IN DEFENSE OF DEFERENCE

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> For my part, as I went away, I reasoned with regard to myself: "I am wiser than this human being. For probably neither of us knows anything noble and good, but he supposes he knows something when he does not know, while I, just as I do not know, do not even suppose that I do. I am likely to be a little bit wiser than he is in this very thing: that whatever I do not know, I do not even suppose I know."[1]

> You want the death penalty? Persuade your fellow citizens [via legislation or by amending the Constitution].... You don't want abortion? Persuade them the other way.... Judges have no more capacity than the rest of us to determine what is moral.[2]

In late October, 1997, University of Michigan students unable to gain admission to its undergraduate school filed a lawsuit in federal court against the University. The plaintiffs maintained that the infusion of race into the admission process violated their rights under the Fourteenth Amendment.[3] A few days later, while answering general questions about the case, and specifically about the University's admission process, University President Lee Bollinger remarked that "[t]his [suit] is a campaign to reverse the constitutional decision supporting higher education's

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1. PLATO, *Apology*, *in* FOUR TEXTS ON SOCRATES 70 (Thomas G. West & Grace Starry West trans., 1984).

2. *Too Many Morally Charged Questions in Court*, CNN.COM, Sept. 21, 2004, *at* http://cnn.com/2004/LAW/09/21/Scalia.democracy.ap/ (quoting Justice Scalia on a speech to the Ethics and Public Policy Center).

3. *See* Gratz v. Bollinger, 97-CV-75231-DT (E.D. Mich. 2001); Grutter v. Bollinger, 97-CV-75928-DT (E.D. Mich. 2001).

efforts to diversify."[4] Most appropriate to our general inquiry, the President stated that "I think inevitably the Supreme Court will and must speak to this issue."[5]

This was a remarkable prediction, on two fronts. First, the modern affirmative action[6] controversy presents one of the most important and vexing questions of social policy in the last quarter century. And the Constitution does not offer clear guidance for resolving this difficult question, if any at all.[7] Hence, this issue appears to be the perfect candidate for a properly democratic resolution, at the hands of those to whom we entrust such matters.[8] Generally, one would suppose that complex questions of social policy should be resolved no other way.

And yet, secondly, President Bollinger proved to be deadly accurate. This last Term, in the *Michigan Cases*,[9] the Supreme Court offered its constitutional views about the use of race in higher education. Its approach was rather surprising. Before the Court decided the *Michigan Cases*, and as a direct result of the Court's mechanical approach to race conscious measures, the resolution of these cases appeared pre-ordained. First, the Court would assert that race had in fact been used in admission decisions. Indeed, the University admitted as much. As such, the Court would apply its strict scrutiny test, and would demand not only that the state assert a legitimate and compelling interest, but also that the means in question be narrowly tailored to these purported ends. The Court would then offer its view about the

4. John A. Woods, *Battle Lines Drawn in U-M Discrimination Suit*, ANN ARBOR NEWS, Oct. 15, 1997, at A1.

5. *Id.*; *see* Ronald Dworkin, *Affirming Affirmative Action*, 45 N.Y. TIMES REVIEW OF BOOKS, Oct. 22, 1998, at 91, 91 ("Sooner or later the Supreme Court will be required to take [an affirmative action case in higher education] for review.").

6. For the purposes of this Essay we use the term affirmative action broadly to mean any decisions any decision-making process where a state actor takes race into account. When used in this way, as we do throughout this Essay, affirmative action and race conscious decision-making may be used interchangeably.

7. *See* Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 192 (1997) ("There is . . . nothing in the Constitution that is capable of resolving this social policy dispute without simply elevating one policy preference above the other for reasons of subjective normative appeal. The meaning of the Equal Protection Clause is simply indeterminate with respect to the constitutionality of [affirmative action].").

8. For support for this general proposition, see New York City Transit Authority v. Beazer, 440 U.S. 568, 594 (1979) (explaining that the wisdom of policy initiatives is properly left to the political branches, and that "the Constitution does not authorize a federal court to interfere in that policy decision").

