Butler, *Stupidest Housemaid, J.*, *Harvard Speluncean Symposium*, *supra* note 7, at 1917-23.

216. Fuller, *supra* note 1, at 625.

217. *Id.* at 632.

his purposive approach to statutory construction in so many contexts that, in the event of Justice Foster's incapacity, Justice Keen "could write a satisfactory opinion for him without any prompting whatever, beyond being informed whether he likes the effect of the terms of the statute as applied to the case before him."<sup>218</sup> According to Justice Keen, Justice Foster's approach is unprincipled and simple-minded because it is both outcome-driven and overly mechanical. Justice Keen concluded by criticizing "[t]he essential shabbiness" of Justice Foster's attempt to rewrite the Newgarth murder statute as incompatible with the proper role that judges should play in the legal system.<sup>219</sup>

Another example of sarcasm in *The Case of the Speluncean Explorers* is found in a passage reminiscent of Justice Scalia, in which Justice Handy criticized the Newgarth Supreme Court for throwing "an obscuring curtain of legalisms about every issue presented to them for decision."<sup>220</sup> After listing some examples of these "obscuring" legalisms (positive law, law of nature, purpose of the statute), Justice Handy concluded: "My only disappointment was that someone did not raise the question of the legal nature of the bargain struck in the case—whether it was unilateral or bilateral, and whether [the victim] could not be considered as having revoked an offer prior to action taken thereunder."<sup>221</sup>

"Streaks of meanness" thus are no strangers to the United States Supreme Court or to the fictional Supreme Court of Newgarth. Such sarcasm has no place in a jurisprudence of humility, and inflamed rhetoric can be an indicator of bad judging. The type of rhetoric used by Justice Scalia and by the fictional Justices Foster and Keen is problematic in at least two ways.

First, such rhetoric is symptomatic of individuals who believe they possess a monopoly on wisdom.<sup>222</sup> Judges with such views are less willing to engage their brethren in earnest debate because they feel they have little to learn from others. Judges who isolate themselves are freer to offend their colleagues with inflamed rhetoric.<sup>223</sup>

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218. *Id.*

219. *Id.* at 636.

220. *Id.* at 637.

221. *Id.*

222. See Sherry, *supra* note 151, at 805.

223. Sally J. Kenney, *Puppeteers or Agents? What Lazarus's CLOSED CHAMBERS Adds To Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 *LAW & SOC. INQUIRY* 185, 221 (2000) ("When justices isolate themselves from one another . . . it is harder for the Court to function as an institution").

Second, a jurisprudence of humility requires a particular manner of relating to and treating others. Humble judges will make a concerted effort to avoid humiliating those in their presence by showing both courtesy and respect.<sup>224</sup> This humility manifests itself as better treatment of parties and their judicial colleagues.<sup>225</sup> Although we of course do not know the personal interactions among the various members of the Court,<sup>226</sup> we do know that the kind of rhetoric used by Justice Scalia is not conducive to an atmosphere of respect and does not belong in a jurisprudence of humility.

Consistent with his conservative judicial philosophy,<sup>227</sup> Justice Thomas also strongly criticized the majority's opinion in *Grutter* on doctrinal grounds. He argued that the Court's precedents clearly indicate that only actions taken by the state "to provide a bulwark against anarchy, or to prevent violence" satisfy the compelling interest prong of strict scrutiny in matters of racial classifications<sup>228</sup> and that the Law School's "facile" interest fails this test.<sup>229</sup> Justice Thomas also criticized the majority's application of the narrow tailoring prong, calling it "conclusory" and devoid of any "serious effort" to explain the connection between the use of racial classifications and the interest pressed by the Law School.<sup>230</sup>

Following his doctrinal critique, Justice Thomas unleashed an even sharper "personal" commentary on the stigmatizing effect of affirmative action on members of minority groups who are presumed to be unworthy of admission to the University of

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224. See Scharffs, *supra* note 141, at 195.

