RPL, CRT, & LatCrit: "Finding the 'Me' in the Legal Academy"*

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In 1990, I was the first Latino professor hired to a tenure-track faculty position by the University of Denver Sturm College of Law (Sturm).[1] As a Puerto Rican—who spent part of my childhood in Puerto Rico—I often reflect on race relations in the United States and the different experiences I have had living in each country.[2] When I became a law professor, I was finally able to dedicate time to reading about race—in particular, people's real, lived experience of race in the context of United States history, law, and institutions—through a body of literature called Critical Race Theory (CRT).[3] The late Professor Jerome McCristal Culp, Jr., said, "[w]e normally distinguish between good and bad writing by making a distinction

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* Tip of the hat to my friend and mentor, Jerome McCristal Culp, Jr. (RIP). *See* Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 Va. L. Rev. 539 (1991).

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1. A Latina professor, Cecelia Espenoza, who would go on to become a judge on the Board of Immigration Appeals in Washington, D.C., was also hired that year. Cecelia M. Espenoza, *How My Practical Immigration Experiences Impacted Clinical Immigration Law: The Colorado Experience as an Example*, 26 Clinical L. Rev. 169, 169 n.* (2019); *see* Desiree Mathurin, *Retired Judge and Attorney Cecelia Espenoza Is Looking to Fill the House District 4 Seat, with Gun Safety, Education and Housing in Mind*, Denverite (Aug. 22, 2023, 4:51 PM), https://denverite.com/2023/08/22/retired-judge-and-attorney-cecelia-espenoza-is-looking-to-fill-the-house-district-4-seat-with-gun-safety-education-and-housing-in-mind/. In fact, that year the University of Colorado also hired its first Latino law professors, Richard Delgado and Paul Campos. *Faculty Directory: Paul F. Campos*, Colo. L.: Univ. of Colo. Boulder, https://lawweb.colorado.edu/profiles/profile.jsp?id=10 (last visited Jan. 21, 2024); *see* Richard Delgado, *Judicial Influences and the Inside-Out Dichotomy: A Comment on Professor Nagel Ira C. Rothgerber Jr. Conference on Constitutional Law: Constitutional Law and the Experience of Judging*, 61 U. Colo. L. Rev. 711, 711 n.* (1990). Delgado, an established academic by then, was hired as a chaired full professor. *See* Delgado, *supra*. The rest of us were all entry level hires.

2. For more about this difference, see Roberto L. Corrada, *Familiar Connections: A Personal Re/View of Latino/a Identity, Gender, and Class Issues in the Context of the Labor Dispute Between Sprint and La Conexion Familiar*, 53 U. Mia. L. Rev. 1065, 1071–73 (1999); Ángel Ricardo Oquendo, *Puerto Rican National Identity and United States Pluralism*, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 315, 315–16 (Christina Duffy Burnett & Burke Marshall eds., 2001).

3. *See* Critical Race Theory: The Key Writings That Formed the Movement, at xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas eds., 1995) [hereinafter Critical Race Theory] (defining CRT as "a movement of left scholars, most of them scholars of color, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole").

between what rings true and what sounds false."[4] In CRT, and later in Latina/o Critical Legal Theory (LatCrit)[5] and writing, I found a body of work about race that rang true and resonated deeply with what I had experienced growing up and as an adult navigating various social, educational, and work spaces in the United States.[6]

As a young law professor reading CRT for the first time, I was introduced to ideas such as "dual consciousness," "systemic discrimination," "limits of mainstream discrimination equality theory and law," "non-neutrality," and "critiques of colorblindness," which further influenced my involvement in LatCrit and the creation of the Rocky Mountain Collective on Race, Place & Law (RPL). The following readings, which I found to be truer and more accurate than mainstream accounts, introduce these ideas and provide a convincing critique of existing law related to race, gender, and ethnicity:[7]

- Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*[8] (describing the acceptance of "positioned perspective" and narrative and rejecting the idea of neutrality and objectivity; introducing the idea of dual consciousness through the writings of W.E.B. DuBois);

- Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*[9] (introducing the idea that anti-discrimination law is premised

4. Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 541 n.7 (1991).