9. *See* Grutter v. Bollinger 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

myriad harms of racial classifications,[10] after which it would conclude that race may not be used by admission officers except in an extremely limited set of circumstances that no set of facts would ever meet. In keeping with its recent cases addressing the use of race in districting for example, the Court might also choose to apply its "predominant factor" test;[11] it would matter little, of course, as the Court would likely invalidate the programs in question under either test, by a five-to-four vote, with Justices O'Connor and Kennedy at the center of the storm. This was the ultimate outcome anticipated by most court-watchers including the *Hopwood* Court[12] and the Michigan District Court.[13]

In a series of surprising moves, the Court discarded the script. In the law school case, *Grutter v. Bollinger*, a Court majority endorsed Justice Powell's view in *Bakke* that the goal of diversity in college admissions "can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[14] As far as holdings go, this one is quite unremarkable. Far more interesting and of greater significance is the way the Court arrived at this conclusion. "Context," stated Justice O'Connor writing for the majority, "matters when reviewing race-based governmental action under the Equal Protection Clause."[15] In the context of higher education, the "Law School's educational judgment that . . . [racial] diversity is essential to its educational mission is one to which we defer."[16]

In his opinion dissenting from the Court's holding, Justice Thomas exclaimed that the Court's deference to the Law School's educational judgment is "antithetical to strict scrutiny."[17] Similarly, Chief Justice Rehnquist complained that the Court's "application of . . . [strict scrutiny] is unprecedented in

10. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 657 (1993):
Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. . . . Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.

11. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995):
The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race- neutral districting principles . . . to racial considerations.

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

13. *See* Grutter v. Bollinger, 137 F.Supp.2d 821 (E.D.Mich.,2001).

14. *Grutter*, 539 U.S. at 322.

15. *Id.* at 327.

16. *Id.* at 328.

17. *Grutter*, 539 U.S. at 362 (Thomas, J., concurring in part and dissenting in part).

its deference."[18] Not to be outdone, Justice Kennedy described the Court's application of strict scrutiny as "nothing short of perfunctory" for "accept[ing] the University of Michigan Law School's assurances that its admissions process meets with constitutional requirement."[19]

In this Essay, we defend the Court's deference to the judgment of educators and admissions officials on the necessity of raceconscious admissions. Our central thesis is that the *Michigan Cases* are properly understood as representing the proposition that affirmative action in higher education—and perhaps race-conscious state action more broadly—is centrally a question of public policy and less so a question of constitutional law. Neither the constitutional text nor constitutional doctrine provides direct guidance on the constitutionality of race-consciousness by state actors. Fundamentally, affirmative action is a moral question and an issue of educational policy. These are precisely the questions for which judges are less useful and administrations are at a comparative institutional advantage. Though the Court may have a role to play, that role would be played at the margins. Because the Constitution has very little to say about preferential race-conscious admissions by state actors, this is an area that the judiciary should constitutionalize only at the boundaries and leave room for public policy makers to implement their preferred policy choices.

Prior to the *Michigan Cases*, and in light of the Court's inevitable incursion in the affirmative action controversy, the countermajoritarianists' traditional fears appeared true: in the face of a complex question of social policy, the Court would forge ahead and purport to resolve this difficult issue.[20] Yet the

18. *Id.* at 380 (Rehnquist, C.J., dissenting).

19. *Id.* at 388-89 (Kennedy, J., dissenting).

20. Ironically, some of the most influential critics of the power of judicial review are only too quick to ask the Court to reverse the policy course of affirmative action programs. Alexander Bickel, one of the prominent constitutional figures of our time, provides a leading example. While at the center of the Warren Court storm, on the one hand, he showed a great deal of concern for the judiciary's "undemocratic" transgressions. When it came to affirmative action measures, conversely, he was willing to set aside all prior concerns and ask for the Court's hand in overturning these programs. *See* Brief of Amicus Curiae Anti-Defamation League of B'Nai B'rith, DeFunis v. Odegaard 416 U.S. 312 (1974) (No. 73-235); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975); *cf.* Lino A. Graglia, *The Constitution and "Fundamental Rights," in* THE FRAMERS AND FUNDAMENTAL RIGHTS 86, 86 (Robert A. Licht ed., 1991) ("[Constitutional law's] potency . . . rests entirely on a misunderstanding, the mistaken belief of the American people that judicial declarations of unconstitutionality are in a meaningful sense based on the Constitution.") *and id.* ("The nightmare of the American intellectual

Court did no such thing. Part I uses the Legal Process School to justify the Court's restraint in the *Michigan Cases*. Part II provides an internal justification—based upon the Court's cases addressing the limits of state action on the basis of race—for the Court's decision in *Grutter v. Bollinger* to defer to admissions officers.

