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## RESPONSE

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### DOCTRINAL DILEMMA\*

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GIRARDEAU A. SPANN<sup>†</sup>

In response to Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075 (2009).

#### INTRODUCTION

In *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*,<sup>1</sup> Professor Kimberly West-Faulcon has identified a tension between state anti-affirmative action laws and the continued enrollment of minority students in public universities. The tension is not surprising, because the voter initiatives that led to those state anti-affirmative action laws were transparently motivated by white majoritarian desires to reduce minority student enrollment in public universities. What *is* surprising, however, is Professor West-Faulcon's suggestion that state anti-affirmative action laws can themselves be read to permit precisely the type of race-conscious affirmative action that they might initially be thought to prohibit.<sup>2</sup>

Capitalizing on the self-interested desires of states to avoid federal-funding cutoffs, Professor West-Faulcon constructs an argument that is both analytically sound and enticingly clever. However, that does not mean that the argument is free from a potentially fatal flaw. The problem is that doctrinal arguments alone cannot compel adherence

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<sup>†</sup> Professor of Law, Georgetown University Law Center.

<sup>1</sup> Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075 (2009).

<sup>2</sup> See *id.* at 1083-84, 1155-58 (asserting that the "federal-funding exceptions" contained in state anti-affirmative action laws may allow states to defend race-conscious admissions policies).

to policies that are sufficiently unpopular to mobilize effective political opposition. Alternate doctrinal arguments can always be developed that are cogent enough to support the outcomes favored by socially powerful opponents, and the original argument can always be marginalized to the point where its analytical soundness ceases to appear particularly relevant.

This problem creates a dilemma for those of us who are tempted to formulate doctrinal arguments as a means of advancing our own racial-equality agendas. Participation in a syllogistic game that purports to be governed by doctrinal rules but actually uses those rules simply to mask the dispositive role of political preferences runs the risk of reinforcing the authenticity of the game itself. But declining participation in the game precludes the possibility of securing even those occasional victories that are permitted in order to convey the impression that the game is legitimate. It is difficult to see how the dilemma can ever be satisfactorily resolved. However, the loss of innocence entailed in recognizing this doctrinal dilemma may, at least, constitute a step in the right direction.

#### I. DOCTRINE

In the mid-1990s, political opponents of affirmative action began using ballot-initiative measures to secure the enactment of state anti-affirmative action laws.<sup>3</sup> Although supporters typically framed the laws as antidiscrimination measures, and never actually mentioned the term “affirmative action,” the intended effects included a reduction of minority enrollment in public colleges and universities that had previously been obtained through affirmative action programs.<sup>4</sup> However, the anti-affirmative action laws also included what Professor West-Faulcon calls “federal-funding exceptions,” which explicitly stated that the laws did not prohibit actions necessary to maintain eligibility for federal-funding programs.<sup>5</sup> Professor West-Faulcon believes that those federal-funding exceptions preclude a reading of the anti-affirmative action laws that would violate the prohibition on disparate impact discrimination contained in Title VI of

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<sup>3</sup> See *id.* at 1087-90 (discussing California’s Proposition 209, Washington’s Initiative 200, Michigan’s Proposal 2, and Nebraska’s Initiative 424).

<sup>4</sup> See *id.* at 1087 & n.31, 1091 (“State anti-affirmative action laws are the product of a political and legal campaign to end state-sponsored affirmative action.” (footnote omitted)).

<sup>5</sup> *Id.* at 1092 & n.49 (citing CAL. CONST. art. I, § 31(e); MICH. CONST. art. I, § 26(4); NEB. CONST. art. I, § 30(5); WASH. REV. CODE § 49.60.400(6) (2008)).

the Civil Rights Act of 1964.<sup>6</sup> Her argument is so elegant that it is fun just to recite it.