5. *See* FRANCISCO VALDES & STEVEN W. BENDER, LATCRIT: FROM CRITICAL LEGAL THEORY TO ACADEMIC ACTIVISM 1 (New York University Press 2021) (defining LatCrit as "a genre of critical outsider jurisprudence" that seeks "to develop a critical, activist, and interdisciplinary discourse on law and policy toward Latinas/os/x" as well as promote "the development of coalitional theory and practice").

6. For more on my personal experience with LatCrit, including the formation of RPL, see Steven W. Bender, Francisco Valdes, Shelley Cavalieri, Jasmine B. Gonzales Rose, Sarudzayi M. Matambanadzo, Roberto L. Corrada, Jorge R. Roig, Tayyab Mahmud, Zsea Bowmani, & Anthony E. Varona, *Afterword: What's Next? Into a Third Decade of LatCrit Theory, Community, and Praxis*, 16 SEATTLE J. FOR SOC. JUST. 823, 848–58 (2018) [hereinafter *What's Next?*].

7. The discovery of this literature also created in me a sense of relief that came from understanding that I was not alone, that others saw the world as I do. This helped to inform my approach to teaching and learning, as I described in Roberto L. Corrada, *Toward an Ethic of Teaching: Class, Race and the Promise of Community Engagement*, 50 VILL. L. REV. 837, 837–845 (2005).

8. Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2256–57, 2259, 2265 (1992); Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, *in* CRITICAL RACE THEORY, *supra* note 3, at 342. Other narratives on race that have moved and inspired me include: Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990); Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994); Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992). Delgado's *Rodrigo's Chronicle* dialogue format motivated me to write my own dialogue narrative relating to a time when I had been insufficiently sensitive to race and gender dynamics. The dialogue narrative, I discovered, was the only real way to tell the story. *See generally* Corrada, *supra* note 2.

9. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1978); Alan

on the "perpetrator perspective" and intentional discrimination—who has committed the act, fault/liability and causation—but race discrimination evades these constructs because discrimination is systemic, a social phenomenon);

- Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*[10] (exposing the limits of civil procedure (e.g., statutes of limitation) and law in general (evidentiary strictures) in remedying wrongs perpetrated by society against minoritized and indigenous peoples, introducing the idea of reparations in the context of Native Hawaiians, and explaining the difference between Critical Legal Studies and CRT);

- Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*[11] (introducing the concept of intersectionality, the idea that introducing in antidiscrimination law, as required by the law, someone as either a woman *or* as a person of color "relegate[s] the identity of women of color to a location that resists telling."); and

- Neil Gotanda, *A Critique of "Our Constitution Is Color Blind*"[12] (distinguishing uses of race (positive and negative), explaining the nuances, and criticizing the colorblind construct of race as false).

I was looking for a place where I could explore critical race ideas in a safe environment. In the early 1990s, the University of Denver was not that place! But in 1997, it felt like a breath of fresh air when I attended the LatCrit II Conference in San Antonio, Texas.[13] I remember noticing how diverse the participants were: there were faculty who were Black, Latina/o, Asian, Native, and Filipino, and there were LGBTQIA+ faculty as well. I finally felt that I had a place within the legal academy where I could be my complete self: a place where my Puerto Rican identity did not make me an oddity, my view of the world was validated, and I felt comfortable.[14] I was passionate about the work, so I put together the very first LatCrit

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David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY, *supra* note 3, at 29.

10. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 368, 381, 387 (1987); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations, in* CRITICAL RACE THEORY, *supra* note 3, at 63.

11. Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *in* CRITICAL RACE THEORY, *supra* note 3, at 357; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991).

12. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 STAN. L. REV. 1, 2, 53–54 (1991); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," *in* CRITICAL RACE THEORY, *supra* note 3, at 257.

13. *See generally* Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998).