I. THE NEW LEGAL PROCESS, INSTITUTIONAL COMPETENCE AND THE FAMED DIFFICULTY

The role of an unelected, unaccountable judiciary in democratic society has been the subject of much controversy. In recent memory, and as a direct response to the travails of the Warren Court, we have witnessed the resurgence of a strong, mostly negative reaction to the judicial branch and its perceived undemocratic transgressions. This recent charge has been led by Alexander Bickel, who coined the phrase "countermajoritarian difficulty" to encompass the seemingly troubling notion that a judiciary may interpose its constitutional reading against the people's current preferences, as evinced strictly by legislative enactments. "[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive," Bickel wrote a generation ago, "it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it. This, without mystic overtones, is what actually happens. . . . [I]t is the reason the charge can be made that judicial review is undemocratic."[21]

From the time of Bickel's influential contribution, constitutional scholars have spent countless hours attempting to diffuse the "countermajoritarian" dilemma.[22] They still do.[23] We ques-

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elite (broadly defined) is that control of public policy will fall into the hands of the American people. The function of judges, acting in the name of the Constitution, they believe, is to prevent that from happening.") *with* Lino A. Graglia, Podberesky, Hopwood, *and* Adarand: *Implications for the Future of Race Based Programs*, 16 N. ILL. U. L. REV. 287 (1996) (demonstrating a strong dislike for racial preferences, and hailing the virtues of justices who are willing, scarce constitutional guidance notwithstanding, to strike them down).

21. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (2nd ed. 1986); *see* HENRY STEELE COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 55 (1958) ("Whatever the logical support for the theory [of judicial review,] it cannot be found in the philosophy of democracy if by democracy we mean majority rule; whatever the practical justification, it cannot be found in the defense of fundamental rights against the assault of misguided or desperate majorities.").

22. *See* Steven Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule*

tion neither Bickel's conclusions nor the various responses and counterstories that followed in his wake. Instead, we take the teachings of the legal process school to heart, particularly its focus on the strength of institutional responsibilities. Put simply, the Court must not attempt to solve complex social problems in isolation. Instead, the Court must establish broad and forgiving constitutional boundaries, thus allowing the affected parties room for implementation.[24] This Part argues that the affirmative action debate falls squarely within this prescription.

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of Law, 62 U. CHI. L. REV. 689, 712 ("[R]esponding to the countermajoritarian difficulty has been an important staple on the menu of constitutional theory since the appearance of Bickel's influential book."); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1288 n.2 (1982) ("The 'countermajoritarian difficulty' has spawned the central line of constitutional scholarship for the last thirty years."). *See also* Croley, *supra*, at 712 n.66 (documenting some of the many published acknowledgments to Bickel's influence).

23. Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921 921 (2001) ("[T]he 'counter-majoritarian difficulty' remains—some forty years after its christening—a central theme in constitutional scholarship. Indeed, one might say that reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today.").

24. *See* Paul J. Mishkin, *Foreword: The Making of a Turning Point*—Metro *and* Adarand, 84 CAL. L. REV. 875, 884 (1996) (arguing that vague and undefined standards not only empower Congress, but also give the Court "leeway in exercising judicial review, backed by confidence that future Courts would stop something that was really wrong."). *Cf.* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 136 (1976) (explaining that in order to avoid linking both preferential and exclusionary policies similarly, the applicable "mediating principle of the [Equal Protection] Clause is clearly and explicitly assymetrical, one that talks about substantive ends, and not fit, and one that recognizes the existence and importance of groups, not just individuals.").

In specific reference to the affirmative action controversy, see Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 703 (1975):

> [A decision against affirmative action] would necessarily rest upon predictions that are equally conjectural and, therefore, equally personal. If judges are uneasy about resting constitutional interpretation upon such foundations, the remedy is not to fashion principles that mask the underlying choices. The remedy, rather, is candidly to avow the choices that must be made and to develop doctrines that consign ultimate authority for those choices to the legislature, where in a democracy it rightly belongs.

