Affirmative Action and Colorblindness from the Original Position

Guy-Uriel E. Charles*

In this Article, the author explores Grutter v. Bollinger from the vantage point of the colorblindness principle. He posits that the Grutter decision is noteworthy for two reasons. First, the Court rejected the argument that the Constitution is colorblind and that classifications based on race are per se unconstitutional. Second, the Court explicitly recognized that racial categorizations are not all morally equivalent. The author uses classical liberalism as a heuristic for exploring whether the colorblindness argument is necessarily a moral imperative. He ultimately concludes that the Court adopted the correct approach in Grutter in rejecting the allure of the colorblindness principle.

I. INTRODUCTION

In Grutter v. Bollinger, the United States Supreme Court dealt an important blow to opponents of affirmative action.1 In a surprising move, the Court upheld the University of Michigan Law School's affirmative action program and concluded that diversity is a compelling interest.2

The Court's decision is particularly noteworthy in two respects. First, the Court rejected the argument that the Constitution is colorblind and that classifications based upon race, except in extremely narrow circumstances, are per se unconstitutional.3 This move is significant as enshrining colorblindness as a constitutional

* Associate Professor of Law, University of Minnesota Law School. This is an annotated version of remarks delivered at from Brown to Grutter: Affirmative Action and Higher Education in the South. I am grateful to my colleague Brian Bix for comments on an earlier draft.

2. Id. at 2339-40, 2347.
3. Id. at 2338-39.

2009
principle was a central aim of the plaintiff and the advocacy groups that supported her. Though the lawsuit was filed ostensibly on behalf of Barbara Grutter, an unsuccessful applicant for admission to the University of Michigan Law School, the suit was in fact an attempt by opponents of affirmative action and race consciousness to inscribe their views into constitutional doctrine.

Second and relatedly, the Court explicitly recognized that racial categorizations are not all morally equivalent. With the possible exception of Easley v. Cromartie, the Court had never sustained a racial classification against an equal protection challenge and the application of strict scrutiny. By sustaining the classification at issue, the Court revived the benign/malign racial classification distinction that it had interred in City of Richmond v. J.A. Croson Co.

In this Essay, I examine the decision from the vantage point of the colorblindness principle. I use classical liberalism as a heuristic for exploring whether the colorblindness argument is necessarily a moral imperative. I argue that the Court adopted the right approach in Grutter and justly rejected the allure of the colorblindness principle.

II. COLORBLINDNESS, INDIVIDUALISM, AND EPISTEMIC AUTHORITY

Classical liberalism consists of four major propositions. First, the individual is the only legitimate moral and political entity. Relatedly, the individual is free, autonomous, and capable of independently choosing her ends. Second, a separation exists between what is public and what is private. Most importantly for liberal theory, state power can only be concerned with matters that are civil in nature; in all other matters the individual will is sovereign. Third, the state (and society) cannot interfere with the individual's pursuit of her ends

4. Id. at 2332-33.
5. Id. at 2338.
9. This proposition is true both of Kantian-based liberalism and Millian-based liberalism. Michael J. Sandel, Introduction to Liberalism and Its Critics 1, 4 (Michael J. Sandel ed., 1984) ("[T]rights-based liberalism begins with the claim that we are separate, individual persons, each with our own aims, interests, and conceptions of the good, and seeks a framework of rights that will enable us to realize our capacity as free moral agents, consistent with a similar liberty for others.").
10. JOHN STUART MILL, ON LIBERTY 13 (Stefan Collini ed., 1995).
except to prevent harm to others.\textsuperscript{12} Fourth, liberalism presupposes an individual capable of consent.

Classical liberalism has had a great effect on American history and constitutional law.\textsuperscript{13} This effect is no less present in the constitutional debate that surrounds the practice of affirmative action. Of the four foundational principles of liberalism noted above, affirmative action jurisprudence draws upon three of them quite explicitly: (a) individualism, (b) the harm principle, and (c) the public and private distinction. The notion of consent is virtually invisible in affirmative action jurisprudence. To the extent that it plays a role, its presence is more or less implicitly assumed as a background principle.

Commentators on both the left and the right blame liberalism for the demise or persistence of affirmative action, respectively.\textsuperscript{14} To some, affirmative action policies are “in tension with the liberal ideals of our society, they may encourage divisive identity politics, and they may stigmatize and foster antagonism toward members of the groups they are intended to benefit.”\textsuperscript{15} To others, “liberal democratic theory” is to blame for the “backlash against affirmative action.”\textsuperscript{16} To these critics, liberalism’s focus on individualism necessitates a different framework for properly appreciating the moral worthiness of affirmative action programs.

Opponents of affirmative action maintain that any consideration of race in determining how burdens and benefits are to be distributed is unconstitutional. This is obviously the colorblind argument. This argument has found a sympathetic ear from some Justices on the United States Supreme Court. In particular, Justices Thomas and

\textsuperscript{12} Mill, supra note 10, at 13.


Scalia have expressed their view that, except in extremely rare circumstances, race is an imprescriptible basis for state action.\textsuperscript{17}

In \textit{Grutter}, Justice Thomas provided two analytically related arguments to support his contention that the Constitution must be colorblind.\textsuperscript{18} First, Justice Thomas maintained that the Constitution protects individuals, and all individuals equally, irrespective of color.\textsuperscript{19} As he stated in \textit{Grutter}, "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society."\textsuperscript{20} Justice Thomas's position in \textit{Grutter} paralleled those of Justice Powell in \textit{Regents of the University of California v. Bakke}, who maintained that "it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights."\textsuperscript{21} Similarly, Justice O'Connor stated in \textit{Croson} that citizens possess the "‘personal rights’ to be treated with equal dignity and respect."\textsuperscript{22}

The problem of race-based decision making, from this perspective, is that it undermines or implicates those personal rights.\textsuperscript{23} As a consequence, "racial classifications are \textit{per se} harmful and . . . almost no amount of benefit in the eye of the beholder can justify such classifications."\textsuperscript{24}