14. For a more detailed account of my involvement with LatCrit, *see What's Next?*, *supra* note 6, at 851–56.

Primer, a collection of early Latcrit writing that formed the canon.[15] I continued to attend LatCrit conferences throughout the 1990s and 2000s, until finally, in 2014, likeminded faculty and staff came together at Sturm to create a critical race space of our own, known today as RPL.[16] RPL was built based on CRT and LatCrit principles, including those mentioned above and others added later on as these theories evolved.[17]

As I knew even before I read any CRT scholarship, race matters, especially in this country.[18] The idea of a colorblind society and constitution is a dream, not reality. Importantly, the idea of colorblindness has been used to hijack laws and constitutional provisions specifically created to right societal wrongs against minoritized persons, especially Black persons.[19] Take for example, the recent controversy surrounding affirmative action in higher education. My own view on this subject accords with that articulated by Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit in 1996:

> I believe that the law has not done itself proud in its handling of the issue of affirmative action. To the contrary, some of the absurdities of our methods of legal analysis may be seen in their starkest form when we examine how we have taken a great constitutional principle designed to aid historically deprived minorities—or, to speak more bluntly, a historically enslaved minority—to achieve liberty, equality, and justice, and have turned that principle, the Fourteenth Amendment, into a cold, harsh, and inflexible barrier against progress by African Americans. For, remarkable as it may be, it is the Fourteenth Amend-

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15. *See* Francisco Valdes & Steven W. Bender, *LatCrit Primers*, LATCRIT, www.latcrit.org/publications/latcrit-primers/ (last visited Feb. 20, 2024). A primer is an introductory book on a subject.

16. *See Rocky Mountain Collective on Race, Place & Law*, STURM COLL. OF L., https://www.law.du.edu/content/rocky-mountain-collective-race-place-law (last visited Jan. 25, 2024).

17. Added ideas include antiessentialism, antisubordination, globalism, hegemony, deconstruction of merit, and white privilege. *See id.*; Katherine Steefel, *From Whiteboard to Statement of Principles: The Development of the Rocky Mountain Collective on Race, Place & Law's Principles*, 101 DENV. L. REV. 457, 458–59 (2024).

18. One of the tenets of the critical race and LatCrit movements and literature. *See* Cornel West, *Forward* to CRITICAL RACE THEORY, *supra* note 3, at xi; CRITICAL RACE THEORY: THE CUTTING EDGE, at xiii (Richard Delgado ed., 1995); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 2–4 (2001).

19. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 5, 16 (10th anniversary ed. 2020) (arguing that mass incarceration has become a new form of racial control in the United States, even though it operates under a supposedly colorblind system); TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015) (non-fiction book written as a letter to Coates's son, exploring the realities of being Black in America and the enduring legacy of racism, including the limitations of colorblindness in addressing racial inequality); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE, at xvii–xviii (10th anniversary ed. 2006) (examining the legal history of race in the United States and arguing that the concept of "colorblindness" has been used to uphold racial inequalities despite the Fourteenth Amendment).

> ment that is now frequently being used against equal employment opportunities, against fair representation in the halls of government, against social equality, and against integration itself.[20]

And so, the Fourteenth Amendment of the United States Constitution[21] and Title VI of the Civil Rights Act of 1964,[22] both created to secure the rights of Black citizens, have been co-opted to instead deprive them of opportunities.[23] The latest example of this is a Supreme Court case decided this past summer—*Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*).[24] In *SFFA*, the Supreme Court found admissions programs at Harvard and at the University of North Carolina (UNC) unconstitutional and unlawful[25]—UNC's under the Equal Protection Clause of the Fourteenth Amendment and Title VI, and Harvard's under Title VI, which requires an Equal Protection Clause analysis.[26]

Though the Court does not explicitly overrule the holding of *Grutter v. Bollinger*,[27] the *SFFA* decision seemingly guts this precedential case. Confusingly, language at the end of the majority opinion suggests *Grutter* survives.[28] *SFFA* contains a forty-one page majority opinion authored by

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20. Stephen Reinhardt, *Remarks at UCLA Law School Forum on Affirmative Action: "Where Have You Gone, Jackie Robinson?*,*"* 43 UCLA L. REV. 1731, 1731 (1996).

21. U.S. CONST. amend. XIV.

22. Title VI of Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7.

23. *See* Reinhardt, *supra* note 20, at 1731, 1743; Olatunde Johnson, *The Supreme Court's Decision on Affirmative Action Must Not Be the Final Word*, TIME MAG. (June 29, 2023, 4:07 PM), https://time.com/6291410/supreme-court-affirmative-action-final-word/.

24. 600 U.S. 181 (2023).

25. *Id.* at 229–30.

26. *Id.* at 198 n.2, 213.

27. 539 U.S. 306 (2003).