See also Neal E. Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15, 16 (1991) (arguing for a "limited judicial and a broad legislative role"); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 731-32, 741 (1974) (contending that difficult moral questions, such as affirmative action, must be left to the states and the political process); Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1179 (1996) ("[A]ffirmative action should be settled democratically, not judicially.").

A. THE COUNTERMAJORITARIAN DIFFICULTY COMES TO SCHOOL: MAKING SENSE OF POLICY-MAKING

In their monumental *The Legal Process*, Hart and Sacks warned that consensus on some questions of policy would be hard to achieve, if not altogether impossible. For this reason, and as an "alternative to disintegrating resort to violence," they counseled for the principle of institutional settlement, "the establishment of regularized and peaceable methods of decision."[25] The questions raised by the affirmative action debate fit squarely within this principle. In general, these questions boil down to a debate about what criteria admissions officials may take into account.[26] These are complex and ultimately "intractable" questions, to be sure.[27] They are also policy questions in their clearest form. Some of these arguments are made on the strength of our hopes for a better society, others on social utility and the weight of the costs and benefits at issue. These are not constitutional arguments.[28] A sampling of the many arguments deployed here

25. HENRY M. HART, JR., AND ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (W. Eskridge & P. Frickey eds., 1994).

26. *Cf.* Amy Gutmann, *Responding to Racial Injustice*, *in* K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 106, 122 (1996) (arguing that "[s]etting qualifications for a position is not an exercise in arbitrariness. Rather, it is an exercise in discretion, which operates against a background of considerable uncertainty as to what constitutes the correct standards and how best to apply those standards in the practice of searching, identifying, and assessing qualified candidates"); Alasdair MacIntyre, *Some Sceptical Doubts*, *in* AFFIRMATIVE ACTION AND THE UNIVERSITY: A PHILOSOPHICAL INQUIRY 264, 264 (Steven M. Cahn ed., 1993) (questioning the assumption that "in academia we already possess an adequate and generally agreed conception of what it is to be either the best qualified candidate for a particular academic appointment or at least a candidate as well qualified as any other").

27. Devins, *supra* note 24; *cf.* Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 893-94 (1994) (explaining that the debate has become "a bitter stalemate"); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 WEST VA. L. REV. 111, 124 (1991) (arguing that the debate "has come to a dead-end").

28. *Compare* Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (Powell, J.) (concluding that layoffs, unlike hirings, are too burdensome on the affected parties) *and* Fullilove v. Klutznick, 448 U.S. 448, 523 (Stewart, J., dissenting) (arguing that it is odious to classify persons along racial lines) *with* Wygant, 476 U.S. at 313 (Stevens, J., dissenting) (asserting that the plan is not too unfair to the laid off teachers, does not stereotype beneficiaries, and is not racially disrespectful); *see* NATHAN GLAZER, ETHNIC DILEMMAS, 1964-1982 (1983); BARRY R. GROSS, DISCRIMINATION IN REVERSE: IS TURNABOUT FAIR PLAY? (1978); RICHARD KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996); Charles Krauthammer, *Why We Need Race Consciousness*, *in* RACIAL PREFERENCE AND RACIAL JUSTICE : THE NEW AFFIRMATIVE ACTION CONTROVERSY 141 (Russell Nieli ed., 1991); *see also* Jerome McCristal Culp, *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 171 (1994); *see also* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) ("If I had to choose, I

provides ample illustration of this view.[29] The arguments come under three general rubrics.

First, and while looking at the institutional level, critics have leveled the charge that affirmative action plans bring about "a cost in loss of efficiency and productivity."[30] The argument is a simple one. In hiring workers, and even when admitting students to institutions of higher education, decisionmakers must always seek better qualified applicants, to those who not only meet the required institutional requirements but rise above their competitors in skill and merit. In hiring these workers, institutional utility is maximized, as better-qualified workers will work more efficiently and productively. Affirmative action programs impede this perceived efficiency. The decision to hire or admit is made not on the qualifications at hand, or the fit between an applicant's skills and the job in question, but on conditions entirely independent of these. Affirmative action, in fact, cares less about efficiency and productivity, but social justice and progress.