225. *Id.*

226. The most detailed depiction of the inner workings of the Court is EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998). For some of the commentary on *CLOSED CHAMBERS*, see *THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON* (David J. Garrow & Dennis J. Hutchinson, eds., 2002); Erwin Chemerinsky, *Opening Closed Chambers*, 108 *YALE L.J.* 1087 (1999); Barry Cushman, *Clerking for Scrooge*, 70 *U. CHI. L. REV.* 721 (2003); David J. Garrow, *Dissenting Opinion: A Witness from Inside the Supreme Court is Not Impressed*, *N.Y. TIMES*, Apr. 19, 1998, at 26; David J. Garrow, "The Lowest Form of Animal Life"?: *Supreme Court Clerks and Supreme Court History*, 84 *CORNELL L. REV.* 855 (1999); Alex Kozinski, *Conduct Unbecoming*, 108 *YALE L.J.* 835 (1999); Richard W. Painter, *Matter of Ethics: Open Chambers?*, 97 *MICH. L. REV.* 1430 (1999).

227. For commentary on Justice Thomas's jurisprudence, see Symposium, *Clarence Thomas After Ten Years: Some Reflections*, 10 *AM. U. J. GENDER, SOC. POL'Y & L.* 327 (2002); Symposium, *A Tribute to Justice Clarence Thomas*, 12 *REGENT U. L. REV.* 333 (2000); *supra* note 183.

228. *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003).

229. *Id.* at 355.

230. *Id.* at 356-57.

Michigan Law School. Reminiscent of his dissenting opinion in an earlier school desegregation case,<sup>231</sup> Justice Thomas began his *Grutter* dissent with a pointed quote from Frederick Douglass regarding the treatment of African-Americans by “well-intentioned” whites.<sup>232</sup> This portion of Justice Thomas’s opinion is similar not to the conservative bloc in the *Newgarth* Court, which voted to affirm the convictions, but rather to Justice Foster, who voted to reverse the convictions on the basis of his paean to a liberal judicial philosophy. Justice Foster used his own view of morality in arguing that when trapped in the cave, the explorers were outside the laws of *Newgarth* and effectively in a “state of nature.”<sup>233</sup> This incursion onto moral ground allowed Justice Foster to argue that judges should first divine and then apply the legislature’s purpose in enacting a statute.<sup>234</sup> Because the explorers were in such an extreme situation, they were outside the reach of the law, and the *Newgarth* Court should accordingly have stepped outside the confines of the law as well to decide their fate.

Like Justice Foster, Justice Thomas looked inward to support his preferred outcome and focused on what appear to be his own feelings and experiences with affirmative action. Justice Thomas’s personal commentary made the same appeal with respect to race as Justice Foster’s exegesis on a “state of nature.” In both cases, the Justices argued that the situation at hand is extreme. Justice Thomas suggested that because race is such a pervasive societal concern, it is of a completely different nature than other legal problems. Yet while Justice Foster fashioned an extrajudicial remedy in ignoring standard legal doctrine to deal with the unique problems associated with human cannibalism, Justice Thomas responded to the special problems of racial preferences by enthusiastically embracing the doctrinal niceties of strict scrutiny.<sup>235</sup>

Although they proposed very different solutions to the “extreme” problems with which they were presented, neither Justice

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231. *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J. concurring) (“It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior.”).

232. *Grutter*, 539 U.S. at 350.

233. See Fuller, *supra* note 1, at 621.

234. See *George Washington Speluncean Symposium*, *supra* note 7, at 1742.

235. Justice Ginsburg’s concurring opinion is based on the same view of the uniqueness of the race problem. “It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.” *Grutter*, 539 U.S. at 345.

Foster nor Justice Thomas exhibited much humility. By adhering to his own personal moral views (in the case of Justice Foster) or to his own personal views on how African-Americans feel stigmatized by the use of affirmative action (in the case of Justice Thomas), both Justices failed to “doubt themselves and to risk being wrong.”<sup>236</sup> Both thus showed a streak of arrogance rather than of humility.

