

Constitutional Sunsetting?: Justice O'Connor's Closing Comments in *Grutter*

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Most Supreme Court watchers were unsurprised that Justice Sandra Day O'Connor's vote proved pivotal in resolving the University of Michigan affirmative action cases; indeed, Justice O'Connor has been in the majority in almost every case involving race over the past decade, and was in the majority in each and every one of the 5-4 decisions the Court handed down across a broad range of difficult issues last Term. Some smaller number of observers were unsurprised that Justice O'Connor decided (along with the four Justices who in the past have voted to allow latitude with regard to race-based affirmative action programs) to uphold the kind of flexible and individualistic use of race to promote a diverse student body embodied in the University of Michigan Law School's admissions policy. Justice O'Connor had often cited Justice Powell's opinion in *Bakke*¹ favorably,² and just two terms ago she had voted with the more "liberal" Justices in a 5-4 decision that permitted race consciousness in a voting redistricting setting.³ But perhaps most *were* surprised by a comment Justice O'Connor made for the Court at the end of the *Grutter* opinion: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."⁴ In this short essay, we explore that provocative sentence, and tease out some of the doctrinal and jurisprudential implications and connections that it might be understood to raise.

The intended meaning of this sentence is highly ambiguous. We must

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

2. See Akhil Reed Amar and Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745 (1996).

3. Easley v. Cromartie, 532 U.S. 234 (2001).

4. Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

make clear at the outset, for the purposes of this exploratory essay, what we are assuming Justice O'Connor meant, and why. It is possible, of course, that she intended her remark to have no legal significance at all. She may have been trying to express nothing more than her (and the Court's) fervent desire that the number of minority law school candidates with top grades and test scores would naturally increase so dramatically over the next quarter century that racial diversity in all competitive law schools would exist even if it were not pursued as a distinct admissions goal, or if it were pursued only in a race-neutral way. Or, it is also possible that Justice O'Connor was merely sending a signal to the nation's elected representatives that the underrepresentation of minorities in higher education is an issue that should be elevated to the top of the political agenda over the next few decades – that this is a serious problem that needs some serious attention.

But for present purposes we want to put aside these relatively minimalistic readings, plausible and perhaps even likely though they are, in order briefly to explore a more jurisprudentially intriguing possibility. One reason to question the first reading – that the demographics of the applicant pool will improve on their own – is that many people would doubt its empirical plausibility.⁵ And a reason to question both of these non-legal interpretations is the particular language Justice O'Connor used. She did not say the Court “hoped” that “racial preferences” would not be needed after 25 more years; she said the Court “expected” so, a somewhat stronger expression.

A more important reason to doubt the non-legal interpretations of her remark is that elsewhere in the *Grutter* opinion Justice O'Connor repeated – in legal terms – her insistence that “race-conscious admissions policies *must be* limited in time,” and that “[e]nshrining a *permanent* justification for racial preferences would offend [a] fundamental equal protection principle.”⁶ Thus, Justice O'Connor's reference at the close of her opinion to an expected end of race consciousness in 25 years suggests at least the possibility that she meant to do something more than express a demographic hope or engage in political prodding. Rather, it may connote some kind of a warning about the evolution of the law – that she (or her counterpart on a future Court) would not vote to uphold the law school's program on the same facts in the year 2028.

5. For example, data compiled during the *Grutter* litigation itself demonstrates that the differences in LSAT performance between various racial groups, while smaller than they once were, are still quite significant, and apparently quite stubborn.

6. *Grutter*, 539 U.S. at 341 (emphasis added).

In this essay, we do not intend to defend the strong claim advanced by Justice Thomas' separate writing in *Grutter* that Justice O'Connor necessarily meant to impose, as a flat matter of legal doctrine, a firm 25-year "doctrinal sunset" provision.⁷ It is simply too hazardous to definitively read any specific intention into a single and potentially ambiguous line that wraps up a majority opinion. But we'd like to underscore the notion of such a doctrinal sunset, in part because whether or not Justice O'Connor necessarily meant to impose one, we have both come across the same idea expressed by others. In other words, we've heard other jurists and commentators take the position that race-conscious admissions programs ought to be deemed acceptable for a limited amount of time, but then terminated after several more decades – whether or not they have successfully achieved their goals. So, for ease of exposition, we ascribe this view to Justice O'Connor from here on out, assuming she meant what Justice Thomas claims she meant – that, if she were on the Court in the year 2028, she would enjoin the same diversity-based race-conscious admissions program she upheld in *Grutter*. (In order to remind the reader that we are self-consciously making this assumption, we sometimes use "arguendo" or "hypothesized" or similar language in referring to Justice O'Connor's views.)

