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Peter Schuck's new book, *Diversity in America: Keeping Government at a Safe Distance*, offers an admirably lucid and forthright account of the advantages and disadvantages of affirmative action in the United States. Schuck argues that "government-sponsored preferences" should be barred "except in the relatively narrow remedial situations that the courts now permit,"[1] but that affirmative action in private institutions should be allowed when it is transparent.[2] Schuck candidly and carefully canvasses the arguments for and against his position, concluding that:

> [A]ffirmative action, although well intended, is hard to square with liberal ideals in general and the diversity ideal (properly understood) in particular. The social benefits are too small, too arbitrarily and narrowly targeted, and too widely resented to justify the costs that it imposes—its unfairness to other individuals, its propensity to corrupt and debase public discourse, its incoherent programmatic categories, and its reinforcement of the pernicious and increasingly meaningless use of race as a central principle of distributive justice rather than the other distributive principles, particularly merit, with which most Americans, white and minorities alike, strongly identify.[3]

History has not been exactly kind to Schuck's treatment of affirmative action in *Diversity in America*. The book was written at a time when the Supreme Court was hostile to most justifications for affirmative action, with the striking exception of the holding in *Bakke* that allowed institutions of higher education to use affirmative action to pursue the goal of "diversity."[4] As a result Schuck naturally focused his analysis "on the diversity rationale for affirmative action."[5] But the very year in which *Diversity in America* was

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1. PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 198 (2003).

2. *Id.* at 196-97. Schuck would prohibit private associations from using affirmative action to discriminate "against minorities entitled to the highest level of protection under the equal protection principle." *Id.* at 136.

3. *Id.* at 135.

4. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). At the time Schuck was writing, the *Bakke* opinion was under siege. *See* Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001).

5. SCHUCK, *supra* note 1, at 135. Schuck explains that this focus is justified because "of my larger interest in how law manages diversity, and because diversity is the only broad rationale that the Supreme Court has not yet rejected." *Id.*

published, the Court decided *Grutter v. Bollinger*.[6] Although *Grutter* used the vocabulary of "diversity," it actually approved quite distinct justifications for affirmative action in higher education.

Grutter held that state universities could use affirmative action in order (1) to train persons to work in "'an increasingly diverse workforce'";[7] (2) to maintain "'our political and cultural heritage'"[8] by making certain that "knowledge and opportunity . . . be accessible to all individuals regardless of race or ethnicity";[9] and (3) to "cultivate a set of leaders with legitimacy in the eyes of the citizenry" by ensuring that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[10] These three justifications for affirmative action reach far beyond the "diversity" rationale of *Bakke,* which was the primary focus of Schuck's attention.[11]

The first justification essentially holds that affirmative action can be constitutional if it is functionally necessary to achieve legitimate institutional objectives. Several years ago, Judge Richard Posner had used an analogous form of instrumental reasoning in *Wittmer v. Peters*[12] to uphold affirmative action in the hiring of correctional officers for an experimental prison "boot camp." Posner held that racially specific hiring was constitutional because "the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp."[13]

The first justification of *Grutter* uses this kind of functional reasoning to conclude that affirmative action is constitutional if it is "essential" to the success of a legitimate "educational mission."[14] *Grutter* holds that a state law school can use affirmative action to secure the "real" educational "benefits" of endowing students with "the skills needed in today's increasingly global marketplace," which "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[15] The Court accepts this claim of functional necessity on the basis of "the expert studies and reports entered into evidence at trial," as well as "numerous studies [that] show that student body diversity promotes learning outcomes, and better prepares students for an

6. 539 U.S. 306 (2003). For a discussion of *Grutter*, see Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 56-77 (2003).

7. 539 U.S. at 330 (quoting Brief of the American Educational Research Association, the Association of American Colleges and Universities, and the American Association for Higher Education as Amici Curiae in Support of Respondents at 7, Grutter v. Bolinger, 539 U.S. 306 (2003) (No. 02-241)).