Professor West-Faulcon argues that public colleges and universities have responded to state anti-affirmative action laws by eliminating the affirmative action programs that they used to select students for admission.<sup>7</sup> As a result, minority enrollment in those schools has declined in ways that are statistically significant enough to establish a prima facie case of disparate impact discrimination prohibited by Title VI.<sup>8</sup> A showing of some “educational necessity” justifying use of the selection criteria producing a racially disparate impact can rebut a prima facie Title VI violation.<sup>9</sup> However, no such showing justifies the declines in minority enrollment that have been produced in response to state antidiscrimination laws. Those declines were produced by continued heavy reliance on applicant SAT scores, though those scores do not correlate highly enough with student success in college to warrant the racially disparate impact that they produce.<sup>10</sup> Rather, the schools’ use of SAT scores is motivated more by a desire to enhance the institutional prestige and financial bond ratings of those schools than to serve as an accurate predictor of student success.<sup>11</sup> Unlike SAT scores, high-school grades do have a high correlation with college success,<sup>12</sup> and they do not produce the same racially disparate impact that SAT scores do.<sup>13</sup> Accordingly, reliance on high-school grades as an admission criterion would constitute a less discriminatory alternative to the continued use of SAT scores. One cannot say, therefore, that continued use of SAT scores constitutes an educational necessity within the meaning of Title VI.<sup>14</sup>

Others have argued that the use of selection criteria that produce a racially disparate impact is inconsistent with statutes such as Title VI and Title VII of the Civil Rights Act of 1964 because those statutes

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<sup>6</sup> See *id.* at 1084 (“[U]niversities may invoke the federal-funding exception to defend the readoption of race-conscious admissions policies as legally permissible under their state’s anti-affirmative action laws.”).

<sup>7</sup> *Id.* at 1086, 1090-93, 1119-20.

<sup>8</sup> *Id.* at 1092-1102.

<sup>9</sup> *Id.* at 1129 n.192 (citing *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 981 n.6 (9th Cir. 1984)).

<sup>10</sup> *Id.* at 1120-44.

<sup>11</sup> *Id.* at 1105-09.

<sup>12</sup> *Id.* at 1115.

<sup>13</sup> *Id.* at 1127, 1128 & n.189.

<sup>14</sup> *Id.* at 1128.

view disparate impact as a form of prohibited discrimination.<sup>15</sup> Professor West-Faulcon, however, adds a new twist to this argument. She argues that the inclusion of federal-funding exceptions in each of the new state anti-affirmative action laws controls the way that those *state* laws must be interpreted and implemented.<sup>16</sup> Because one of the remedies for a disparate impact violation of Title VI is the very loss of federal funds that the state affirmative action laws explicitly seek to prevent, the use of race-conscious selection criteria motivated by a desire to avoid federal-funding cutoffs cannot constitute a violation of those anti-affirmative action laws. Instead, it constitutes the remedial use of race, rather than the prohibited use of race as a discriminatory preference.<sup>17</sup> Any other reading of state anti-affirmative action laws runs the risk of “normaliz[ing]” lower minority admissions.<sup>18</sup> As a result of Professor West-Faulcon’s doctrinal sleight of hand, state anti-affirmative action laws end up *requiring* the very sorts of race-conscious affirmative action that they might superficially have been thought to prohibit. This is impressive doctrinal reasoning. But there is a problem.

## II. PROBLEM

As cogent as Professor West-Faulcon’s doctrinal argument is, it is difficult to imagine that the argument could meaningfully change the attitudes or behavior of affirmative action opponents who currently believe that state anti-affirmative action laws compel a reduction in minority student enrollment. The problem is *not* that Professor West-Faulcon’s doctrinal argument is in any way deficient. The problem is that doctrine itself is typically unable to overcome strongly motivated political opposition—especially with respect to the issue of race.

It is possible to evade Professor West-Faulcon’s conclusion that state anti-affirmative action laws actually permit race-conscious re-

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<sup>15</sup> See, e.g., Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 506-08, 577-85 (2003) (tracing the development of the Title VII prohibition on disparate impact discrimination and invoking the expressive content of the statute to support the constitutionality of the prohibition under the Equal Protection Clause); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1494-1501 (1997) (proposing the creation of a new doctrine, “intentional impact theory,” through which “a party could combine evidence of an industry or profession’s discriminatory intent in adopting or developing certain selection standards with current evidence of disproportionate impact, to create a prima facie case” under Title VI).