We start by noting that a constitutional requirement of a temporal limit makes some analytic sense as applied to remedial race-conscious affirmative action; at some point in time, and because of intervening causal factors, a program designed to remedy a past wrong is so far removed from that wrong that it ceases to be a meaningful remedy. The current Court has stressed this point not only in the contracting affirmative action cases, but also in its recent rulings involving school desegregation.⁸

But this absolute requirement that race consciousness must at some point in time end makes much less sense if one truly embraces race consciousness as a permissible way to accomplish diversity. Diversity, unlike remedy, is a justification that is not temporally linked to past events; whereas remedy looks to the past, diversity looks to the educational benefits today and in the future. If diversity (including but not limited to racial diversity) truly is a compelling interest – and Justice O'Connor spends a lot of time in *Grutter* explaining that it is – and if individualistic race consciousness is in fact a constitutionally unproblematic way to accomplish this interest consistent with the Fourteenth Amendment, then there should

7. Justice Thomas reads the majority opinion as "holding that racial discrimination in higher education admissions will be illegal in 25 years." See *Grutter*, 539 U.S. at 362 (Thomas, J., concurring in part and dissenting in part).

8. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995).

be no “requirement” that the permissible means not be employed indefinitely. Thus, we suggest, one must look hard at Justice O’Connor’s approach to ask: (1) Is racial diversity *really* a compelling interest in her mind?; and (2) Is individualistic race consciousness *really* a constitutionally permissible means for her? If either of these questions yields a negative, or at least a qualified response, then perhaps we can begin to make sense of our hypothesized reading of Justice O’Connor’s so-called “sunsetting” language.

As to the first question, it seems clear to us the Justice O’Connor truly does believe that the goal of admitting a student body that is diverse along racial and other lines really is a compelling one. In describing and defending this goal in *Grutter*, Justice O’Connor, rather than wrapping her reasons in *Bakke* as she does in other parts of her opinion, defends the compelling nature of the state’s interest in racial diversity in her own, significantly broader, terms. Whereas Justice Powell tended to focus on the pedagogic aspects of racial diversity – the way in which it enhanced the educational process for its own sake – Justice O’Connor’s opinion in *Grutter* tends to characterize diversity more instrumentally, by focusing, in addition, on the ways in which racial diversity in education serves the outside world. In particular, she raises four significant points that hadn’t previously been a major part of the Court’s jurisprudence of racial diversity: (1) that a racially diverse educational environment appreciably enhances people’s capacity later to succeed in business leadership roles; (2) that a racially diverse officer corps is necessary to effective military operations, and the primary sources for the Nation’s officer corps are the service academies and elite undergraduate schools; (3) that higher education trains people to be good citizens and that this opportunity for civic education must be available to people of all races for the polity to function well; and (4) that because competitive law schools in particular tend to produce legislators and judges, these government training grounds must include people of all backgrounds so that whichever leaders are selected have “legitimacy in the eyes of the citizenry.”⁹

That Justice O’Connor would stress these last two points – which focus on the political dimension of higher education¹⁰ – is not altogether surprising given that she had already approved narrowly crafted race-

9. *Grutter*, 539 U.S. at 334-35.

10. In many ways the political dimension is reflected in her last three points, since military service and leadership have often been considered by the Court as falling within the political rights realm. See, e.g., Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 222-41 (1995).

conscious government action where access to legislatures was involved, in the so-called racial redistricting cases. In that setting, Justice O'Connor's vote has been key, as it has been in all equal protection race cases. And her approach in that arena has been remarkably similar to Justice Powell's in *Bakke* – that race may be used, but not as the “predominant” factor that crowds out all other relevant characteristics.

When she said, for example, in *Bush v. Vera*,¹¹ that government cannot make race the “predominant” factor to the exclusion of all other “traditional districting criteria,” she was saying essentially what Justice Powell said – that even as government acknowledges that race matters, it should not assume that other attributes do not. In the education setting, those other attributes might be test scores, undergraduate or high school performance, musical or athletic talent, geographic and socioeconomic background, personal essays, references, etc. – what we might call “traditional admissions criteria.” In the voting setting, the traditional districting criteria that cannot be entirely displaced by race would include political party, socioeconomic background, education level, religion, etc. Justice O'Connor, then, appears to have articulated a vision similar to Justice Powell's – which we might call a commitment to look at the “whole person” – on a consistent basis. So when she voted to approve a narrow race-conscious redistricting plan just two Terms ago in *Easley v. Cromartie*¹² because the plan respected the “whole person” principle, some proponents of the University of Michigan Law School plan took heart.