8. 539 U.S. at 331 (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).

9. *Id.*

10. *Id.* at 332.

11. For a detailed comparison of *Bakke* and *Grutter*, see Post, *supra* note 6, at 58-70.

12. 87 F.3d 916 (7th Cir. 1996).

13. *Id.* at 920.

14. 539 U.S. at 328.

15. *Id.* at 330.

increasingly diverse workforce and society, and better prepares them as professionals."[16]

Diversity in America does not analyze this claim of functional necessity, which prior to *Grutter* had not appeared in the context of affirmative action in higher education. Suffice it to say that the claim is both empirical and quite far-reaching. In fact it is so very sweeping as to lead to the suspicion that the Court has appropriated social scientific evidence to justify distinct normative values. The nature of these values are suggested in the second and third justifications for affirmative action advanced by *Grutter*.

Grutter holds that affirmative action is necessary in order to maintain "our political and cultural heritage."[17] Six years before *Grutter*, I had defended affirmative action in higher education on the analogous ground that universities should promote "the health of public culture," because a well-functioning public culture is a prerequisite for the maintenance of democratic legitimacy.[18] I had argued that "[i]f the racial and ethnic rifts that divide us are to be transcended by a democratic state that is legitimate to all sides, there must be articulate participation in public culture that concomitantly spans the lines of these controversies."[19] It followed that the educational mission of universities ought to be understood "to include the obligation to facilitate this participation."[20]

When I made this argument, however, I had (with some discouragement) conceded that it was "uncertain whether this justification for affirmative action, if candidly expressed, would pass constitutional muster."[21] It is understandable, therefore, that *Diversity in America* considers my position only long enough accurately to characterize it as "really an effort to change the subject" from

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16. *Id.* at 331 (internal quotation marks omitted).

17. *Grutter* states:

> 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. This Court has long recognized that "education . . . is the very foundation of good citizenship." For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae,* affirms that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." And, "[n]owhere is the importance of such openness more acute than in the context of higher education." Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Id. at 331-32 (citations omitted).

18. Robert Post, *Introduction: After* Bakke, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 1, 23 (Robert Post & Michael Rogin eds., 1998).

19. *Id.* at 24.

20. *Id.*

21. *Id.*

"diversity."[22] That *Grutter* can now explicitly approve this argument suggests how fundamentally the decision has transformed the normative and legal landscape of affirmative action.

The third justification *Grutter* offers for affirmative action is somewhat analogous to what Schuck calls the "Anticaste" and "Leadership Cadre" rationales. *Diversity in America* dismisses these rationales in four short pages.[23] Schuck rejects the "Anticaste" rationale because "the stunning political, economic, and social advances by blacks both individually and as a group" mean that affirmative action is "no longer warranted . . . especially in light of" its social costs.[24] And he rejects the "Leadership Cadre" rationale because "the vast majority of those admitted to select institutions may well have succeeded, participated, and been leaders *anyway* even without the preferences."[25] (Schuck carefully concedes, however, that "some of them, perhaps because of reduced financial aid opportunities at less select institutions, would have succeeded less."[26])

These arguments approach the question of affirmative action from a very different perspective than that of *Grutter*, and, as a consequence, they neither anticipate nor adequately answer the considerations that *Grutter* now puts on the table. *Grutter* defends affirmative action neither on the ground of a lack of "genuine democratic participation on the basis of equality,"[27] which is how Schuck defines the "Anticaste" principle, nor on the ground of cultivating a diverse group of leaders, which is how Schuck formulates the "Leadership Cadre" rationale. Instead, *Grutter* explains that affirmative action is necessary for the maintenance of legitimacy:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.[28]

It is striking that *Grutter* speaks of what must be made "visible" in order that society can maintain "confidence" in its leadership. *Grutter* considers it essential that elite educational institutions *appear* to be "open to talented and qualified individuals of every race and ethnicity." Schuck's claim that African-

22. SCHUCK, *supra* note 1, at 169.
23. *Id.* at 156-59.
24. *Id.* at 157.
25. *Id.* at 159.
26. *Id.*
27. *Id.* at 156.
28. 539 U.S. at 332-33.