<sup>16</sup> West-Faulcon, *supra* note 1, at 1084.

<sup>17</sup> *Id.* at 1145-58.

<sup>18</sup> *Id.* at 1158.

medial admissions by challenging some of the doctrinal assumptions on which her conclusion rests. Professor West-Faulcon's interpretation of state anti-affirmative action laws depends on her interpretation of Title VI as a federal-funding-based prohibition on the disparate impact that would result from reducing minority student enrollment in order to comply with state anti-affirmative action laws. Title VI, however, might *not* be offended by such disparate impact. Professor West-Faulcon herself admits that reliance on the SAT scores that produce this disparate impact might serve as the educational-necessity justification that would preclude the need for any Title VI disparate impact funding cutoff.<sup>19</sup>

Professor West-Faulcon argues that SAT scores cannot constitute an educational necessity, because high-school grades are a better predictor of college success than are SAT scores, and the former do not produce the disparate impact generated by the use of the latter.<sup>20</sup> Her argument, however, assumes that the pursuit of enhanced prestige and financial bond ratings is not a legitimate interest sufficiently compelling to qualify as an educational necessity under Title VI. Although Professor West-Faulcon does consider the possibility that prestige and bond ratings might constitute an educational necessity, her rejection of that argument might be too dismissive.<sup>21</sup>

The Supreme Court's decision upholding the University of Michigan Law School's affirmative action plan in *Grutter v. Bollinger* seems to recognize that the pursuit of educational prestige *is* a compelling interest.<sup>22</sup> As Justice Thomas convincingly pointed out, the majority's decision to uphold the law school's affirmative action plan can best be understood as endorsing the pursuit of educational elitism.<sup>23</sup> That is

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<sup>19</sup> See *id.* at 1124-26 (conceding that even if "the use of the SAT as an admissions criterion has a racially discriminatory effect," Title VI is not violated if "the SAT is necessary to ensure that minority applicants have the requisite college performance ability").

<sup>20</sup> *Id.* at 1127-28.

<sup>21</sup> See *id.* at 1127 ("[I]t is unclear whether . . . the SAT's rankings- and prestige-enhancing value . . . would suffice as an educational necessity . . .").

<sup>22</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 327-30 (2003) (holding that the pursuit of diversity in higher education can constitute a compelling governmental interest under strict scrutiny applied to racial classifications, and acknowledging deference to educational institutions' "educational judgment").

<sup>23</sup> See *id.* at 354-56 (Thomas, J., concurring in part and dissenting in part) ("[T]he Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution."); see also Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 236-37 (2004) (exploring Justice Thomas's claim that "the [*Grutter*] Court's real interest is in protecting elitism").

precisely because the law school could have relied on the less discriminatory alternative of pursuing student diversity through the abandonment of LSAT scores if it were willing to incur a potential loss of prestige.<sup>24</sup> In holding that the affirmative action plan survived strict scrutiny, therefore, the *Grutter* majority was necessarily holding that the pursuit of prestige *did* constitute a compelling state interest.

Professor West-Faulcon goes on to argue that school reliance on SAT scores to predict college success is unnecessary because the marginal increase in predictive value that SAT scores add to high-school grades is too small to warrant the disparate impact that the use of SAT scores produces.<sup>25</sup> In reaching that conclusion, however, Professor West-Faulcon assumes that “[t]he key factual question is whether reliance on the SAT is necessary to ensure that minority applicants have the requisite college performance ability to attend certain selective public universities in states with anti-affirmative action laws.”<sup>26</sup> But that need not be the key question. It seems quite legitimate for a school to rely on admissions criteria designed not simply to identify *qualified* students but also to identify the *best* students in the applicant pool. If that is the goal, the marginal increase in predictive value provided by SAT scores may, in fact, be sufficient to constitute a Title VI educational necessity. Indeed, it is not clear why merely being *qualified* would ever alone be sufficient for admission in a selective student-ranking environment, where the goal is to admit the *best* students.<sup>27</sup>

Professor West-Faulcon has rejected Professor Eugene Volokh’s interpretation of the federal-funding exception contained in state anti-affirmative action laws, but it is not clear what is wrong with Professor Volokh’s interpretation. Based on the statutory language “must be taken,” Professor Volokh views the federal-funding exception as applying only when race-conscious affirmative action is absolutely necessary

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<sup>24</sup> See *Grutter*, 539 U.S. at 367-71 (Thomas, J., concurring in part and dissenting in part) (discussing alternatives to the use of the LSAT for admissions).