Justice Thomas's second point is that neither the judiciary nor the state are capable of distinguishing between racial classifications that are beneficial—in their application—to citizens of color and racial classifications that are harmful to citizens of color.\textsuperscript{25} Indeed, the bulk

\begin{thebibliography}{99}
\bibitem{17} Grutter v. Bollinger, 123 S. Ct. 2325, 2365 (2003) (Thomas, J., concurring in part and dissenting in part) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." (internal quotations omitted) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).
\bibitem{18} Id. at 2352, 2361 (Thomas J., concurring in part and dissenting in part).
\bibitem{19} Id. at 2352 (Thomas J., concurring in part and dissenting in part).
\bibitem{20} Id. (Thomas J., concurring in part and dissenting in part) (internal quotations omitted) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas J., concurring in part and concurring in judgment)); see also id. (Thomas J., concurring in part and dissenting in part) (stating that “every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demean us all!”).
\bibitem{21} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (stating that the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual” (internal quotations omitted)).
\bibitem{22} Croson, 488 U.S. at 493.
\bibitem{23} Id. at 493-94.
\bibitem{24} Grutter, 123 S. Ct. at 2361 (Thomas J., concurring in part and dissenting in part).
\bibitem{25} Id. (Thomas J., concurring in part and dissenting in part).
\end{thebibliography}
of Justice Thomas's dissent is directed at the Law School’s contention that affirmative action benefits citizens of color, particularly African-Americans. Justice Thomas maintained that “what lies beneath the Court’s decision . . . are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups.” He then goes on to argue that affirmative action in admissions does not benefit students of color.

In *Bakke*, Justice Powell articulated similar concerns. He stated: “[T]here are serious problems of justice connected with the idea of preference itself.” These serious problems of justice include the difficulty of ascertaining whether “a so-called preference is in fact benign.”

In justifying its refusal to distinguish between invidious and benign racial classifications, the Court has explicitly looked to classic liberal theory, and the maxim that the “Constitution protect[s] persons, not groups.” As Justice Powell stated in *Bakke*, “[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights.” Similarly, Justice O’Connor stated in *Croson* that citizens possess the “personal right” “to be treated with equal dignity and respect.” The problem of race-based decision making, from this perspective, is that it implicates, and ultimately undermines, those personal rights. This position raises an initial inquiry about the reasons for recognizing political rights as belonging only to the individual and not also to groups. Justice Powell offers two

26. *Id.* at 2353-63 (Thomas J., concurring in part and dissenting in part).
27. *Id.* at 2361 (Thomas J., concurring in part and dissenting in part).
28. *See id.* at 2361-63 (Thomas J., concurring in part and dissenting in part).
30. *Id.*
31. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (stating that “the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as ‘in most circumstances irrelevant and therefore prohibited’—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding ‘benign’ state and federal racial classifications to different standards does not square with them.”).
32. *Bakke*, 438 U.S. at 271; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (stating that “the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual”).
34. The harms that are implicated by race-conscious decision making are race-conscious actions motivated by notions of racial inferiority, racial politics, and stigmatic harms. *Id.* at 493-94.
justifications for guaranteeing this political right—the right not to be subjected to a racial classification—to individuals and not to groups. He is concerned with a line-drawing problem and a problem of judicial competence.

Justice Powell’s first concern is that if racial groups are granted political rights there “is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which groups would not.”35 For Justice Powell, all groups, with the possible exception of “white Anglo-Saxon Protestants,”36 have an arguable claim to constitutional protection. This is because “the United States has become a Nation of minorities,” each of which has “had to struggle—and to some extent struggles still—to overcome the prejudices not a monolithic majority, but of a ‘majority’ composed of a various minority groups.”37 Given that we are in fact a nation of minorities, as Madison intimated and the pluralists made clearer some time ago,38 how do we determine which groups deserve constitutional protection?

On its face, this is not truly a constitutional question but a question of political power. In other words, the issue is not one of discrimination against groups and the discovery of traits that may enable a given group to claim “discrete and insular” status, but instead it is one of political influence and constitutional norms. What does one do with groups that are at the losing end of the political bazaar? For, larger debates aside, affirmative action litigation is exactly that: the presentation of claims by those affected negatively by the state action at issue. Bakke, Fullilove, Adarand, and Grutter are all similar in this respect; the claim is not of direct discrimination, but of political loss, perhaps indifference. Seen this way, and taking Justice Powell’s position seriously, one possible solution to his query is to defer to the judgment of the other political branches.

This move raises the issue of institutional epistemic authority. Who should we believe with respect to providing justifications for taking race into account? Is credibility institution-dependent? One possibility is that certain justifications for race-based state decision making are off limits irrespective of the institution sponsoring the justification. Another possibility is to defer to a particular institution irrespective of the justification being provided. The option that the Court has opted for is a mixture of both of these possibilities:

35. Bakke, 438 U.S. at 296.
36. Id.
37. Id. at 292.
38. See, e.g., ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).
sometimes a justification is discounted irrespective of the sponsoring institution; in other cases credibility is institution-dependent.

In this respect, affirmative action jurisprudence follows the example of classical liberalism, in particular a Lockean understanding of epistemic authority. For Locke, justification is always institution-dependent. In different spheres, different social rules apply or different reasons count. Don Herzog explains: "[A] world of fractured authority is an orderly world." More specifically, he proceeds:

Multiple roles, multiple institutions, perfectly distinct, and infinitely different from each other: they add up not to chaos, but to order. No one is in control, but everything has its own sphere. Place and degree fade, the one neat pyramid dissolves; instead individuals occupy many roles, and they may well find themselves in charge in some settings, anonymous and weak in others. This account of social order is the crucial insight of liberalism, the counterintuitive solution to decades of religious and political conflict.

This account of the tradition pays close attention to social roles, spheres of authority, and institutional responsibilities. The ultimate goal is social order amidst a chaotic world. Liberalism achieves this order by splintering authority from its medieval, unified source and dispersing it among varied institutions. Once these institutions are in place, substantive disagreements on the policies at issue take a back seat to the view that proper political channels must be left to carry out their predetermined duties.