28. *See Harvard*, 600 U.S. at 211, 227–28; *see also* Anemona Hartocollis & Amy Harmon, *Affirmative Action Ruling Shakes Universities Over More than Race*, N.Y. TIMES (July 26, 2023), https://www.nytimes.com/2023/07/26/us/affirmative-action-college-admissions-harvard.html ("Ms. [Catherine E.] Lhamon[, Assistant Secretary for Civil Rights in the Department of Education,] said that the court did not rule that working to achieve diversity was unlawful, and that her office would be 'ready to help you, including through technical assistance,' in determining how to comply with the ruling." Kristen Clarke, assistant attorney general for civil rights in the Justice Department, said that the "[d]iscussion of race was not flatly forbidden . . . . A Black student might want to write an essay about becoming interested in civil rights law after a field trip to the courthouse, or about learning to cook Jamaican dishes from her mother — both experiences that she had, Ms. Clarke added."); Jessica Cheung, *Affirmative Action Is Over. Should Applicants Still Mention Their Race?*, N.Y. TIMES (Sept. 4, 2023), https://www.nytimes.com/2023/09/04/magazine/affirmative-action-race-college-admissions.html ("'I think people are scratching their heads wondering, well, what did Justice Roberts mean by that exactly, and how is it going to be tested?' Jeff Brenzel, a former dean of undergraduate admissions at Yale, told me. Brenzel is currently a trustee at Morehouse College, where he is helping its board work through how the ruling will affect admissions. 'How is it going to be interpreted at the individual school level? I think that's a matter of tremendous uncertainty.' The Biden administration, which finds itself in the position of enforcing a decision it dislikes, recently released a letter trying to help parse Roberts's position: Schools cannot give an automatic boost to students of a particular race, it read, but they 'remain free to consider any quality or characteristic of a student' even if that quality or characteristic is tied to a life experience shaped by the student's race." (quoting Dep't of Just., *Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina*, U.S. DEP'T OF EDUC. 3 (Aug. 14, 2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-questionsandanswers-tvi-20230814.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=).

Chief Justice Roberts (joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Coney Barrett);[29] a fifty-six page concurring opinion by Justice Thomas;[30] a twenty-three page concurrence by Justices Gorsuch and Thomas;[31] a six page concurrence by Justice Kavanaugh;[32] and a sixty-six page dissent by Justice Sotomayor (joined by in full by Justice Kagan and regarding only UNC by Justice Jackson).[33]

Although the college admissions policies at issue in *SFFA* and the University of Michigan Law School admissions policy in *Grutter* are strikingly similar,[34] the discussion and analysis in Justice O'Connor's centrist majority opinion in *Grutter* and Justice Roberts's conservative opinion in *SFFA* could not be more disparate.

For example, with respect to whether there is a "compelling state interest" in the diversity of the student body, Justice O'Connor, in *Grutter*, writes the following:

> [T]he [Michigan] 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." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." . . . "In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."
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> These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. . . .

29. *Harvard*, 600 U.S. at 190–231.
30. *Id.* at 231–287 (Thomas, J., concurring).
31. *Id.* at 287–310 (Gorsuch, J., concurring).
32. *Id.* at 311–17 (Kavanaugh, J., concurring).
33. *Id.* at 318–84 (Sotomayor, J., dissenting).
34. *Compare id.* at 190–96, *with* Grutter v. Bollinger, 539 U.S. 306, 311–16 (2003). All schools perform a holistic review of each applicant. Race is treated as a "plus" factor but only after the complete record of the applicant is closely scrutinized, including test scores, grade point average (GPA), and essays and recommendations. No school looks only at test scores and GPA, but additionally consider a whole host of other attributes, including extracurricular activities, athletic ability, artistic ability, volunteer work, and whether the applicant is a child of or related to an alumnus, etc. *See What Counts in Admission Decisions*, COLLEGEBOARD, https://counselors.collegeboard.org/college-application/admission-decisions (last visited Feb. 21, 2024). Clearly, nobody is admitted on the basis of race alone. And why would they be? Nobody has an interest in seeing an accepted student drop out of school because they were not prepared for the work or prepared to be a college or law school student at the school.