Americans can succeed even without admission to elite educational institutions does not meet this argument. Whereas Schuck is concerned with the fact of minority success, *Grutter* is instead focused on the question of legitimacy. *Grutter* suggests that it is not enough for America to be integrated; the potential for integration must also be *seen*. What accounts for this difference in approach?

Schuck agrees that without affirmative action, elite educational institutions "might rapidly be stripped of much of their African-American presence."[29] But Schuck does not seem to count this as a loss, so long as minority students can nevertheless receive a good education and achieve ultimate success. The resegregation of elite educational institutions is for him only a temporary condition that marks the current failure of minority students to excel in the forms of merit that presently determine admittance to such institutions.

Grutter, by contrast, reads this potential resegregation from the particular perspective of minority groups, who *Grutter* believes will interpret their exclusion from elite educational institutions as evidence of denigration. *Grutter* regards this possibility as a serious threat to American democracy, because the legitimacy of national institutions depends upon all citizens accepting "the dream of one Nation, indivisible."[30] The allegiance of minority groups to that dream is already fragile, because of the "appalling inequalities of opportunity"[31] that Schuck concedes continue to divide the races. *Grutter* suggests that the visible embrace of minorities by elite educational institutions is indispensable for the maintenance of that dream among the growing numbers of America's minority citizens.

Grutter in fact insists that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential" for "maintaining the fabric of society."[32] *Grutter* regards "education as pivotal to sustaining our political and cultural heritage," and for this reason *Grutter* counts it as "a paramount government objective" to ensure that institutions of higher education be rendered "open and available to all segments of American society, including people of all races and ethnicities."[33] *Grutter*'s determination to visibly integrate the realm of public culture derives its urgency precisely from the ongoing and "appalling inequalities of opportunity" that continue to plague the everyday lives of minority citizens. If the dream of one nation indivisible is continuously shattered by blatant differences in health, housing, and wealth, it is especially urgent to reconstitute and affirm the possibility of national unity in

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29. SCHUCK, *supra* note 1, at 173; *see also id.* at 182-86. Schuck believes that in the absence of affirmative action, minority students will be redistributed to non-flagship campuses. *Id.* at 183.

30. 539 U.S at 332.

31. SCHUCK, *supra* note 1, at 201.

32. 539 U.S. at 331-32.

33. *Id.* (internal quotation marks omitted).

the symbolic realm of public culture.

The considerations that lead *Grutter* to defend affirmative action become salient only if the question of affirmative action is understood from the distinct perspective of minority groups. It is striking that *Diversity in America* does not analyze affirmative action from that point of view. This difference in approach underlies a second fascinating point of difference between *Grutter* and Schuck. Schuck would allow private institutions to adopt affirmative action programs only if they do so in a transparent way:

> Private entities that now use preferences seldom admit this fact to the public, preferring obfuscation and outright deception to candor. One may argue that silence is golden here, that opacity about racial preferences minimizes social disputes over abstract, irreconcilable principles and sustains desirable social myths. Although this argument for opacity has force in some contexts, it is notably weak as applied to affirmative action. There, divisions and suspicions already abound and dissimulation serves only to magnify and multiply them, as people who assume that preferences are even more widespread than they actually are stigmatize even those who did not receive them. Concealment of the truth about preferences inflames these social conflicts and injustices.[34]

Grutter reaches the opposite conclusion. Because it insists that each applicant to an institution of higher education receive "truly individualized consideration,"[35] *Grutter* effectively requires affirmative actions plans to use highly opaque processes of implicit individual comparisons. Indeed, *Gratz v. Bollinger*,[36] the companion case to *Grutter*, actually rejects the undergraduate affirmative action plan of the University of Michigan precisely *because* of its transparency.[37] The program had explicitly awarded "20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race."[38] *Gratz* invalidates the program because of its failure to give sufficiently individualized consideration to each applicant.