Following in the footsteps of liberalism, affirmative action jurisprudence attempts to delineate the areas in which certain race-based justifications are off-limits and attempts to promulgate defensible principles pursuant to which certain articulating institutions may permissibly employ constitutionally legitimate race-based justifications. We know, of course, that since Marbury v. Madison, the Court has abrogated to itself the power (or authority) to determine the extent of the exercise of state action upon the individual and concomitantly the power/authority to determine the limits of individual autonomy. Since Marbury, the issue has been whether, and under what circumstances, other branches are entitled to share in that determination.

39. See Locke, supra note 11.
41. Id. at 169-70.
42. Of course, liberalism differentiates between power and authority. The ambiguity here is intended to reflect the contested nature of the Court's move in Marbury.
**Fullilove v. Klutznick** provides an apt example of epistemic authority in affirmative action jurisprudence. In **Fullilove**, the plaintiffs challenged a federal statute mandating that ten percent of federal funds granted for local public works projects be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of the statutorily defined minority groups. The plaintiffs filed suit seeking an injunction of the set-aside provision.

A central issue raised by **Fullilove** is whether and to what extent the Court should defer to Congress’s determination that certain racial groups were entitled to special treatment because they were subjected to either the present or lingering effects of societal discrimination. Recall that in **Bakke** Justice Powell argued that state universities were not competent to make those determinations. In Justice Powell's view, state institutions—in the form of public educational institutions—cannot make those determinations because they cannot be trusted to appropriately balance the equities. Given that the choice is between the courts and the state, if we can not trust the state, then, by default, the courts must make these decisions. In **Fullilove** the question was whether Congress possessed the “authority and capability” to decide what racial groups to prefer and for what reasons. The plurality answered in the affirmative. Then-Chief Justice Burger, writing for the plurality stated:

---

43. 448 U.S. 448 (1980).
44. *Id.* at 453. The preferred groups were included but were not limited to “black Americans, American Indians, Spanish-Americans, oriental Americans, Eskimos, and Aleuts.” *Id.* at 464.
45. *Id.* at 455.
46. **Bakke**, 438 U.S. at 309-10:

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. ... [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination.

47. *Id.* at 307-08. It cannot be Justice Powell's decision that democratically elected regents of state universities are incapable of determining that their institutions underserve a certain percentage of their state’s population, a situation which they take upon themselves to remedy. Justice Powell's concern must be that without access to judicial review “the legal rights of victims” will not be vindicated. *Id*; see also **Wygant v. Jackson Bd. of Ed.**, 476 U.S. 267, 275-76 (1986)
A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.

Here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President.\(^{48}\)

The fact that Congress had determined that certain racial groups were victims of discrimination in the contracting industry was sufficient for the Court. The Court was persuaded that, because Congress was a national legislature, it, and it alone, was capable and authorized by the Constitution to remedy a national problem.

In contrast, in *City of Richmond v. J.A. Croson Co.*,\(^{49}\) the Supreme Court struck down the City of Richmond's thirty-percent set aside partly on the ground that the City, unlike Congress, did not have "a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."\(^{50}\) This is not to say that the City was foreclosed from ever enacting race conscious measures. The Court acknowledged that the City need not become a "passive participant in a system of racial exclusion."\(^{51}\) Specifically, the Court explained that as "a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending power to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment."\(^{52}\) The point

---

48. *Fullilove*, 448 U.S. at 472-73. The Court went on to state:

Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

\(\text{Id. at 483; see also id. at 499 (Powell, J., concurring)}\) ("The history of this Court's review of congressional action demonstrates beyond question that the National Legislature is competent to find constitutional and statutory violations. Unlike the Regents of the University of California, Congress properly may—and must—address directly the problems of discrimination in our society.")


50.  Id. at 470 ("That Congress may identify and redress the effects of society wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate.").

51.  Id. at 492.

52.  Id.
is not that the State is not authorized to ever take race into account; recall the reference to a “passive participant.” However, because we trust states less and have codified our level of trust in section 5 of the Fourteenth Amendment, we cannot allow them the type of latitude that Congress was allowed in Fullilove. Thus, even though epistemic authority is discussed as a federalism/supremacy concern—drawing the appropriate line between congressional and state authority in formal doctrinal terms—what the decision boils down to is the inability to trust states 5 and the inability to trust black people with political power. 54

From the perspective of epistemic authority, we can now make sense of Justice O’Connor’s deference to the University of Michigan Law School. 55 Moreover, Justice O’Connor’s exercise of epistemic deference is not without historical precedent. Various members of the Court have explained that colleges and their regents must be accorded leeway in devising admission plans tailored to the established mission of their particular institution. 56 Some respond to this position with the

53. Id. at 490. The Court stated:
That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit constraint on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1.

54. Id. at 495-96 (“In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.”).

55. 123 S. Ct. 2325, 2339 (2003) (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).


Programs of admissions to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this. The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds. For me, therefore, interference by the judiciary must be the rare exception, not the rule.
criticism that it invites, perhaps welcomes, all kinds of invidiously discriminatory practices. Others argue that the Court should only be concerned with invidious distinctions. Justice O'Connor's outlook is that the "good faith" of university officials must be "presumed" unless one has reason to believe otherwise.

Justice Powell also articulated a second concern. Assuming that a defensible and/or "arbitrary" line could be drawn, Justice Powell worried that the Court is not competent to adequately reflect the changing social and political realities. That is, as certain groups gained political power and social standing, such that they were no longer subject to societal discrimination or its effects, "new judicial rankings would be necessary." As the Court explained, the "kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if

---

Id.; see also DeFunis v. Odegaard, 416 U.S. 312, 329, 344 (1974) (Douglas, J., dissenting) (explaining that "educators must be given leeway" in devising admission processes for their institutions). Justice Douglas further noted: "The educational policy choices confronting a university admissions committee are not ordinarily a subject for judicial oversight."