> We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society.[35]

Meanwhile, on the same point, Chief Justice Roberts notes in *SFFA*:

> [T]he interests [Harvard & UNC] view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."
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> . . . At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed?[36]

Dissenting to the majority decision in *SFFA*, Justice Sotomayor offers the following commentary on the point of "compelling state interest":

> To avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. None of this Court's precedents, however, requires that a compelling interest meet some threshold level of precision to be deemed sufficiently compelling. In fact, this Court has recognized as compelling plenty of interests that are equally or more amorphous, including the "intangible" interest in preserving "public confidence in judicial integrity," an interest that "does not easily reduce to precise definition."[37]

In *Grutter*, the Court also addresses "viewpoint diversity," or whether applicants of color share some perspective that is critical to education and therefore requires more racial diversity on campus and in classrooms.

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35. *Grutter*, 539 U.S. at 328–31 (citations omitted) (quoting Petition for Writ of Certiorari at 244a, 246a, *Grutter*, 539 U.S. 306 (No. 02-241); Brief of the American Educational Research Ass'n et al. as Amici Curiae Supporting Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241); Plyler v. Doe, 457 U.S. 202, 221 (1982)).

36. *Harvard*, 600 U.S. at 214 (citations omitted) (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 173–74 (1st Cir. 2020); Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 656 (M.D.N.C. 2021)).

37. *Id.* at 358 (Sotomayor, J., dissenting) (citations omitted) (quoting Williams-Yulee v. Fla. Bar, 575 U.S. 433, 447, 454 (2015)).

Justice O'Connor writes:

> The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.[38]

Chief Justice Roberts, also addressing "viewpoint diversity" in *SFFA*, states:

> We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." That requirement is found throughout our Equal Protection Clause jurisprudence more generally.
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> Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." UNC is much the same. It argues that race in itself "says [something] about who you are."[39]

On the other hand, Justice Sotomayor states in her dissent:

> The absence of racial diversity, by contrast, actually contributes to stereotyping. "[D]iminishing the force of such stereotypes is both a crucial part of [these college's] mission, and one that [they] cannot accomplish with only token numbers of minority students." When there is an increase in underrepresented minority students on campus, "racial stereotypes lose their force" because diversity allows students to "learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." By preventing respondents from achieving their diversity objectives, it is the Court's opinion that facilitates stereotyping on American college campuses.[40]

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38. *Grutter*, 539 U.S. at 333 (citation omitted) (quoting Brief for Respondents at 30, *Grutter*, 539 U.S. 306 (No. 02-241)).

39. *Harvard*, 600 U.S. at 219–20 (citations omitted) (quoting *Grutter*, 539 U.S. at 333; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978); Transcript of Oral Argument at 97, *Harvard*, 600 U.S. 181 (No. 21-707)).

40. *Id.* at 364–65 (Sotomayor, J., dissenting) (citations omitted) (quoting *Grutter*, 539 U.S. at 319–20, 333).

In *Grutter*, the Court expressed hope that affirmative action would not be necessary in twenty-five years.[41] Addressing this hope in *SFFA*, Justice Roberts notes the following:

> [Harvard and UNC's] admissions programs also lack a "logical end point."
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> Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark," or "precise number or percentage," or "specified percentage."
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> . . . Harvard "has not set a sunset date" for its program. And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." And UNC suggests that it might soon use race to a *greater* extent than it currently does.[42]

Justice Sotomayor addressed this point directly in her dissent, stating:

> [C]herry-picking language from *Grutter*, the Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. This new durational requirement is also not grounded in law, facts, or common sense. *Grutter* simply announced a general "expect[ation]" that "the use of racial preferences [would] no longer be necessary" in the future. As even SFFA acknowledges, those remarks were nothing but aspirational statements by the *Grutter* Court.
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> . . . A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable.[43]

The sharp contrast between Justice Roberts and Justice O'Connor's view of the same questions is quite telling. In fact, Justice Sotomayor spends much of her dissent in *SFFA* defending the *Grutter* decision, a case the Court does not expressly purport to overrule.[44] However, remarkably,

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41. *Grutter*, 539 U.S. at 343.

42. *Harvard*, 600 U.S. at 221, 225 (citations omitted) (quoting *Grutter*, 539 U.S. at 342; Transcript of Oral Argument at 86, 167, *Harvard*, 600 U.S. 181 (No. 21-707); Brief for Respondent at 38, 52, *Harvard*, 600 U.S. 181 (No. 20-1199); Transcript of Oral Argument at 91, *Harvard*, 600 U.S. 181 (No. 20-1199); Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 612 (M.D.N.C. 2021)).