By characterizing education as political, rather than just economic, Justice O'Connor tapped into a deep vein of Supreme Court decisions involving voting, jury service and other political arenas in which the Court has been especially sensitive to the actual – and not just hypothetical – inclusion of minority groups, with the redistricting cases being just one example. And this political characterization of law schools also may explain why the Court's opinion so readily dismisses the suggestion of the Solicitor General and Justice Scalia that the admissions policy was not narrowly tailored because law schools can pursue diversity without using race simply by lowering their academic standards. Justice Scalia's factual assumption is highly problematic. But more centrally, for Justice O'Connor and the Court, putting competitive law schools to this Hobson's choice would serve only to hurt the Republic.¹³ In light of this extensive backdrop, and Justice

11. 517 U.S. 952 (1996).

12. 532 U.S. 234 (2001).

13. That Justice Scalia's reasoning here did not resonate at all with the majority highlights certain facets of the litigation that made it a particularly sympathetic vehicle for supporters of race-based affirmative action. Not only were plaintiffs

O'Connor's key role in creating it, we have little doubt that Justice O'Connor really *does* believe that having people of all races in competitive law schools is a very important and admirable objective – “compelling” in doctrinal terms.

Given that she thinks diversity, including and perhaps especially racial diversity, in important civic institutions is a compelling state interest to pursue, the view we ascribe to her here – that affirmative action needs a temporal stopping point – must really be intended to focus on the government's means, not its laudable end. In other words, our hypothesized position of Justice O'Connor must be that individualized race consciousness – even when deployed in service of the very worthy goal of promoting diversity – itself works sufficient constitutional injury that it cannot be continued indefinitely. But locating one's discomfort with the means rather than the end itself still raises questions. For it is still not clear why, if one thinks that individualistic racial consciousness is a problematic or at least suboptimal means to accomplish a laudable goal, she would endorse those means for 25 years, but not beyond. If race consciousness is permissible now, why not forever; and if not permissible later, why is it OK to use now? To put the point slightly differently, again assuming that the key facts remain unchanged, why should Justice O'Connor's or anyone else's reading or application of the Fourteenth Amendment change over the next 25 years?

The oddity we see in the notion of such a doctrinal sunset is perhaps best illustrated by a timeline that describes Justice O'Connor's hypothesized votes in cases that would arise over the course of 50 years. Suppose Justice O'Connor would decide the *Grutter* question at various points in time (denoted here as “T”) in the following ways: (a) at T = 1978, when the matter first arose in *Bakke*, Justice O'Connor would have disapproved and disallowed what she calls “racial preferences” as a means of attaining di-

challenging a program at a law school – which is inherently a more political setting than, say, a graduate physics department – they were challenging a law school that produces leaders and that needs racial preferences right now to accomplish any meaningful racial diversity. Indeed, if plaintiffs had prevailed, the resulting invalidation of race-based affirmative action would have affected not just very competitive public law schools like the University of California's law schools and the University of Michigan, but also all very competitive private law schools as well, because plaintiffs included a Title VI claim. We are not saying, of course, that *Grutter*'s holding is limited to top tier law schools – recall the cases after *Brown* that reflexively invalidated racial segregation in settings very different than education, *see, e.g.*, *Gayle v. Browder*, 352 U.S. 903 (1956) (involving city buses); *Baltimore City v. Dawson*, 350 U.S. 877 (1955) (involving public beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (involving a municipal golf course) – but much of *Grutter*'s reasoning and explanation seems focused on admissions problems facing competitive law schools.

versity; (b) at T = 2003, Justice O'Connor permitted racial preferences as a means of attaining diversity; (c) at T = 2028, Justice O'Connor would reject racial preferences as a means of attaining diversity. This timeline, of course, begs the following questions: Given (a), how can we explain (b)? And if we can somehow explain (b) after (a) – as we try to do below by reference to reliance interests – why wouldn't this reliance explanation carry over and dictate an opposite result in (c)? We address these two questions in turn.