Similarly, Christopher Edley asserts, and I recognize, that "[t]he value-intensive choices [involved in the affirmative action debate] are tough ones." CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 204 (1996). Edley also asks, upon his recognition that "affirmative action needs a lot of discretion," whether we can "trust all those organizations and people with that kind of discretion, given the moral costs of error?" Id.; see also Nathan Glazer, In Defense of Preference, NEW REPUBLIC 18, 24-5 (April 6, 1998) ("[W]e have always left room for a large degree of freedom for institutions of higher education, public as well as private, to admit students based on academic criteria. . . . Let us preserve this institutional autonomy."); Amy Gutmann, Responding to Racial Injustice, in K. ANTHONY APPiah & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 106, 129 (1996) (explaining that while the set of proper qualifications for a given position is open ended, "boundaries [exist] beyond which it would be unreasonable to claim that someone is basically qualified to be admitted as a student to a selective university or hired as a high school teacher," and that inside these loosely delineated boundaries "a range of discretion may be legitimately exercised"). To Edley's admission, Professor Deborah Malamud responds with a question of her own: "Is that not a good argument for vigorous judicial review, lest we leave the decisions in the hands of the 'tens of thousands of decision-makers in corporations and colleges and governments' who will otherwise be in charge?"


57. See DeFunis, 416 U.S. at 344 (1974) (Douglas, J., dissenting) ("Courts are not educators; their expertise is limited; and our task ends with the inquiry whether, judged by the main purposes of the Equal Protection Clause, -- the protection against racial discrimination -- there has been an 'invidious' discrimination."); Cedric Merlin Powell, Blinded By Color: The New Equal Protection, The Second Deconstruction, and Affirmative Inaction, 51 U. MIAMI L. REV. 191, 198 (1997) (arguing that constitutional racial discriminations must be distinguished from unconstitutional ones on the basis of racial animus).

58. Grutter, 123 S. Ct. at 2339.
they otherwise were politically feasible and socially desirable.\textsuperscript{59} Consequently, "the mutability of [the] constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation."\textsuperscript{60}

Such a preoccupation with appropriate line drawing is important to the conception of freedom or liberty, and thus implicates liberal theory as well. John Rawls, among others, argues that justice, at least formal justice, necessitates the "impartial and consistent administration of laws and institutions, whatever their substantive principles."\textsuperscript{61} He notes that a legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men's liberties.\textsuperscript{62}

Ronald Dworkin makes a similar argument.\textsuperscript{63} For Dworkin, the preoccupation with appropriate line drawing is based upon the related concern of fairness, as opposed to strictly justice.\textsuperscript{64} Fairness demands that like cases are to be treated alike.\textsuperscript{65} The debate is, therefore, over the proper criterion for classifying cases as "alike" and "dissimilar." Dworkin argues that cases must be grouped together when they implicate the same principles.\textsuperscript{66} To facilitate the fair (Dworkin), just (Rawls), and/or equal (\textit{Bakke}) adjudication of later cases, the judicial

\begin{itemize}
\item \textsuperscript{59} \textit{Bakke}, 438 U.S. at 297.
\item \textsuperscript{60} \textit{Id.} at 298.
\item \textsuperscript{61} JOHN RAWLS, \textit{A THEORY OF JUSTICE} 58 (1971).
\item \textsuperscript{62} \textit{Id.} at 235.
\item \textsuperscript{63} RONALD DWORIN, \textit{TAKING RIGHTS SERIOUSLY} 113-16 (1997).
\item \textsuperscript{64} \textit{Id.} at 113 ("The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.").
\item \textsuperscript{65} This same argument can be made from the concern with equality, in addition to concerns with justice and fairness. \textit{See Bakke}, 438 U.S. at 289-90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.").
\item \textsuperscript{66} DWORIN, supra note 63, at 113 ("Hercules will conclude that this doctrine of fairness offers the only adequate account of the full practice of precedent. He will draw certain further conclusions about his own responsibilities when deciding hard cases. The most important of these is that he must limit the gravitational force of earlier decisions to the extension of the arguments of principle necessary to justify those decisions.").
\end{itemize}
task, in this context, is to articulate principled distinctions that necessitate a decision in favor of one party and against another.

It is precisely the force of this point that persuaded Justice Powell in *Bakke* that a “two-class theory” of equal protection was indefensible on principled grounds. Thus, Justice Powell concluded that it would be better to promulgate “a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation” than one that attempts to distinguish between the various claims of respective racial groups. This conclusion follows from the Court’s lack of confidence in its ability to adequately perform that task. This principle of “universal application,” we know well, is that all racial classifications are suspect, irrespective of the underlying motivations for their enactments. This principle of universal application deprives the Court of the concomitant necessity of engaging in an exercise of comparative harm impairment. All the while, at least in theory, a principle of universal application enables the Court to evaluate legitimate uses of race from illegitimate ones.

The inability to distinguish between legitimate and illegitimate applications of race is forcefully articulated by Justice O’Connor in *Croson*.

Absent searching judicial inquiry into the justification for ... race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple

---

67. Justice Powell noted:

The reservation of a proportion of the law school class for members of selected minority groups is fraught with ... dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt v. Painter* and allowed imposition of a ‘zero’ allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group?


68. *Id.* at 293.

racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.70

Moreover, affirmative action programs may produce negative externalities or undesirable social costs. For example, they may "engender[] attitudes of superiority or, alternatively, provoke[] resentment among those who believe that they have been wronged by the government’s use of race."71 They may also lower the incentive for their intended beneficiaries to achieve on their own merits.72 Or, they may serve to "reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."73

If the Court is incompetent to distinguish illicit from licit motives but insists on the justiciability of affirmative action claims, colorblindness in state decision making can be the only alternative. Moreover, given the fact that all racial classifications are suspect—especially because they are more often than not motivated by unconstitutional considerations—and the difficulty of distinguishing between legitimate and illegitimate motives, it is not incomprehensible that strict scrutiny would and did lead to fatal scrutiny.

Hence, the actions complained of in Sweatt v. Painter74 and Hopwood v. Texas75 are constitutionally suspect because they may have been motivated by illicit purposes. By lumping both cases into the same broad category, an affirmative action remedy to facilitate the legal education of people of color is classified on the same moral plane as a plan that categorically denied admission to any person of color.