Justice Kennedy’s opinion is the most Tatting-like of the four *Grutter* dissents. Justice Kennedy argued that the majority’s effective abandonment of strict scrutiny analysis will eliminate any incentive for government officials at educational institutions to fashion the race-neutral admissions policies to which all of the Justices in *Grutter* purportedly aspired to. In particular, noted Justice Kennedy, “[b]y deferring to the law school’s choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration.”<sup>237</sup> University administrators consequently will have “few incentives” to make their minority admission programs “transparent and protective of individual review.”<sup>238</sup>

Of greater concern to Justice Kennedy, however, was the effect of the Court’s decision on its ability to participate in the continuing development of public policy regarding racial classifications. By abandoning or manipulating strict scrutiny analysis, the Court loses authority to approve the use of race and thus diminishes its role in this important national debate. Justice Kennedy concluded by noting how the Court’s holding affects him as a judge: “If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates *my* authority to approve the use of race in pursuit of student diversity.”<sup>239</sup>

Although all of the Justices in *The Case of the Speluncean Explorers* purported to be concerned about judicial legitimacy, Justice Tatting’s approach best preserved the Supreme Court of Newgarth’s judicial role in the special circumstances posed by human cannibalism. A review of the commentary and later opinions on the hypothetical reveals that the decision of whether to affirm or reverse the convictions was a doctrinally difficult and normatively contentious issue. For example, the most recent

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236. See Sherry, *supra* note 151, at 810.

237. *Grutter*, 539 U.S. at 393.

238. *Id.* at 394.

239. *Id.* at 395 (emphasis added).

symposium on *The Case of the Speluncean Explorers* resulted in a 3-3 tie vote on whether to affirm the convictions of the explorers.<sup>240</sup> Justice Tatting thus faced a “hard” decision. On the one hand, siding with Justices Foster and Handy to reverse the convictions would have been the popular course of action, but at a very high cost to legal doctrine (by stretching the scope of the murder statute) and to the reputation of the court as a principled institution guided by law and not popular will. On the other hand, joining Chief Justice Truepenny and Justice Keen to affirm the convictions also would have damaged legal doctrine (by freezing the reach of the murder statute) and the court’s reputation. Justice Tatting’s withdrawal got the Court “off the hook.” The Court no longer commanded the floor. Instead, the Chief Executive, the head of a branch more comfortable in the political arena, took center stage. The Court also avoided manipulating doctrine in the context of a very difficult case, leaving doctrinal changes to future cases of a less polarizing nature and thus more conducive to extensive and reflective debate.

Yet Justice Tatting’s approach was not without cost. The decision to withdraw meant, as Justice Handy reminded the Newgarth Court, an affirmance of the death sentence imposed by the lower court. The failure by Justice Tatting to decide could on itself be viewed as a failure, having the potential of diminishing the reputation of the institution.

Nonetheless, Justice Kennedy’s approach in *Grutter* (and, as we argue later, in *Lawrence*) presents the truest jurisprudence of humility. In *Grutter*, Justice Kennedy both recognized the importance of diversity and demanded fidelity to the Court’s strict scrutiny doctrine, which would leave the special problems posed by racial preferences in admissions in the hands of the very officials given such latitude by the majority. This approach is consistent with Justice Kennedy’s overall judicial philosophy, recently described as “a beautiful synthesis of principled legalism and honest realism.”<sup>241</sup> Although he prefers not to create new constitutional principles, Justice Kennedy is willing to adapt old ones to new contexts.<sup>242</sup> He cares deeply about providing citizens with “places where diverse people come together to democratically discuss and deliberate,”<sup>243</sup> as well as keeping citizens informed,

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240. See *Harvard Speluncean Symposium*, *supra* note 7, at 1842.