In modern times, the quintessential institutional argument in favor of affirmative action plans is concerned with the diversification of the work force and educational institutions. Its pervasiveness owes a great deal to Justice Powell's deciding opinion in *Bakke*, where he counseled against quotas in favor of plans such as Harvard's, where race played not a controlling role in the admissions process but was considered alongside various other individual characteristics. According to Justice Powell, and to advocates of affirmative action in general, diversity is a worthy and legitimate institutional goal – though *not a constitutional mandate*—for institutions of higher education. More broadly, this argument looks to the fabric of American society and social necessity in the face of the demands of an evolving multicultural world. Amy Gutmann explains: "Were it not for the presence of black students in universities like Princeton, students and teach-

would probably vote to scrap the entire patchwork of affirmative action measures in this country in favor of a massive capital infusion into inner-city day care and educational facilities. But this conclusion goes to affirmative action's costs and benefits, not to its constitutionality.").

29. For an early analysis of the debate and its myriad issues, see Robert M. O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971).

30. BICKEL, *supra* note 20, at 132. *Cf.* Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 34 (1992) ("Merely touting the successes of affirmative action, of course, is to glance at only one side of the ledger. On the other side are substantial costs. When examined in terms of both theory and practice, affirmative action deserves a negative judgment.").

ers alike would have far less sustained contact with significantly different life experiences and perceptions, and correspondingly less opportunity to develop the mutual respect that is a constitutive ideal of democratic citizenship."[31]

Second, the debate has carried on over the social costs and benefits of race conscious measures. The costs are many. In general, and as posited by Justice Brennan in his concurring opinion in *United Jewish Organizations of Williamsburg, Inc. v. Carey*, the use of racial classifications by the state may "stimulate our society's latent race consciousness."[32] Critics of race conscious decision-making argue that the use of race in any context, and under any circumstance, is invidious per se. The overarching goal is a colorblind society, a social condition where skin color is irrelevant. Affirmative action plans do not lead us towards that goal, but instead foster racial resentment[33] and divisive identity politics.[34] These measures, therefore, exact a heavy price on our long-term social goals. For this reason, "one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race."[35]

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31. Gutmann, *supra* note 26, at 127; *see* Trevor W. Coleman, *Affirmative Action is about people, not just numbers and grades*, DET. FREE PRESS, May 29, 1997, at 14A ("You cannot run the affairs of a state or nation that is growing in ethnic diversity and expect the victims of exclusion to accept their condition quietly. The anti-apartheid revolution in South Africa proved that."); Nathan Glazer, *In Defense of Preference*, NEW REPUBLIC, Apr. 6, 1998, at 18, 24; Philip L. Quinn, *Affirmative Action and the Multicultural Ideal*, *in* AFFIRMATIVE ACTION AND THE UNIVERSITY, *supra* note 26, at 197; Patricia J. Williams, Metro Broadcasting, Inc., v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990) (exalting the overall value of diversity as defended by the Court in *Metro Broadcasting*).

32. United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring). The following year, of course, Justice Brennan displayed different concerns. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

33. *See* THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? (1984); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986) (asserting that this argument is deployed by affirmative action critics).

34. *See* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 858 (1995). Similarly, critics argue that the categories in question are "arbitrary" and "absurd," as it is not entirely clear who qualifies as a beneficiary. Russell Nieli, *Ethnic Tribalism and Human Personhood*, *in* RACIAL PREFERENCE AND RACIAL JUSTICE, *supra* note 28, at 61; *see* Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L. Q. 147.

35. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979); *see* BICKEL, *supra* note 20, at 133 ("The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the

The social costs of race conscious policies are also measured in more practical terms. While departing from the shared goal of racial justice, some critical commentary argues that affirmative action plans do not lead us towards this worthy goal but away from it. The argument is one based on complacency, and the divestment of much needed attention for the real problems afflicting our nation's truly disadvantaged. In the words of one such critic:

The tragedy is that meanwhile, a great complex of issues lies untreated beyond affirmative action. Although these issues bear on life's prospects and the nature of opportunity in America, our leaders will not address them as directly as they should. These issues concern health, safety in the streets, and education, both academic and vocational. More attention must focus on, among other things, improving the quality of education in all schools. Especially deserving of improvements are those schools in which minorities are predominant, particularly the elementary grades, kindergarten, pre-kindergarten, and apprentice programs in which those without adequate job skills can learn them.[36]

This is one of the most serious charges leveled against race conscious plans.