<sup>25</sup> West-Faulcon, *supra* note 1, at 1126.

<sup>26</sup> *Id.*

<sup>27</sup> I note—with admiration rather than criticism—that Professor West-Faulcon seems to shift her emphasis from “best” to “qualified” as necessary to strengthen her argument. See, e.g., *id.* at 1154 (arguing that if “the primary interest of a selective public university is to admit the *best and brightest* high-school students based on their academic merit without regard to race, [SAT] test deficienc[ies] unfairly undermine[] that goal” because of their “racially discriminatory effect on African American and Latino applicants with the *requisite college performance ability* to attend the institution” (emphasis added)).

to maintain federal funding.<sup>28</sup> Under this view, if some race-neutral alternative way of maintaining federal funding is available, then affirmative action is not permitted under state anti-affirmative action laws. Professor West-Faulcon rejects this argument because she believes it would deprive the exception of any practical effect.<sup>29</sup> Schools could never be certain that a court would find that all conceivable race-neutral alternatives were literally unavailable, so schools would be unwilling to risk voluntary race-conscious remedial action because that action might later be held invalid under state anti-affirmative action laws.<sup>30</sup> Professor West-Faulcon, therefore, prefers to borrow the strong-basis-in-evidence standard from the Supreme Court's affirmative action cases—a standard under which schools would be free to engage in voluntary, race-conscious remedial action if they had a strong basis in evidence for thinking that the failure to take such action would constitute a Title VI disparate impact violation.<sup>31</sup>

Professor West-Faulcon's argument makes intuitive sense. But Professor Volokh's position is arguably more consistent with the idea of strict scrutiny, which is customarily applied to racial classifications. Strict scrutiny imposes the heavy burden of proving the existence of a compelling state interest and a narrowly tailored means for advancing that interest,<sup>32</sup> which is consistent with Professor Volokh's literalistic view of state anti-affirmative action laws. It is also worth noting that even though the Supreme Court has used the strong-basis-in-evidence standard under strict scrutiny in some of its constitutional affirmative action race cases, the Court has never found that standard to be satisfied.<sup>33</sup> And even the intuitive appeal of Professor West-Faulcon's argument now seems to have been largely overtaken by a new development. Since her article was published in the spring of 2009, the

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<sup>28</sup> See Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1387 (1997) ("If it's possible to be eligible without the discrimination, then the discrimination is prohibited, because it's not true that the action 'must be taken' for eligibility.").

<sup>29</sup> West-Faulcon, *supra* note 1, at 1157-58.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1148-57 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)).

<sup>32</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2752 (2007) (discussing strict scrutiny for racial classifications).

<sup>33</sup> The only two cases in which a racial classification has survived strict scrutiny are the now-discredited *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld a World War II exclusion order that led to the internment of Japanese Americans, and the more recent *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld the University of Michigan Law School's affirmative action plan as a narrowly tailored means of advancing a compelling interest in student diversity. Neither case considered the application of the strong-basis-in-evidence standard for remedial affirmative action.

Supreme Court has decided a new Title VII case that seems to offer renewed support to the Volokh interpretation.