241. See Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 515, 520 (1997).

242. *Id.*

243. *Id.* at 532.



in as clear and accessible language as possible, of the important debates facing the Court and the country.<sup>244</sup>

Justice Kennedy's dissenting opinion in *Grutter* and majority opinion in *Lawrence* reflect a humble, yet courageous, approach to judging. His humility is illustrated in *Grutter* in two ways. Justice Kennedy recognized that in the university setting people from all walks of life "will talk to and learn from each other face-to-face as democratic equals,"<sup>245</sup> and thus began his opinion with unquestionable support for diversity in higher education. "Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence."<sup>246</sup> Indeed, Justice Kennedy's acceptance of diversity as a compelling state interest, appears to be the reason why none of the other dissenters joined his opinion. He lamented that the result of the majority's decision will be to lose "the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration" in the admissions process.<sup>247</sup>

Justice Kennedy's humility, however, is infused with courageousness. Although Justice Kennedy is willing to defer to government officials, he was unwilling in *Grutter* to abdicate his "constitutional duty to give strict scrutiny to the use of race in university admissions."<sup>248</sup> He thus demonstrated his courage through his unwillingness to bend doctrine to achieve the politically expedient and popular result. Perhaps Justice Kennedy now can shed the "Greenhouse Effect" moniker that has dogged him since his early years on the Court.<sup>249</sup> Similarly, Justice Kennedy in *Lawrence* refused to manipulate the doctrinal underpinnings of *Bowers v. Hardwick*<sup>250</sup> and instead confronted the de-

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244. *Id.* at 526; see also Neal K. Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1801 (1998) (discussing the importance of judges addressing the public at large in their opinions).

245. See Amar, *supra* note 241, at 532; Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745 (1996).

246. *Grutter v. Bollinger*, 539 U.S. 306, 387-88 (2003).

247. *Id.* at 393.

248. *Id.* at 395.

249. See *supra* note 133; for articles labeling Justice Kennedy as the Justice most prone to this malady, see Boot, *supra* note 168; Tony Mauro, "Kennedy Court" Ponders *Net Case*, USA TODAY, Mar. 19, 1997, at 3A ("When conservative federal Judge Laurence Silberman decried the 'Greenhouse Effect' on his colleagues—named for New York Times court correspondent Linda Greenhouse, a presumed liberal—many think he had Kennedy in mind").

250. 478 U.S. 186 (1986).

mands of *stare decisis* head on: "*Bowers* was not correct when it was decided, and is not correct today."<sup>251</sup>

Like Justice Tatting in *The Case of the Speluncean Explorers*, Justice Kennedy cares deeply about both the Court's reputation and the democratic values advanced by the Court's decisions. In *Grutter* and *Lawrence*, Justice Kennedy navigates a course, through both dissenting and majority opinions with a jurisprudence of humility as his compass, which other judicial explorers should follow.<sup>252</sup>

### CONCLUSION

As a tax law professor and a labor law professor using a jurisprudence of humility to help explain the Court's recent landmark affirmative action decision in the context of Lon Fuller's masterful hypothetical that has challenged and perplexed students and scholars for generations, we complete the task with an even keener sense of humility than when we undertook this project. But we also believe our effort here draws strength from two recent strands in legal scholarship.

First, thoughtful books by Richard Fallon<sup>253</sup> and Daniel Farber and Suzanna Sherry<sup>254</sup> argue that the search for grand theory does not contribute to our understanding of how actual judges decide actual cases.<sup>255</sup> For all their intellectual brilliance,

251. *Lawrence v. Texas*, 123 S. Ct. at 2472, 2484 (2003).

252. Of course, we have not exhausted the possible connections between *The Case of the Speluncean Explorers* and *Grutter*. Indeed, in our Introduction to Law classes in Fall 2003, we asked our incoming first year students to write a paper on which opinions in the two cases reflect the best jurisprudential match. The students surprised us with a number of interesting jurisprudential connections (we did not require the students to read all of the opinions in *Grutter*):

Jurisprudential "Matches" in <i>The Case of the Speluncean Explorers</i> and <i>Grutter</i> University of Cincinnati College of Law Class of 2006					
	Truepenny	Keen	Foster	Handy	Tatting
O'Connor	-	2	20	11	-
Rehnquist	-	2	-	-	-
Scalia	1	7	2	-	3
Thomas	4	29	2	2	4

253. RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001).

254. DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

255. See also Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 41 (1993) ("Those who develop grand theories of statutory construction, either to explain

purveyors of such theories are doomed to fail because our courts “are simply too wildly messy—too beautifully, incongruously complicated—to be captured in any elegant theory.”<sup>256</sup> Instead, we should focus our attention on the day-to-day role of judges as “practical lawyers, trying to find workable solutions to institutional, structural, and political difficulties.”<sup>257</sup> We agree with Anthony D’Amato who, in discussing *The Case of the Speluncean Explorers*, notes that we too often focus on *judicial* decisionmaking as opposed to a *judge’s* decisionmaking.<sup>258</sup> Instead, “the essence of the lawyer’s craft is not to learn theories but to persuade judges.”<sup>259</sup> A jurisprudence of humility brings these “institutional, structural, and political difficulties” into the sunlight for all to see and, in the process, both constrain judges in deciding individual cases and guide lawyers in future cases.

Second, William Stuntz makes a plea for greater humility on the part of law professors because “we know less than we claim to know, and we are not as smart as we claim to be.”<sup>260</sup> He observes that “[o]ur theories may be beautiful things to behold (if anything published in a law review can fairly be called a thing of beauty), but they tend to ignore a great deal of messy reality—especially the reality of our own limits.”<sup>261</sup> Professor Stuntz writes in the context of a Christian perspective on law which we share. Like Justices Foster and Thomas, whose personal experiences inform their judicial decisionmaking, our Christian faith informs our work as well. We heed the prophet Micah’s advice to “[D]o justice, and to love kindness and walk humbly with your God.”<sup>262</sup> We believe that a focus on humility has much to offer, regardless of one’s religious faith (if any). We agree with Profes-

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the values on which judges actually decide how to construe statutes or to advocate the values on which judges should construe them, not only confuse technique with theory but attempt to create values out of mere technique.”).

256. Steven D. Smith, *Desperately Seeking Serenity*, 19 CONST. COMMENT. 523, 526 (2002) (reviewing FARBER & SHERRY, *supra* note 254).

257. Brian H. Bix, *Practical Judging*, 19 CONST. COMMENT. 453, 454 (2002) (reviewing FALLON, *supra* note 253).

258. Anthony D’Amato, *The Effect of Legal Theories on Judicial Decisions*, 74 CHI.-KENT L. REV. 517, 526 (1999); *see also* Martineau, *supra* note 255, at 40 (distinguishing judicial decisionmaking from decision-justifying).

259. D’Amato, *supra* note 258, at 526. For further discussion of lawyering as a craft, *see* Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245 (2001).

260. William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1741 (2003) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell & Robert F. Cochran et al., eds. 2001)).

261. *Id.*

262. MICAH 6:8. *See also* Scharffs, *supra* note 141, at 147-57 (discussing the application of this passage to the act of judging).

sor Stuntz that we should approach difficult legal issues with both caution (“acknowledging that one might not be weighing costs and benefits quite right, there is usually a case to be made on the other side”)<sup>263</sup> and modesty (“paying attention to the possibility that other institutions might be able to contribute more to solving the problem at hand than could lawyers and courts”).<sup>264</sup> A jurisprudence of humility, extending beyond the law professoriate to both judges and lawyers, at least motivates us to ask the right questions even if we do not agree on the answers. We cannot improve on Professor Stuntz’s conclusion:

Humility does not counsel inaction, and it is not a posture of indifference. Rather, humility always sees the possibility of its own mistake. That implies not blindness to the errors and injustices that attend the status quo, but awareness that proposed solutions must be tentative, subject to revision as experience dictates. . . . [It is a ] combination of a strong desire to do justice with an equally strong sense of the limited vision of those of us who seek to remold the justice system. And it is unpredictable — neither clearly liberal nor clearly conservative nor inevitably anything else.<sup>265</sup>

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263. Stuntz, *supra* note 260 at 1744.

264. *Id.*

265. *Id.*