70. Id.
72. Id. at 2364 (Thomas J., concurring in part and dissenting in part) ("As admission prospects [for black applicants] approach certainty, there is no incentive for the black applicant to continue to prepare for the LSAT once he is reasonably assured of achieving the requisite score.").
73. Bakke, 438 U.S. at 298.
74. 339 U.S. 629, 634-35 (1950). In Sweatt, Heman Marion Sweatt challenged a statute of the State of Texas restricting admission to the University of Texas Law School to white students. Id. at 631. In response to the challenge, the State of Texas created a new law school for black students. Id. at 633. Applying the doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court held that Mr. Sweatt was entitled to admission at the University of Texas Law School because the new law school—the School of the Texas State University for Negroes—was not substantially equal to Texas’s flagship law school. Sweatt, 339 U.S. at 633-34.
75. Hopwood v. Texas, 78 F.3d 932, 939-40 (5th Cir. 1996).
From this perspective, colorblindness as a constitutional principle is a moral imperative. This moral imperative is derived from the propositions that the individual is the proper unit of constitutional analysis; that the Court and the state are more often than not unable to distinguish between legitimate and illegitimate uses of race; and that even where the state may believe that it is acting in the best interest of citizens of color, the state’s action may be in fact harmful to intended beneficiaries or produce negative externalities.

In the remainder of this Essay, I evaluate whether colorblindness is a moral imperative. I do so against the backdrop of classical liberalism and in particular from a Rawlsian perspective.76

III. RAWLS AND JUSTICE

The primary purpose of John Rawls’s theory of justice is to “provide a way of assigning rights and duties in the basic institutions of society and to define the appropriate distribution of the benefits and burdens of social cooperation.”77 Rawls’s theory of justice presents a set of principles whose purpose is to provide a method for “choosing among the various social arrangements which determine [the] division of advantages and for underwriting an agreement on the proper distributive shares.”78

Rawls’s first basic assumption is that even though we may all have different conceptions of justice, we all share the same concept of justice.79 Our shared concept of justice is that institutions should not make arbitrary distinctions between individuals.80 In addition, institutions must strike a “proper balance” between competing claims in distributing the bounty of social resources that is the product of social cooperation.81 We agree on a particular conception of justice when we share the same understanding about how benefits and burdens are to be distributed in society.

At first glance, Rawls’s theory appears to be profoundly individualistic. He notes that “[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.”82 Justice, Rawls instructs us, does not allow the few to

76. See generally Rawls, supra note 61.
77. Id. at 4.
78. Id.
79. See id. at 11.
80. See id. at 3-4.
81. Id. at 5.
82. Id. at 3.
subsidize the welfare of the many. Consequently, Rawls’s theory is a very rights-oriented theory. Individuals possess certain basic political rights that cannot be curtailed.

However, Rawls’s theory is not completely individualistic. Rawls maintains that although “justice as fairness begins by taking the persons in the original position as individuals, or more accurately as continuing strands, this is no obstacle to explicating the higher-order moral sentiments that serve to bind a community of persons together.” Rawls notes that the “primary subject of the principles of social justice is the basic structure of society, the arrangement of major social institutions into one scheme of cooperation.” Thus, it is social institutions that are the aim of the principles of justice.

For Rawls, the task is to determine the rules and principles that are to govern the interaction between individuals (or representative persons) and social institutions. These rules, or principles of justice, are determined from the original position of equality. In the hypothetical original position of equality, free and rational human beings pursuing their individual ends in cooperation with one another establish the principles that will govern “the fundamental terms of their association.”

Rawls posits two principles that would have been chosen in the original position:

83. See id. at 3-4.
84. See id.
85. Id. at 192. As Rawls notes,

The point is rather that the persons in the original position are not to view themselves as single isolated individuals. To the contrary, they assume that they have interests which they must protect as best they can and that they have ties with certain members of the next generation who will also make similar claims.

Id. at 206.
86. Id. at 54.
87. Rawls defines an institution as

a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses, and so on, when violations occur. As examples of institutions, or more generally social practices, we may think of games and rituals, trials and parliaments, markets and systems of property.

Id. at 55.
88. See id. at 54.
89. See id. at 60.
90. Id. at 11.
First: each person is to have an equal right to the most extensive basic liberty\textsuperscript{91} compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.\textsuperscript{92}

The first principle, the liberties of equal citizenship principle, applies to the assignment of rights and duties. The second principle correlates with the appropriate distribution of the benefits and burdens of social cooperation.

In Rawls's theory, institutions cannot differentiate among individuals with regard to political liberties, what he terms the liberties of equal citizenship.\textsuperscript{93} "These liberties are all required to be equal by the first principle, since citizens of a just society are to have the same basic rights."\textsuperscript{94} Moreover, greater socioeconomic equalities can never compensate for political inequality.\textsuperscript{95} By the promulgation of the second principle, the equal opportunity principle, Rawls acknowledges the reality of inequalities in wealth, income distribution, etc.\textsuperscript{96} However, Rawls attempts to cabin those inequalities by the restriction that inequalities must be to everyone's benefit and that institutional offices must be open to all.

The justification for the principles of equal citizenship and equal opportunity is that these are the principles that rational, self-interested individuals would agree upon in the original position as they set about attempting to pursue their respective ends.\textsuperscript{97} The original position performs the same function for Rawls as the concept of autonomy in

\textsuperscript{91} Rawls defines basic liberties as political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.

\textit{Id.} at 61.

\textsuperscript{92} \textit{Id.} at 60-61.

\textsuperscript{93} \textit{Id.} at 63-64.

\textsuperscript{94} \textit{Id.} at 61. Rawls does allow for a possible exception. He notes that the "only reason for circumscribing the rights defining liberty and making men's freedom less extensive than it might otherwise be is that these equal rights as institutionally defined would interfere with one another." \textit{Id.} at 64.