I. RELIANCE

First, as to how Justice O'Connor could conceivably reject race consciousness were she on the Court in 1978 when *Bakke* was decided and yet vote to allow "racial preferences" 25 years later in *Grutter*, one possible explanation is some variant of a stare decisis-type argument. Justice Thomas' partial dissent in *Grutter* plainly anticipates that the majority would try to ground its decision on the doctrine of precedent. As he writes, "one might expect the Court to fall back on the judicial policy of *stare decisis*."¹⁴ But, he goes on to write, "the Court eschews . . . this . . . defense of its holding."¹⁵

To our minds, the Court does, and it does not. On the one hand, Justice O'Connor purports not to engage the debate (waged in the Sixth Circuit below and in other Circuits) over whether Justice Powell's opinion in *Bakke* embracing race-conscious means of obtaining diversity constitutes binding Supreme Court authority: "We do not find it necessary to decide [that question because] today we endorse Justice Powell's view that student body diversity is a compelling interest."¹⁶

But on the other hand, Justice O'Connor begins her discussion of the issues in *Grutter* by recalling *Bakke* and then observing:

Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies. We *therefore* discuss Justice Powell's opinion in some detail.¹⁷

14. *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part).

15. *Id.*

16. *Id.* at 330 (majority opinion).

17. *Id.* at 328-29 (emphasis added and citations omitted).

The “therefore” in Justice O’Connor’s punchline sentence strongly suggests that the twenty-five year history of reliance by the public and private universities matters in the way the Court structures its opinion and analysis. It seems to count a great deal to Justice O’Connor that society has come to know and accept Powell’s approach in *Bakke*.¹⁸ Along with *Brown*,¹⁹ *Roe*,²⁰ and *Miranda*,²¹ *Bakke* is one of those cases, and labels, that has made the leap from the legal doctrine world to the real world.

The centrality of Justice Powell’s *Bakke* opinion is further illustrated by how tightly Justice O’Connor’s writing in *Grutter* tracks not only Powell’s reasoning, but also his exact language. Even putting aside the part of the *Grutter* opinion before the Court said it was endorsing Powell’s approach, Justice O’Connor quoted extensively from Justice Powell a whopping sixteen times. To endorse and cite a case and suggest independent agreement with it is one thing; to cannibalize all its key formulations suggests that the case is doing a great deal of the work. Powell’s words themselves, and not just the ideas they convey, are what admissions offices built their programs around, and thus they are what Justice O’Connor builds her opinion around.

Of course, reliance interests and the dislocation costs of a reversal in judicial direction can be asserted in virtually any important case; the Court (and Justice O’Connor) usually decides cases based on these considerations only when they are unusually substantial. The question is thus posed: why would Justice O’Connor find the dislocation costs particularly substantial in this context? It cannot be because the University of Michigan Law School or other law schools would confront insurmountable logistical obstacles in eradicating race consciousness from their admissions policies. That could be accomplished with the stroke of a pen and a simple injunction issued to admissions officers: “don’t consider race.” Indeed, the logistical problems that arise when trying to change admissions programs did

18. Indeed, it seems to count a great deal to other members of the *Grutter* majority as well. In a piece written for the *Legal Times*, Supreme Court reporter Tony Mauro related the contents of Justice Stevens’ personal notes from the Conference at which the Court discussed the merits of the Michigan cases. According to the notes, Justice Stevens’ “leading point, and a crucial one, was to buttress the precedential value of Justice Lewis Powell Jr.’s concurrence” in *Bakke*. According to Mauro, Stevens “said he urged that the Court not undertake a ‘technical analysis’ of the stare decisis value of Powell’s writing in the case but instead consider ‘the extent of reliance’ on Powell’s view by major institutions ever since.” Tony Mauro, “*Gearing Up for the New Term*,” *LEGAL TIMES*, Oct. 6, 2003, at 9.

19. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

20. *Roe v. Wade*, 410 U.S. 113 (1973).

21. *Miranda v. Arizona*, 384 U.S. 436 (1966).

not appear to give Justice O'Connor (or the rest of the Court majority) any pause in invalidating the University of Michigan's undergraduate admissions policy in *Grutter*'s companion case, *Gratz*.²²

Nor can the extraordinary dislocation costs be described as the difficulties that future admissions applicants would face in adjusting their behavior and decision-making in light of revamped admissions possibilities. Similar private sector adjustment to changing rules has not stopped the Court – including Justice O'Connor – from revamping the world of remedy-based affirmative action programs in cases like *Croson*²³ and *Adarand*.²⁴ So, what are the dislocation costs that might have given Justice O'Connor pause as she considered abruptly jettisoning the *Bakke* framework?