43. *Harvard*, 600 U.S. at 368–70 (Sotomayor, J., dissenting) (citations omitted) (quoting *Grutter*, 539 U.S. at 343).

44. *See id.*; *see also id.* at 352 ("In reaching [the] conclusion [that the Harvard and UNC admission's programs are unconstitutional], the Court claims those supposed issues with respondents' programs render the programs insufficiently 'narrow' under the strict scrutiny framework that the

Justice Roberts gives life again to the sort of holistic approach to race that university admissions offices have been using for years at the very end of the majority opinion:[45]

> At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. . . . A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.[46]

In her dissent, Justice Sotomayor explains the extent of the majority's "straw man" argument regarding admissions decisions based on race alone:[47]

> [T]he Court's demand that a student's discussion of racial self-identification be tied to individual qualities, such as "courage," "leadership," "unique ability," and "determination," only serves to perpetuate the false narrative that Harvard and UNC currently provide "preferences on the basis of race alone." The Court's precedents already require that universities take race into account holistically, in a limited way, and based on the type of "individualized" and "flexible" assessment that the Court purports to favor.[48]

Critical race scholars predicted this extreme limitation on affirmative action, and its ultimate demise, long ago.[49] In their critique, affirmative action could not endure if the Supreme Court's view was one of colorblindness.[50] They argued that a view of equality that does not account for history, and past and present injustices, cannot sustain either remedial or diversity rationales for affirmative action.[51] It is now worrisome that many

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Court's precedents command. In reality, however, 'the Court today cuts through the kudzu' and overrules its 'higher-education precedents' following *Bakke.* There is no better evidence that the Court is overruling the Court's precedents than those precedents themselves. 'Every one of the arguments made by the majority can be found in the dissenting opinions filed in [the] cases' the majority now overrules." (quoting *Harvard*, 600 U.S. at 307 (Gorsuch, J., concurring); Payne v. Tennessee, 501 U.S. 808, 846 (1991) (Marshall, J., dissenting))).

45. *See Harvard*, U.S. 181 at 230–31.

46. *Id.*

47. *Id.* at 358 (Sotomayor, J., dissenting).

48. *Id.* at 363 (quoting *Harvard*, 600 U.S. 181 at 220, 231 (majority opinion); Grutter v. Bollinger, 539 U.S. 306, 334 (2003)).

49. *See* DELGADO & STEFANCIC, *supra* note 18, at 22; *see also* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1099 (1978); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 STAN. L. REV. 1, 40–42 (1991); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1222–23 (1991).

50. *See* DELGADO & STEFANCIC, *supra* note 18, at 22.

51. *See* Delgado, *supra* note 49, at 1223–26.

will only read the headlines about *SFFA* and assume that race can no longer be taken into account in any context despite the conclusion of Chief Justice Roberts's majority opinion. Hopefully, admissions officers and university counsel will take a closer look at *SFFA* and see that what the decision allows is not far from what schools have been doing all along. High school and college counselors will hopefully continue to encourage students of color to write about their race experiences, and talk about what individual and unique perspective they can bring in their application essays.[52]

Unfortunately, the feared overreaction to headlines accompanying articles about *SFFA* has already started to become reality. The same individual, Edward Blum, who started Students for Fair Admissions and sued Harvard and UNC has created another organization called the American Alliance for Equal Rights (AAER).[53] Right after the *SFFA* decision was announced, AAER brought a § 1981 suit against Morrison Foerster in the Southern District of Florida and Perkins Coie in the Northern District of Texas, alleging the firms' 1L and 2L summer associate fellowship programs that are only available to minority applicants (based on race and LGBTQIA+ status) are unlawful.[54] The organization sued on behalf of itself and one member, Member A.[55] The complaint states that:

> Member A has a demonstrated record of academic achievement, excellent writing and interpersonal skills, and leadership and community involvement. He attended an Ivy League college, where he was actively involved in several debating organizations and served as a peer counselor. He is an accomplished writer—authoring a best-selling book, high-level research papers, and numerous op-eds—who focuses on policy issues, including diversity and race. He has held senior leadership positions in several nonprofits and has worked on political campaigns and grassroots efforts both locally and nationally.[56]