\textsuperscript{95} \textit{Id.} at 63 (noting that the serial ordering of the two principles of equal citizenship and equal opportunity "does not permit exchanges between basic liberties and economic and social gains").

\textsuperscript{96} See \textit{id.}

\textsuperscript{97} See \textit{id.} at 92.
classical liberalism.\textsuperscript{98} Rawls reasons that even though the concept of a society implies a cooperative venture, because human beings are self-interested individuals, principles are necessary for determining how to distribute the actualized benefits of mutual cooperation. The functional purpose of the original position is to reason from a set of circumstances that will provide a fair procedure "so that any principles agreed to will be just."\textsuperscript{99} Rawls maintains that to "say that a certain conception of justice would be chosen in the original position is equivalent to saying that rational deliberation satisfying certain conditions and restrictions would reach a certain conclusion."\textsuperscript{100}

One of the conditions of the original position is the veil of ignorance.\textsuperscript{101} The purpose of the veil of ignorance is to prevent individuals in the original position from choosing principles that will serve their particular situations.\textsuperscript{102} This would be contrary to Rawls's purpose, which is to deduce the most just principles.\textsuperscript{103} In order to fulfill that goal, individuals in the original position "must choose principles the consequences of which they are prepared to live with whatever" their lot in life.\textsuperscript{104} Thus, in the original position:

\begin{quote}
[N]o one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this . . . the parties do not know the particular circumstances of their own society. That is, they do no know its economic or political situation, or the level of civilization and culture it has been able to achieve.\textsuperscript{105}
\end{quote}

\textsuperscript{98.} \textit{Id.} at 516:
Both autonomy and objectivity are characterized in a consistent way by reference to the original position. The idea of the initial situation is central to the whole theory and other basic notions are defined in terms of it. Thus acting autonomously is acting from principles that we would consent to as free and equal rational beings, and that we are to understand in this way.

\textsuperscript{99.} \textit{Id.} at 136.
\textsuperscript{100.} \textit{Id.} at 138.
\textsuperscript{101.} \textit{See id.} at 136-42.
\textsuperscript{102.} \textit{See id.} at 136-37.
\textsuperscript{103.} Rawls states, "It must make no difference when one takes up this viewpoint, or who does so: the restrictions must be such that the same principles are always chosen." \textit{Id.} at 139; \textit{see also id.} at 140 ("The veil of ignorance makes possible a unanimous choice of a particular conception of justice.").
\textsuperscript{104.} \textit{See id.} at 137.
\textsuperscript{105.} \textit{Id.}
In addition to the veil of ignorance, there are other constraints imposed upon persons in the original position. First, persons in the original position can only adopt general principles. That is, the adoption of a principle of justice is not contingent upon the circumstances of a particular person or group of persons. Second, the principles chosen in the original position must be applied universally. Third, the principles must be public. Fourth, the principles must be capable of preferencing competing claims. This seems to be a requirement that claims be adjudicated on the basis of the principles of justice as fairness. Last, a solution of competing claims deduced from the principles of justice as fairness is final. “They override the demands of law and custom, and of social rules generally.”

The cumulative effect of Rawls’s framework is to provide us with a mechanism for the creation of just principles, rules, and policies. Rawls promises us principles that apply to the basic structure of society. It is precisely for these reasons that Rawls framework is particularly à propos for analyzing the claims of affirmative action opponents. Their claim is that race consciousness violates a fundamental understanding of equality and justice. Rawls provides us with a mechanism for evaluating that claim.

IV. EVALUATING COLORBLINDNESS FROM THE ORIGINAL POSITION

Recall that in the original position “no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.” Importantly, individuals in the original position are also not aware of their race, although we can reasonably assume that they are a racially diverse lot. Recall also that representative persons in the original position would agree first on the principle of equal liberty. That is, “each person [would] have an equal right to the most extensive basic liberty compatible with a
Our first inquiry is whether colorblindness is necessitated by the principle of equal liberty. If it is, then we need to inquire whether the infringement can be justified. If it is not, then we can move on to the second principle.

There are two senses in which representative persons in the original position can understand colorblindness. Here we draw again on our understanding of epistemic authority to distinguish between how representative persons would understand the command to colorblindness in the original position. I will term these two understandings, respectively, colorblindness as social condition and colorblindness as official condition. First, they could understand the command to colorblindness as an ascriptive social condition. That is, colorblindness is a requirement that race not have any place in any arena of institutional social arrangements; this includes all institutions. This is the broad command to colorblindness that encompasses and blurs the line between private and public distinctions. Second, they can understand colorblindness as simply proscribing race as a precluded justificatory category for state decision making. In this sense, all that is meant by colorblindness is that the state can never use race as a justification for a decision because race is an excluded category. Private individuals, however, are free to behave, within limits, according to the dictates of their conscience.

From Rawls's perspective, representative persons in the original position would not choose the understanding of colorblindness implied in the first sense because persons in the original position, all things being equal, would maximize the extent of their liberty. In other words, the default assumption of persons in the original position is to greater autonomy and greater liberty. As Rawls makes clear, the only permissible limit on liberty is the extent to which more liberty jeopardizes liberty itself. Given then that excluding race as a justification for socioinstitutional purposes is a restriction on liberty, that decision must be justified by efforts to secure "the total system of liberty shared by all."
There are two ways in which liberty can be limited. “The basic liberties may either be less extensive though still equal, or they may be unequal.” Colorblindness as social condition falls under the first category, less extensive but equal liberty. To justify the adoption of colorblindness as a social condition, persons in the original position would have to conclude that this restriction of their autonomy, on balance, actually strengthens their autonomy.

Here, then, it is necessary to examine the claims of the proponents of colorblindness and to attempt to understand the nature of the harms that colorblindness attempts to avoid in an ideal or well-ordered society under favorable circumstances. What are the arguments that would be advanced by the proponents of colorblindness in the original position? There are three such arguments.