In *Grutter*, we speculate, Justice O'Connor was somewhat uncomfortable with using race-conscious admissions decisions to attain the compelling goal of racial diversity in higher education. But at the same time, we surmise, she was worried that an abrupt about-face (rather than gradual weaning) from *Bakke* would immediately, openly and notoriously undo the country's recent progress towards a more integrated society. Justice O'Connor notes, for example, that other states have recently been engaged in race-neutral experimentation, and that states like Michigan "can and should draw on the most promising aspects of these race-neutral alternatives as they develop."²⁵ But she knows that because everyone has taken *Bakke* as his guide, these experiments are not nearly as far along as they would have been had the Court foreclosed race consciousness in 1978. Thus, society today is not as far along the road to finding effective race-neutral means of accomplishing racial diversity as it would have been (assuming such effective means exist). Indeed, one of the most prominent recent experiments – the University of Texas' so-called "10% plan" — came about only because the Fifth Circuit in the well-known *Hopwood*²⁶ case had rejected *Bakke* as a plausible basis for the University's race-conscious affirmative action plan. The 10% plan has itself involved much dislocation cost in Texas, and is itself a plausible response to *Hopwood* only by virtue of the unique demographics in Texas. Justice O'Connor could understandably not want to impose a *Hopwood*-like shock on the rest

22. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

23. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

24. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

25. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

26. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

of the country.²⁷

Today, then, unlike in 1978 when the experiment with affirmative action was just beginning, a cold-turkey disestablishment of race-conscious programs would lead to a stark and highly visible resegregation of higher education, with a likely delayed effect being the resegregation of public and private sector leadership positions. Whether or not Justice O'Connor would have embraced Justice Powell's approval of explicitly race-conscious programs in 1978, the situation to her in 2003 was different.

II. WHENCE THE SUNSET?

So far so good. But all of this raises a follow-up question: if the ends are compelling, and if the means – even if not constitutionally optimal – must be tolerated essentially to avoid dislocation costs, what sense would it make for Justice O'Connor to include the twenty-five year “sunset provision”? After all, in other settings where reliance interests are formally acknowledged as doing the work, rather than (as we speculate in *Grutter*) simply behind the scenes providing some explanatory power, the Court has not typically provided any sunset language. Take, for example, perhaps the most important modern case where reliance and dislocation costs seem to explain the Court's decision to stick with an approach some of the Justices appear to think is wrong as a matter of constitutional first principle – *Planned Parenthood v. Casey*.²⁸ There, the plurality opinion (joined by Justices O'Connor, Kennedy and Souter) observed that “for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society in reliance on the availability of abortion.”²⁹ This is similar language to *Grutter*'s: “[s]ince . . . *Bakke* [twenty-five years ago] . . . public and private universities across the nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies.”³⁰ But at the end of *Casey*, there was no suggestion offered in the opinion that parents should tell the *next* generation of young adults not to grow up counting on *Roe*, and that the protection of the right in *Casey* was good only for the generation who had already relied on it.

In *Grutter*, unlike *Casey*, Justice O'Connor seems to want to structure a constitutional transition period, i.e., she's using the next quarter century

27. Cf. Mauro, *supra* note 18 (observing Justice Stevens' fear about the consequences of a “sea change” that would be produced by judicial invalidation of the Michigan Law School plan).

28. 510 U.S. 833 (1994).

29. *Id.* at 856.

30. *Grutter*, 539 U.S. at 328-29.

as a planned transition to what she perceives to be a constitutionally preferable state of affairs. Her embrace of diversity as a compelling state interest seems candid and whole-hearted, but her willingness to countenance explicit race-conscious action as a means to effectuate that interest seems tentative, presumably because of some constitutional injury she believes race consciousness inflicts. She appears unwilling to cut off such race consciousness cold turkey for reasons we've explained, but she wants by means of legal doctrine to bring society around to the point where soon we no longer need it. So she self-consciously approaches the next twenty-five years willing to tolerate a transitional state of constitutional affairs as we move slowly from where we are today to a state she would prefer, where we use means other than race consciousness to attain the desirable diversity (if any affirmative means remain necessary at all).