We may ask, then, why the Court seems to forbid the very transparency that Schuck believes ought to be mandatory. It is noteworthy that Schuck insists on transparency because he is afraid that opacity will fuel white resentment.[39] Schuck is concerned to maintain the legitimacy of national institutions in the eyes of the "predominantly unknown, unaffluent, unorganized" individuals—as

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34. SCHUCK, *supra* note 1, at 196 (internal citations omitted).

35. 539 U.S. at 334.

36. 539 U.S. 244 (2003).

37. For an analysis, see Post, *supra* note 6, at 69-75. As Justice Souter remarked in dissent, the Court in *Gratz* managed to fashion a holding in which "[e]qual protection [is] an exercise in which the winners are the ones who hide the ball." 539 U.S. at 298 (Souter, J., dissenting).

38. 539 U.S. at 270.

39. SCHUCK, *supra* note 1, at 196-97. Schuck writes that white "demoralization and anger must be counted as a very large social cost. It is no less a cost because it is borne by whites, and often less privileged whites at that." *Id.* at 179.

Scalia once called them[40]—who believe themselves harmed by affirmative action. The Court, however, does not seem particularly moved by the views of working-class whites. Having accepted the conclusion of elite institutions that affirmative action is necessary "in today's increasingly global marketplace,"[41] the Court seems primarily concerned with the effect that transparent affirmative action programs will have on its minority beneficiaries.

The Court in *Grutter* is worried that minorities may come to feel entitled to whatever advantages a transparent affirmative action program may award them, and the Court is therefore determined to establish constitutional guidelines that will prevent affirmative action from fostering any such a shift toward group rights. The Court uses the "individualized consideration" requirement to ensure that affirmative action will not lead America down the path to a multiculturalist and "quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life."[42] The Court demands that social integration be visible so as to send a message of inclusion, but it insists on deliberately obscurantist processes of individualized consideration so as to prevent inclusion from modulating into a regime of group entitlements.[43]

It is striking that the Court both justifies the necessity of affirmative action, and crafts constitutional restrictions on the nature of affirmative action programs, with an eye to how minorities will regard their place in America.

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40. Johnson v. Transp. Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

41. *Grutter*, 539 U.S. at 330; *see also* Post, *supra* note 6, at 65-66. *Grutter* specifically relies on the views of the very elite corporations that Scalia regards as supporting affirmative action because in their view "the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists." *Johnson*, 480 U.S. at 677 (Scalia, J., dissenting).

42. *Grutter*, 539 U.S. at 342-43 (quoting Nathanson & Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 CHICAGO B. REC. 282, 293 (May-June 1977)); *see also* Post, *supra* note 6, at 74-75 (elaborating this point).

43. On the Court's history of approaching Equal Protection doctrine with this emphasis on "appearances," see Post, *supra* note 6, at 75 n.338.

This concern is largely absent from *Diversity in America.* Neither the potential threat to the legitimacy of the American State caused by ongoing minority disadvantage and disaffection, nor the potential threat to American values of individualism[44] caused by transparent systems of affirmative action, figure prominently in the reasoning by which Schuck reaches his conclusions. He builds his case instead by focusing on the need "to discipline the granting of preferences"[45] in order to minimize the "divisions and suspicions"[46] that would as a practical matter mostly arise from nonminorities inflamed by opaque programs of affirmative action.

There is much to be gained from Schuck's point of view, but there is also much to be gained from the concerns articulated by *Grutter.* It will be fascinating to learn whether Schuck's thinking has at all been affected by *Grutter*'s passionate reasoning, and if so, in what ways. I very much look forward to hearing his views.

44. Schuck agrees that "American culture remains highly individualistic and liberal in its values and premises, even at some sacrifice (where compromise is necessary) to its goal of substantive equality." SCHUCK, *supra* note 1, at 202.

45. *Id.* at 196.

46. *Id.*