The first argument is that everyone must have the right to be treated as individuals, yet taking race into account when making decisions undermines that right. A second and related argument is that only relevant characteristics about individuals should be taken into account, and, given that race is always an irrelevant characteristic, it should never be taken into account. The third argument is that race consciousness leads to racism (which will have to be defined), and, given that all individuals in the original position would want to avoid racism, race should not be taken into account. I will deal with these arguments in seriatim, starting with the proposition that race consciousness is inconsistent with a system of individual rights.

The proposition that persons must be treated as individuals is incoherent as a practical matter and would not be chosen by persons in the original position for two reasons. First, such a broad proposition would preclude any decisions from being made at all. Second, the principle of equal citizenship can only be coherently understood if it means individuals will not be treated qua individuals but as equal members of a cooperative society. To treat equally means to treat the same. If we are to treat people as individuals, given that no two people are alike, we cannot at the same time treat them as if they are the same.

Suppose that we are attempting to devise rules in the original position for admitting persons to law schools. Suppose that a member of our council proposes as a neutral decision-making principle the proposition that law schools ought to admit people only on the basis of individual merit, not because they belong to particular groups or categories.

119. Id. at 244.
The immediate dilemma that would be faced by our administrators is to determine what it means to treat a person as an individual. Does it mean that all of the characteristics of the individual must be taken into account before a decision about that individual can be made? Does it mean that certain salient characteristics of the individual cannot be given more weight than other characteristics? To further extend our hypothetical scenario, would the law school be forbidden to consider the fact that Applicant X is a member of the group that scored in the ninety-ninth percentile on her LSATs? Or from Region 1? Or the daughter of an alumnus?

How do rational, self-interested individuals (and institutions) make decisions in the process of furthering their ends? When making decisions, individuals and institutions are looking for salient characteristics that some individuals possess and others do not. Indeed, the process of deciding involves precisely the type of categorization (e.g., Northeasterner, smart, high LSAT scorer) that the council’s rule would purport to prohibit. The command to treat everyone as individuals would preclude institutions and people from making any judgments whatsoever about others.

The proposition that race consciousness is inconsistent with the principle that individuals are to be treated *qua* individuals and not as members of particular groups is itself inconsistent with how we presume that rational, self-interested individuals make distinctions among things or people in the process of furthering their goals. Sometimes we want to choose people for certain rewards because they possess salient characteristics that fit our decisional criteria. For example, I want to marry a smart, tall, beautiful, Jewish woman. Or, I only want to admit smart people to my school. Or, I only want hard workers in my factory. Or, I want to live in a predominantly or exclusively black neighborhood; I want to live in this neighborhood not because I do not like people of other races, but because I have a strong sense of self-identity and self-respect when I am surrounded by black people. I may not want any blacks in my restaurant. I do not want any blacks in my house. I only want tall people on my team, and so on. When I choose a person because they are tall, black, Jewish, smart, beautiful, nice, etc., I am not treating them “as individuals.” That is, I am picking a characteristic that they possess that I find salient, and I am making my decision on the basis of that characteristic.

This is how rational people make decisions in the process of furthering their ends. If it were not so, we would not be able to make
distinctions among things or people. Persons in the original position would not want to curtail their autonomy in this way because as rational, self-interested individuals, they would want to be able to make distinctions based upon salient characteristics that further their ends. If institutions cannot make decisions on the basis of salient characteristics (e.g., smart, talented, tall, etc.) then no decisions can ever be made. The cost in individual autonomy would not be worth whatever harms are thought to be averted by a rule postulating individualism.

An argument based upon individualism is also incoherent on a second plane. Rawls's equal citizenship principle states that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." The equal citizenship principle explicitly hinges individual equality upon group equality. How do we know if a person is being treated unequally? We look at the rest of society to see what rights everybody else has.

The following two examples will serve to prove the point. Suppose the administrators at our law school decide to admit everyone who scores above a 165 on the LSAT. Suppose John X scored a 166 but was denied admission. His argument to equal treatment would not be that he should be evaluated differently than everyone else. His argument would be that he should be treated the same as the 165-and-over club: he should be granted admission. Here an argument on the basis of individuality does not make any sense. Indeed, it would be odd for John X to argue that he should be admitted on the basis that he is John X. To treat John X as an individual does not tell us how John X is to be treated, except to say, "Do not treat me like the group that does not deserve admission." What John X wants is to be treated in the same manner that people in his category, in his group, are being treated.

Consider the harm principle in this context. Mill stated that "it must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference." In particular, "disappointed competitors" do not suffer "harm" such that would justify interference with the goals of the successful competitor. The question of course is what counts as "harm." And concomitantly, are all considerations of race harmful?

120. Id. at 60.
121. MILL, supra note 10, at 94.
122. Id. Mill states:
To illustrate, suppose instead that our administrators decide that blacks are stupid, and, therefore, they will not admit any blacks into the law school. Suppose that John Y, who is black, is denied admission to the law school. John Y argues that he should be granted admission on the ground that he should be treated as an individual but not as a member of a group. Perhaps this scenario more closely resembles the typical argument against affirmative action. But it is no more coherent than the example of John X, given above.

John Y and John X are making the same argument: “Do not treat me like the group that does not deserve admission.” In the case of John Y the group is blacks, in the case of John X the group is the 164-and-under club. In both cases the real issue is about whether the individual meets the criterion for admission. John Y would argue that the real criterion for admission is smart people. He would further argue that because he is a smart person, he should be granted admission.

From this perspective, individual equality is either incoherent or an oxymoron. Proponents of colorblindness as individualism often pretend that what they mean when they say that people should be treated as individuals is that every person should be evaluated against herself. But as I remarked above, if you ranked each person against herself, it would be impossible to make any decisions: the criterion for decision making would be each individual. But what they actually mean is that Person X is to be treated similarly as everyone else. At the very least colorblindness as individualism does not provide us with an accurate understanding of what it means to treat people equally. At best, it is unhelpful.