One might immediately wonder how such a motivation/mindset is permissible for a Justice to have. Traditionally, judicial power exists so that judges can say what the law *is now* – “jurisdiction” is, after all, the power to “say the law” – rather than so judges can “make” law by declaring that it is was once one thing (in 1978), will now be a new thing (in 2003), and will be something else again in the future (2028). It is of course true that all judicial dicta in opinions tries to give litigants and lawyers some guidance about future cases, but usually dicta is intended to advise about how the law as it is today would apply to situations not yet before the court. Justice O'Connor's closing comment is – under our hypothesis – not about how today's law would apply tomorrow, but rather about how today's law may *change* tomorrow, and is thus jurisprudentially unusual.³¹ In addition to this large jurisprudential question, Justice O'Connor's transitional mindset also implicates the unique constitutional treatment of the race question. We briefly take up both of these issues.

First, as to whether judges ought to be “making” law by declaring what the law would have been in the past and will be in the future rather than simply stating what it is today, we note that the issues are very complicated. In a line of cases culminating in *James B. Beam Distilling Company v. Georgia*,³² the Court grappled with this jurisprudential question in considering the retroactivity of its rulings. In that case, the majority said that when the Court announces a ruling, call it ruling “X,” even if ruling X

31. Our hypothesized meaning of Justice O'Connor's comment is different, of course, from statements, like that of Justice Rehnquist in his dissent in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 579-80 (1985), to the effect that changed membership on the Court will lead it later to embrace what a dissenter thinks is the correct reading of the law at the time of the dissent.

32. 501 U.S. 529 (1991).

changes the status quo, the proper understanding is that ruling X was *always* the law (whether or not we realized it before), and that nothing has changed other than our awareness of what the law is. This suggests that judges are supposed to just say what the law “is now” and assume it always was and always will be so. Justice O’Connor’s *Grutter* approach appears to be out of line with this understanding.

This essay is not, of course, the place or time fully to engage that jurisprudential debate. All we want to do here is note that Justice O’Connor dissented in *James B. Beam*, and in other contexts as well has seemed to embrace a self-conscious understanding of the judicial role that allows for the conceptual possibility of “transitional” rulings. For example, in *American Trucking Associations v. Smith*³³ in the early 1990s, she took the position that courts can take into account the “newness” of a ruling as a reason for denying relief to a claimant who should win under the new ruling but won’t because that would unfairly disrupt reliance interests.³⁴ In other words, she said in effect: “Ruling X, reached today, is the right ruling, but we cannot implement ruling X yet for reliance reasons.” Her approach in *Grutter* might represent the flip-side of the *American Trucking* coin. In essence, in *Grutter*, she *might* be read to be suggesting: “Today we recognize that *Bakke* is no longer good law, but implementing this immediately would have unacceptable societal dislocation costs, so I will grandfather in currently existing programs similar to those embraced by Justice Powell for twenty-five years and then it’s all over.” Put differently, there is but a fine line between saying, “Today the law is X but tomorrow the law will be Y,” and saying, “Today the law is Y but we will delay implementing that law until tomorrow.”

Of course Justice O’Connor did not put things in these latter words, perhaps because such a formulation sounds particularly legislative in nature – “the law really is X, but I will delay implementation of X for a period of time.” But it is worth noting that Justice O’Connor has, at least once before, explicitly embraced such transitional reasoning and transitional language. In *Northern Pipeline Construction Company v. Marathon Pipe Line Company*,³⁵ she joined part of an opinion that effectively said: “The Act at issue is unconstitutional, but because of the government’s reliance interests, we apply our ruling today only prospectively. More than that, we will stay our ruling for four months, during which time the unconstitutional Act continues to govern, so that the government has time to figure out how to ac-

33. 496 U.S. 167 (1990).

34. Related but distinct questions arise in the context of retroactive application of criminal procedure decisions in the context of federal habeas review.

35. 458 U.S. 50 (1982).

comply with its goals through alternative, constitutionally permissible, means.” That opinion in *Northern Pipeline* is open to criticism as being too legislative, which might explain why Justice O’Connor would have adopted the alternative form here in *Grutter* – “race conscious affirmative action is permissible now, but only for 25 years” rather than copy *Northern Pipeline*’s delayed injunction format (“race-conscious affirmative action is impermissible, but I’ll give you 25 years to transition away from it.”).