In *Ricci v. DeStefano*, decided June 29, 2009, the Supreme Court invalidated New Haven's refusal to certify the results of a firefighter promotion exam that had an adverse, racially disparate impact on minority firefighters.<sup>34</sup> Even though the city's actions were motivated by a desire to avoid a Title VII disparate impact violation, the Court held that the city's race-conscious actions constituted a Title VII intentional-discrimination violation that adversely affected the mostly white firefighters who outscored minorities on the exam.<sup>35</sup> As Professor West-Faulcon suggested in the context of Title VI, the *Ricci* Court extended the strong-basis-in-evidence standard that it had previously used in constitutional affirmative action cases to Title VII disparate impact claims.<sup>36</sup> But the *Ricci* majority's application of that standard was so strained that Justice Ginsburg emphasized in dissent that it was difficult to see how the Court's new incarnation of the standard could ever be satisfied in the absence of an actual adjudication of a disparate impact violation.<sup>37</sup> The *Ricci* majority was so hostile to the continued recognition of disparate impact claims that it expressly left open the question of whether the Title VII disparate impact provision was itself unconstitutional.<sup>38</sup> In a concurring opinion, Justice Scalia even suggested that he had already made up his mind that the Title VII disparate impact provision violated the Constitution.<sup>39</sup> In light of *Ricci*, it is difficult to imagine the current Supreme Court accepting Professor West-Faulcon's argument that federal funds would have to be cut off if state anti-affirmative action laws produced a racially disparate impact in student enrollment. It would be difficult to distinguish a school's voluntary effort to avoid a disparate impact on students from New Haven's voluntary effort to avoid a disparate impact on firefighters. In fact, it seems more likely that the current anti-affirmative action majority on the Supreme Court would hold unconstitutional any reading of Title VI that compelled such a result, in the same way that it has

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<sup>34</sup> See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664-65 (2009).

<sup>35</sup> *Id.* at 2664.

<sup>36</sup> See *id.* at 2664-65, 2675-77 (“[W]e adopt the strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII.”).

<sup>37</sup> *Id.* at 2700-02 (Ginsburg, J., dissenting).

<sup>38</sup> *Id.* at 2676 (majority opinion).

<sup>39</sup> *Id.* at 2681-83 (Scalia, J., concurring).



threatened to hold the disparate impact provision of Title VII unconstitutional.<sup>40</sup>

Finally, the “four-fifths rule” that Professor West-Faulcon favors for establishing a prima facie case of Title VI disparate impact<sup>41</sup> seems to be in tension with the *Grutter* Court’s aversion to quotas, mathematical ratios, and racial balancing.<sup>42</sup> Moreover, the *Ricci* Court gave short shrift to the EEOC interpretive guideline that would have insulated New Haven’s efforts to prevent disparate impact from Title VII liability.<sup>43</sup> It is true that the *Grutter* Court deferred to the “educational judgment” of educational institutions in determining the degree to which racial affirmative action was educationally desirable.<sup>44</sup> But it is precisely that judgment that the voters chose to override when they passed their state anti-affirmative action ballot initiatives.

### III. DILEMMA

Personally, I find Professor West-Faulcon’s argument more persuasive than my suggested evasions of her argument. But that is because I already agree with her conclusion. I believe that state anti-affirmative action laws actually constitute a recent incarnation of the longstanding commitment to the sacrifice of racial-minority interests for the benefit of the white majority in the United States. From slavery and the genocide of indigenous Indians to Japanese-American internment and the current resegregation of public schools, United States society has always found ways to discriminate against racial minorities when it wished to do so.<sup>45</sup> For me, the colorblind race neutrality that state anti-affirmative action laws purport to restore is simply a technique for freezing an unequal baseline in the distribution of

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<sup>40</sup> In recent decades, the Court has expressed unmistakable hostility to racial affirmative action. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 205-09, 226, 235-37 (1995) (applying strict scrutiny to a federal-funding program containing an affirmative action preference for minority contractors). The preference was ultimately abandoned on remand. See *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 106 (2001).

<sup>41</sup> West-Faulcon, *supra* note 1, at 1120-23, 1128-30.

<sup>42</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 330, 334 (2003) (“To be narrowly tailored, a race-conscious admissions program cannot use a quota system . . . .”); cf. *Gratz v. Bollinger*, 539 U.S. 244, 271-76 (2003) (invalidating the University of Michigan’s undergraduate affirmative action plan, which mechanically awarded points to minority applicants).

<sup>43</sup> See *Ricci*, 129 S. Ct. at 2699-2700 (Ginsburg, J., dissenting) (discussing the EEOC interpretive guidelines and the majority’s lack of deference to those guidelines).