Consequently, persons in the original position would eschew the proposition that individuals are to be treated as individuals. Perhaps they would find more persuasive the proposition that only relevant criteria are to be taken into account, and, given that race is always an

---

Whoever succeeds in an overcrowded profession, or in a competitive examination; whoever is preferred to another in any contest for an object which both desire, reaps benefit from the loss of others, from their wasted exertion and their disappointment. But is it, by common admission, better for the general interest of mankind, that persons should pursue their objects undeterred by this sort of consequences. In other words, society admits no right, either legal or moral, in the disappointed competitors, to immunity from this kind of suffering; and feels called on to interfere, only when means of success have been employed which if it is contrary to the general interest to have been employed which it is contrary to the general interest to permit—namely, fraud or treachery, and force.  

Id.
irrelevant criterion, colorblindness should be the standard of choice. It is to this second argument that I now turn.

To better examine this claim, let us return to the case of John Y. John Y, an African-American, is being denied admission to the law school because he is black. One argument available to John Y is that race is an irrelevant criterion and should not be used as a standard for deciding who to admit to the law school.

Although this proposition looks very powerful, upon closer examination we will find that it can very easily be dismissed. To dismiss this proposition we need to examine the question whether individuals in the original position would always regard race as an irrelevant criterion. For the reasons stated below, the answer is no.

First, we must remember the ahistorical perspective of the original position. There, race is no more pernicious than any of the individual's other physical characteristics, such as her height or the size of her feet. Proponents of the proposition that race is an irrelevant criterion would have to explain what it is that is harmful about race such that excluding race as a category contributes to the liberty of all. What is it that differentiates race from other arguably arbitrary characteristics such as geography, legacy, playing musical instruments, and socioeconomic background? The proposition that race is an arbitrary characteristic does not clarify the harms caused by taking race into account—if any—such that would compel persons in the original position to choose to curtail their liberty. This proposition makes sense only if one assumes that colorblindness is the appropriate standard.

There is a second reason why persons in the original position would not favor the proposition that race is an arbitrary criterion. This is because persons in the original position value primary goods, which are necessary for furthering basic liberties. One important primary good is self-respect. There is an associational aspect to the

---

123. Primary goods are things which it is supposed a rational man wants whatever else he wants. Regardless of what an individual's rational plans are in detail, it is assumed that there are various things which he would prefer more of rather than less. With more of these goods men can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be. The primary social goods, to give them in broad categories, are rights and liberties, opportunities and powers, income and wealth.

RAWLS, supra note 61, at 92; see also id. at 62.

124. See id. at 141-42, 144.

125. Id. at 440-46 (stating that "the most important primary good is self-respect").
concept of self-respect. Human beings, Rawls notes, have a basic desire “to express their nature in a free social union with others.”

What is the harm that can be identified when individuals use race as a basis for decisions about the types of people with whom they will associate, marry, befriend, live, etc.? Consider two alternatives: racial animus and individualized burdens.

It seems to me that one of the things we worry about is racial animus. Most people would agree that there is a difference between the NAACP or the Jewish Community Center (JCC) or the Italian Center (ICC) and David Duke’s National Association for the Advancement of White People. Most people would agree that the NAACP is preferable to the NAAWP. The NAACP, the JCC, and the ICC (and other similar race- or ethnicity-based associations) add something to our self-identity and self-respect that we value and treasure. The key is to identify what we value about the former and what we fear with respect to the latter.

It is very obvious that what we fear is racism. This leads us to the third argument, which is that race consciousness leads to racism. We can also dismiss this argument with a simple analogy. Suppose that proponents of colorblindness also argued that freedom of religion must be abolished because religion consciousness leads to religious strife. Once we reposition the problem in the context of freedom of religion and conscience, we can follow and adopt Rawls’s reasoning that people in the original position would choose equal liberty of conscience. For the same reasons that people in the original position would choose equal liberty of conscience. For the same reasons that people in the original position would choose liberty of conscience and religion, even though there exists the possibility that religious pluralism can lead to religious strife, they would also favor racial pluralism. The ability to define oneself according to one’s culture and race is in many important ways synonymous with the ability to define oneself according to one’s religion, or lack thereof.

Fundamentally, the question is empirical. It may be the case that affirmative action will return us to an era of Jim Crow racism. I doubt that, but that is an empirical question that must be answered with empirical facts.

Second, one may be concerned with the fact that affirmative action imposes burdens upon innocent others. However, it is not clear that the concern with burdens necessarily leads to the conclusion preferred by opponents of affirmative action. As Justice Thomas

126. Id. at 543.
himself argued in *Grutter*, the University of Michigan Law School chose “measures it knows produce racially skewed results.”

A concern with individual burdens does not lead to a neutral baseline. Affirmative action may burden members of the nonpreferred class. But the absence of affirmative action imposes a burden also on those harmed by the state’s nonracial classification. Moreover, just as whites may become resentful of the state and of racial groups preferred by affirmative action as a result of affirmative action, African-Americans and Latinos may become distrustful and resentful of the state if they continue to suffer disproportionately. Thus, questions of justice are presented on both sides of the equation.

What would persons in the original position do? Here lies the beauty of the Court’s resolution in *Grutter*. Though one may disagree with the application of the Court’s resolution, the Court’s insistence that diversity is a broad concept that is open to all is fairly compelling. Diversity includes not only racial diversity but geographic diversity, intellectual diversity, etc. Moreover, everyone can argue individually how they would contribute to the diversity of the institution. Each applicant, as a matter of justice, is provided with an opportunity of meeting the relevant criteria. This seems to be a more helpful method of conceptualizing and operationalizing the notion of individualized consideration.

V. CONCLUSION

What we have from the Court in *Grutter* is an attempt to walk a middle line on an issue where there are comparative merits on both sides. Inevitably, the Court will be criticized on both the right and the left. But I think those criticisms are misplaced.

As citizens of a polity, why should citizens of color bear the brunt of a state’s public policy decisions? What would we chose in the original position? My guess is that we would choose a method that more or less resembles the Court’s decision in *Grutter*. People of color have a right to have their considerations taken into account. By the same token, the Court attempted to spread the burdens and benefits of affirmative action as broadly as possible. The Court’s decision may

128. *See, e.g., id.* at 2340 (“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.”).
not be perfectly just, but it is probably as close as one will get outside of the original position.