Whatever the arguments in favor of or against judicial transitioning, if you will, we must observe that the vexing problem of race and race consciousness in American history has featured at least a couple of creative – and not particularly defensible or attractive – transition-like moves at crucial moments. Consider first the U.S. Constitution’s own treatment of the problem of slavery in 1787. The original constitutional text had an anomalous sunset provision, dealing with (although not mentioning) race. That provision accepted a practice that was morally troubling for a period of years, as a matter of transition from a bad place to a good place without too great dislocation costs (as viewed by society at the time). We are speaking, of course, of the twenty-year immunity from federal legislative interference that slave importation enjoyed under Article I, section 9.³⁶

And here’s another troubling racial transition analogy – the decision by the Supreme Court in the second *Brown v. Board of Education (Brown II)*³⁷ decision not to require immediate desegregation but rather to insist upon compliance with the earlier *Brown* mandate only with “all deliberate speed” – a term that has been criticized as countenancing Southern defiance of federal judicial authority. One way to understand *Brown II* is that the Court basically said: “The state of affairs today is impermissible, so you must change, but do so in a way that is responsive to dislocation costs.”

Opponents of race-based affirmative action today could make the same criticism of the approach we hypothesize Justice O’Connor to have taken in *Grutter* as was made of the Court about its *Brown II* ruling. If race-conscious affirmative action is constitutionally problematic today, why should we provide a twenty-five year transition window? Why not require disestablishment of these programs now, immediately? A quick response to this criticism – and one that distinguishes Justice O’Connor’s *Grutter* approach from *Brown II* or Article I, section 9, even assuming she is constitutionally uncomfortable with race-conscious means – is that there is, according to Justice O’Connor, a compelling state interest in accomplishing racial diversity in education. There is no similarly compelling interest in *avoiding* racial diversity and integration in education. Being sensi-

36. U.S. CONST., art. I, § 9, cl. 1.

37. 349 U.S. 294 (1955).

tive to dislocation costs in a manner that sustains achievement of a laudable goal is different – both morally and legally – than taking into account dislocation costs in a manner that perpetuates injustice solely to mollify unworthy public and private sentiments.

One final distinction – this one between *Grutter* and *Casey* – may also be worth flagging. In *Casey*, as we observed, the centrist plurality of which Justice O'Connor was a part did not try to transition the world towards one in which abortion could be banned a few decades from now, even though perhaps the three Justices who joined the centrist opinion might believe, as a matter of first constitutional principle, that *Roe* was wrongly decided. In *Casey*, that is, the reliance interests of those who had grown up around *Roe* were strong enough to preserve *Roe* – or what the plurality called the essence of *Roe* – forever. But in *Casey*, the reliance was a reliance on the existence of an individual right. In *Grutter* (as in *Northern Pipeline* and *James B. Beam*), by contrast, the reliance has been reliance by government (and private) school admissions offices, in exercising powers. Perhaps where government's exercise of powers – as opposed to individuals' exercise of rights – is the subject of the reliance, our hypothesized Justice O'Connor and others might feel a transition approach is more plausible.

III. CONCLUSION

It has become commonplace for the meanings of the Constitution articulated by the Supreme Court to change over time. Sometimes this occurs because of changing Court membership, and sometimes this occurs because individual Justices' positions change over time. But it is a rarity, to say the least, for a Justice to announce an individual change of position *in advance* – in essence proclaiming that the Constitution means X now but will soon mean Y (even assuming no material changes in the relevant facts about the world). While Congress occasionally enacts sunset provisions into its work product, the Supreme Court usually does not. That's why Justice O'Connor's provocative reference to such a doctrinal sunset provision in *Grutter* invites inquiry.

We reiterate that Justice O'Connor's reference was ambiguous, and we intentionally embrace *arguendo* the sunset interpretation (as against other possible interpretations) as a heuristic to set up the intriguing jurisprudential questions raised by the notion of a doctrinal sunset. But Justice O'Connor and some of her colleagues have embraced an equivalent move at least once before, albeit for several months rather than decades. And we do believe that, whether this represents Justice O'Connor's view or not, others have expressed the sentiment that race-conscious admissions programs should be approved today only as limited-duration measures, and

then terminated whether the underlying factual justifications change or not. So we believe it is worth underscoring this potential reading of *Grutter*'s sunset language, as well as suggesting that it invites further inquiry into the legitimacy of announcing in advance a doctrinal sunset as a matter of constitutional interpretation.
