Grutter

As of this writing the response by conservatives, classical liberals, and constitutional and academic traditionalists to the revolutionary Grutter v. Bollinger decision continues to be stunningly weak, even as the dominant liberal culture is presenting the decision's redefinition of America as a fait accompli. It is notable, for example, that in a list of elements constituting "the core of a civil society as understood in the West" that America hopes to install in Iraq, reporter John Burns of the New York Times includes "entrenched individual and group rights" (emphasis added), a formula that would have been inconceivable prior to the Grutter decision. New York Times, 14 December 2003, "There Is No Crash Course in Democracy."

One factor that might explain the lack of effective conservative protest against Grutter is that in the same week that the decision was handed down, along with its companion decision in Gratz v. Bollinger, the Supreme Court also issued its landmark ruling in Lawrence v. Texas. Thus Michael M. Uhlmann, in "The Supreme Court Rules," First Things (October 2003), devotes the better part of his attention to Lawrence and, although he deplors the decision in Grutter, does not grapple with its implications. Commentary published a symposium, "Has the Supreme Court Gone Too Far?" (October 2003), which also takes both Lawrence and the affirmative action decisions under purview, with some respondents focusing mainly on the former. Strong entries come from William Bennett, Robert Bork, and Lino Graglia, but the overall tone of the symposium is disconcertingly mild, featuring as it does a number of legal experts who see no problem with Grutter whatsoever, as well as a number of past affirmative action opponents who unaccountably fail to argue with any urgency against it here. The overall impression is that Grutter is just another regrettable Supreme Court decision, like many others we have had over the years, and not something of any particular significance. The casual attitude is also suggested by the symposium's title: "Has the Supreme Court Gone Too Far?" as if there were some question. On the other hand, Carl Cohen in the letters section of the January Commentary presents a superb refutation of the arguments supporting "diversity."

Another possible factor in the anemic conservative and traditionalist response to Grutter is that racial preference opponents, never having imag-
ined that the Court would actually inject racial discrimination into the United States Constitution, were simply confounded by the decision and didn't know how to reply. (As Justice Thomas pointed out in his dissent, previous Supreme Court findings permitting racial preferences had been on narrow, specific grounds.) Thus the stalwart Stanley Kurtz confesses that “after the Michigan decisions, the battle seemed lost and I didn’t have the heart to look into the matter any further.” But he goes on to say hopefully, “I was wrong. . . . We opponents of affirmative action have only lost that battle if we think we’ve lost. Look closely at the Michigan decisions and you’ll see any number of ways in which we can still pare back—and in many cases even end—racial preferences.” Kurtz’s argument hinges on the expectation that large schools will find it inordinately hard to attain the desired group proportionality without recourse to the more blatant forms of racial preference that were repudiated by the Court in Gratz. “Affirmative Signs: Preferences Won’t Be on Campus Forever,” NRO (17 November 2003). Peter Kirsanow makes a similar point. “Still Unconstitutional,” NRO (30 September 2003).

Yet another possible factor in the passive response to Grutter is simple denial, namely the inability of those who have staked a large part of their intellectual capital on their vision of America as a country “dedicated to a proposition” to accept that the proposition has been radically altered to encompass group rights. Finally, for more than a few, there is the perceived need to avoid a divisive political battle over civil rights while the country is in the midst of a contentious war on terror and is attempting to rebuild Afghanistan and Iraq. It is important to keep in mind, however, that if the “Experiment” in equality under the law fails here, in perhaps the most optimal conditions on the face of the earth and in the history of man, and must be buttressed by group guarantees in order to pacify various minorities, it can scarcely be hoped that the Experiment will succeed in primitive countries with far less developed common cultures and traditions of citizenship than our own.

Even without undertaking arduous legal battles, it is important for adherents of individual rights not to let themselves lapse into silence, but to be crystal clear about what has happened and to keep it before the public mind. In this regard, one heartening sign of energy in the anti-racial preference camp is, of all things, the Affirmative Action Bake Sale movement, supported by Alan Kors’s Foundation for Individual Rights in Education and run by courageous young “cookie rebels” who are keeping the controversy alive on campuses throughout the country. Numerous articles on the bake sales can be found on the web, and a good summary is offered by Wendy McElroy, “The Conservative Cookie Rebellion,” foxnews.com (16 December 2003).

Certainly the pro-racial preference forces have not been resting on their laurels. On the contrary, they have been been busy as bees dissecting the poten-