<sup>44</sup> *Grutter*, 539 U.S. at 328-33.

<sup>45</sup> See Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 591-92, 597-607 (2008).

societal resources that was produced by a long history of discrimination.<sup>46</sup> Further, the distinction between merit and the reverse-discrimination racial preferences that anti-affirmative action laws purport to end is simply a smokescreen designed to make continued white majoritarian discrimination appear legitimate.<sup>47</sup> I know that Professor West-Faulcon is aware of these structural arguments, because she cites them in her article.<sup>48</sup> But she chose not to emphasize them, presumably because her Title VI doctrinal argument would have more credibility if it could not be dismissed as yet another systemic “societal discrimination” claim whose validity the Supreme Court refuses to recognize.<sup>49</sup> And therein lies the problem.

Doctrine does not matter much when outcomes are predetermined by political or ideological beliefs. If the Supreme Court were to construe the meaning of the federal-funding exception to state anti-affirmative action laws—or were to rule on the constitutionality of those laws themselves—the outcome would be determined more by the Court’s personnel and the prevailing political climate than by any controlling doctrinal imperative. Everyone knows this to be true. And yet we continue to formulate carefully crafted doctrinal arguments, as

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<sup>46</sup> See Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 190-92, 241-70 (1997).

<sup>47</sup> See Roithmayr, *supra* note 15, at 1469-81 (“Far from being the opposite of ‘bias,’ the concept of merit is necessarily inscribed with subjective, status-based social bias, which merit sought to exclude in the first place.”).

<sup>48</sup> See *e.g.*, West-Faulcon, *supra* note 1, at 1082 n.15 (citing Roithmayr, *supra* note 15, at 1473-81); *id.* at 1087 n.31 (citing Spann, *supra* note 46, at 189).

<sup>49</sup> This prohibition on the use of legal remedies to redress general societal discrimination as opposed to identifiable acts of particularized discrimination was articulated by Justice Lewis Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 307-10 (1978), and reasserted by Justice Powell in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274-78 (1986) (plurality opinion). Led by Justice Sandra Day O’Connor, this view has now been adopted by a majority of the Court. See *Grutter*, 539 U.S. at 323-25 (stating that *Bakke* “rejected an interest in remedying societal discrimination”); *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) (requiring “identified discrimination” to justify a government’s use of racial distinctions under the Equal Protection Clause (internal quotation marks omitted)); see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 610-14 (1990) (O’Connor, J., dissenting) (noting that the Court has long recognized the government’s interest in remedying identified discrimination); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-98 (1989) (plurality opinion) (same); *Johnson v. Transp. Agency*, 480 U.S. 616, 647-53 (1987) (O’Connor, J., concurring in the judgment) (rejecting “societal discrimination” as a justification for affirmative action under Title VII); *Wygant*, 476 U.S. at 288 (O’Connor, J., concurring) (“[A] governmental agency’s interest in remedying ‘societal’ discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.”).

if syllogistic analysis were likely to determine outcomes rather than merely the opinions issued to rationalize those outcomes.

Those of us who wish to use law as a means of promoting racial justice therefore confront a serious dilemma. If we continue to make doctrinal arguments, knowing that those arguments are unlikely to determine outcomes, we simply reinforce the legitimacy of a social system that uses law and adjudication as one of its tools for the continued oppression of racial minorities. But if we stop participating in the process of doctrinal adjudication, we risk losing those sporadic concessions that even an oppressive social system must occasionally make to those whom it oppresses in an effort to prevent bottled-up frustrations from ripening into serious threats of destabilizing change.

#### CONCLUSION

It might be that when racial minorities seek to advance their interests from a position of political weakness, all that they can realistically hope for are the intermittent concessions that the white majority permits to trickle down. If that is true, racial minorities ought at least to understand that this is what is going on. Doctrinal arguments can then be viewed as an available form of political action, rather than as proof that the white majority can trick racial minorities into falling for the legitimacy of a system that gets minorities to participate willingly in their own oppression. But continued minority participation in doctrinal analysis without this level of self-awareness may prove to be as pathetic as it has been effective.

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