Aside from issues regarding standing, damages, the main plaintiff's anonymity, and inapplicable Fourteenth Amendment case law—including

52. There is already some evidence of this taking place. *See* Cheung, *supra* note 28 ("As of August, at least 20 selective schools, including several in the Ivy League, had introduced new supplemental-essay prompt language for this application cycle that adheres closely to the ruling and seems to guide students along the tightrope that Roberts has laid out for them. These new essay questions direct students to talk about their identity in terms of their lived 'experiences' and ask them to tie it to 'unique contributions' to their campus — all language drawn from Roberts's passage.").

53. Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done.*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html; *Lawyers' Committee for Civil Rights Defends Programs Combatting Historic Racial Bias in Brief Supporting Fearless Fund LLC*, LAWS.' COMM. FOR CIV. RTS. UNDER L. (Sept. 5, 2023), https://www.lawyerscommittee.org/lawyers-committee-for-civil-rights-defends-programs-combatting-historic-racial-bias-in-brief-supporting-fearless-fund-llc/.

54. Julian Mark & Taylor Telford, *Conservative Activist Sues 2 Major Law Firms Over Diversity Fellowships*, WASH. POST (Aug. 23, 2023, 9:28 AM), https://www.washingtonpost.com/business/2023/08/22/diversity-fellowships-lawsuit-affirmative-action-employment/.

55. Complaint at 2, Am. All. for Equal Rts. v. Morrison & Foerster LLP, No. 1:23-cv-23189-KMW (S.D. Fla. Aug. 22, 2023).

56. *Id.* at 7.

the *SFFA* decision—the complaint raises plenty of questions regarding its validity.[57] Understand, first, these fellowships are not the only way, or even the easiest way, to get hired with Morrison Foerster or Perkins Coie. Both firms hire many more associates through regular hiring channels.

Also, nobody should be too worried about Member A! His credentials and accomplishments mean he's likely to get a phenomenal summer associate position. Even Member A believes this, as the complaint reveals he is only willing to spend five weeks, or half of his summer, at Morrison Foerster.[58] Quite frankly, more concern should be mustered over whom Member A would displace and prevent from taking advantage of the chance to apprentice and learn the ways of a large law firm—the student who, otherwise, would not ultimately be offered a job with the firm.

Before answers to the complaints were even due, both firms changed their policies to eliminate any race requirements.[59] And while the plaintiff then dropped the case,[60] AAER is continuing to sue other firms and organizations, gaining easy victories before a response to the complaint is even filed.[61] Diversity programs are folding even though there is no real basis for the challenge.

The biggest irony here is that § 1981, a law that applies to the private sector and is not covered by the *SFFA* precedent, says: "All persons . . . shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws . . . *as is enjoyed by white citizens*."[62] Harkening back to Judge Reinhardt, this law, intended to ensure that Black individuals would be able to contract without fear of discrimination, is being used in furtherance of the opposite goal: taking opportunities away from people of color. Judge Reinhardt's comments about *Regents of the University of California v. Bakke*[63] could signal a searching analysis and deconstruction of merit in the context of college and professional and graduate school admissions. Reinhardt recounted the following:

> Who is more deserving of receiving an education from the state - an affirmative action candidate like Dr. Patrick Chavis or Dr. Allan

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57. *See generally id.*

58. *Id.* at 6.

59. *See* Ryan Boysen, *Conservative Group Drops Perkins Coie Diversity Suit*, LAW360 (Oct. 11, 2023), https://www.law360.com/pulse/articles/1731432/conservative-group-drops-perkins-coie-diversity-suit; Dan Roe, *Blum-Led Group Drops Lawsuit Against MoFo After Firm Opened Diversity Fellowships to All Applicants*, AM. LAW. (Oct. 6, 2023, 3:30 PM), https://www.law.com/american-lawyer/2023/10/06/blum-led-group-drops-lawsuit-against-mofo-after-firm-opened-diversity-fellowship-to-all-applicants/.

60. Boysen, *supra* note 59.

61. *See* Tatyana Monnay, *Blum Says He's Done Suing Law Firms as Winston Yields on DEI (2)*, BLOOMBERG L. (Dec. 6, 2023, 1:14 PM), https://news.bloomberglaw.com/business-and-practice/blum-says-hes-done-suing-law-firms-as-winston-yields-on-dei.

62. 42 U.S.C. § 1981(a), (c) (emphasis added).

63. 438 U.S. 265 (1978).

> Bakke, who successfully sued a U.C. medical school because Chavis was admitted and he was not.
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> Following graduation, Dr. Chavis returned home to render medical assistance, as one of the few obstetricians in a large, but poor minority area. Today, Dr. Chavis still provides desperately needed medical attention in that community, Compton. If Dr. Chavis were not in Compton now, the white male who sought to take his place in medical school would not have been there either, and Compton babies might still be born as Dr. Chavis was, without the help of a family doctor. They might still be facing a possible delivery by whatever overworked young intern happened to be on duty in the emergency room of a very busy, overtaxed, and distant county hospital - and that, only if the babies' mothers arrived in time and the intern was not engaged in a greater emergency.
>
> Where is the man who, in the absence of affirmative action, would have taken Dr. Chavis' place in medical school, and who, thanks to the Supreme Court decision that bears his name, did indeed receive the same medical school education enjoyed by Chavis? According to the Los Angeles Times, Dr. Bakke is today a part-time anesthesiologist living in a comfortable suburban home in Rochester, Minnesota. By whom are the people of California, who helped provide the medical educations of these two individuals, better served? The product of affirmative action or the purported victim of that practice?[64]

There may be a silver lining. *SFFA* may lead to a comprehensive analysis that critical race scholars have been suggesting for years—an analysis of what exactly "merit" is.[65] Indeed, one of RPL's guiding principles is the deconstruction of merit.[66] What is the mission of a law school? Who does it serve? What is the purpose of legal representation? A goal of it? Is it justice? If so, should law schools be concerned about access to it? Does it matter if growing percentages of our population are not represented in the legal profession tasked with assuring access to justice? What is the purpose of a law school? Law schools may, because of *SFFA*, start to eschew the LSAT, for example, in favor of a more searching inquiry into whether particular students can be successful and also add to the school's mission and its broader societal goals. Should our own law school be concerned that in parts of the city with large concentrations of Latina/o persons, there are few lawyers? What about the fact that "*notarios*"[67] in those

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64. Reinhardt, *supra* note 20, at 1738.

65. *See* DELGADO & STEFANCIC, *supra* note 18, at 105–07.

66. *Rocky Mountain Collective on Race, Place & Law*, STURM COLL. OF L., https://www.law.du.edu/content/rocky-mountain-collective-race-place-law (last visited Jan. 25, 2024).

67. *See Understanding Unauthorized Practice of Law Issues*, COLO. SUP. CT. (Dec. 15, 2014), https://www.coloradosupremecourt.com/PDF/UPL/Understanding%20Practice%20of%20Law%20Issues.pdf ("Those people who hold themselves out to the public as 'immigration consultants' or '*notarios*' are not attorneys or accredited representatives, and thus cannot provide legal advice, and cannot select or prepare immigration forms for others").

neighborhoods are filling the gap and giving legal advice, instead of someone who is law trained? A comprehensive look at merit may cause more elite schools to examine the most powerful, non-merit-based affirmative action program in college admissions—the preference for sons and daughters of alumni, or so called "legacy admits."[68] If affirmative action programs must be curtailed, then maybe legacy admission programs preferencing the children of white and wealthy alumni should also be scaled back or eliminated.[69] The elimination of legacy preference programs, however, could also lead to a decrease in diversity on college campuses if those programs are only now beginning to give preferences to a growing number of applicants of color whose parents attended those schools. The fight for true equality is never-ending. Hence the need for more entities like the Rocky Mountain Collective on Race, Place & Law.

68. *See, e.g.*, Jeannie Suk Gersen, *The End of Legacy Admissions Could Transform College Access*, THE NEW YORKER (Aug. 8, 2023), https://www.newyorker.com/news/daily-comment/the-end-of-legacy-admissions-could-transform-college-access; Vimal Patel, *Why Legacy Admissions Are at the Center of a Dispute in Higher Education*, N.Y. TIMES (July 26, 2023), https://www.nytimes.com/2023/07/26/us/legacy-admissions-colleges-universities.html.

69. Patel, *supra* note 68.