In response, affirmative action advocates offer two views. First, and in direct response to the long-term argument for colorblindness, affirmative action supporters share Justice Blackmun's view that in "order to get beyond racism, we must first take account of race."[37] This is a corollary of the diversity ra-

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worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.").

36. Eastland, *supra* note 30, at 50; *see* Derrick A. Bell, Jr., *Xerces and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595 (1989) (arguing that instead of focusing on judicial doctrines and their flaws, we must analyze the larger mechanisms that help sustain socioeconomic status quo); Clint Bolick, *Minority Preferences Hurt, Not Help*, DET. FREE PRESS, August 27, 1998, at 15A ("Preferences only delay the day of reckoning, providing a superficial fix that fails to address the underlying educational inequalities."); Newt Gingrich & Ward Connerly, *Face the Failure of Racial Preferences*, N.Y. TIMES, June 15, 1997 , at 15 ("The racial preferences used in their name have been used as masks to avoid real reform. They have become an excuse to perpetuate an inner-city system to cheat those children most in need out of a real future."). *But see* Brent Staples, *The Trouble with J.C. Watts*, N.Y. TIMES, June 18, 1997, at A22 ("We shouldn't fight discrimination with discrimination . . . but this country has not reached a level playing field. You can't get rid of affirmative action until you have something to replace it." (quoting U.S. Congressman J.C. Watts)).

37. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring); *see* BORIS BITTKER, THE CASE FOR BLACK REPARATIONS 120 (1973) ("[W]e can have a color-blind society in the long run only if we refuse to be color-blind in the short run."); Gut-

tionale: our society is an ever-changing pastiche of races and cultures, and our institutions of higher education must prepare our students for it. Affirmative action is thus a practical way by which individuals of various races may come in contact with and learn from others. Second, by placing individuals who have been deprived of opportunities in the past in positions where they can achieve academically, two further benefits accrue: not only will these students move on and occupy influential leadership positions,[38] but the day will come when affirmative action will no longer be needed. On this view, affirmative action simply provides an initial opportunity, an opportunity which, with time, will eventually be phased out, as students and workers will overcome the institutional and social barriers standing in their way. When this day comes, this view concludes, and only then, will the dream of a colorblind society be truly attainable.[39]

Third, the most serious charges directed against affirmative action plans are those that focus on its costs to individuals. These costs run both ways. On one end, race conscious measures stigmatize the very same students they profess to help[40] and ultimately "undermin[e] [their] self-confidence."[41] Also looking to the costs on the individuals who benefit from affirmative action plans, commentators have further argued that "a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice."[42] Af-

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mann, *supra* note 26, at 131 (arguing that anyone committed to a view of justice as fairness would argue in favor of racial preferences because they "pave[ ] the way for a society in which fair equality of opportunity is a reality rather than merely an abstract promise").

38. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

39. *See* Gutmann, *supra* note 26, at 131 ("It is reasonable to think that by hiring qualified blacks for stereotypically white positions in greater numbers than blacks would be hired by color blind employers, the United States will move farther and faster in the direction of providing fair opportunity for all its citizens.").

40. Eastland, *supra* note 30, at 41-43; Charles Murray, *Affirmative Racism*, NEW REPUBLIC, Dec. 31, 1984, at 18; Alstyne, *supra* note 35, at 787 n.38 (asserting that affirmative action plans "unquestionably impose a racial stigma on those who benefit by them"); *see also* Brest & Oshige, *supra* note 34, at 858 ("Remedies based on race or ethnicity . . . may stigmatize and foster antagonism toward members of the groups that they are intended to benefit.").

41. SOWELL, *supra* note 33, at 118; *see* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

42. BICKEL, *supra* note 20, at 133; *see* Carl Cohen, DeFunis *Case: Race & the Constitution*, 220 NATION 135 (1975). On these terms, one may concede that the Constitution is directly implicated. Unfortunately, both Bickel and Cohen do a poor job of defending the invidious nature of racial preferences. And without that defense, their arguments prove unpersuasive.

firmative action is also unfair to innocent third parties, those individuals supposedly displaced by the admission of affirmative action applicants into the named institution.[43] Almost since the genesis of affirmative action practices, these individuals have fought back, and have won important battles in Court. In recent years, federal courts have been quite friendly to these victims, sometimes going as far as relaxing traditional doctrinal requirements in order to afford them their day in court.[44]

Two serious charges remain. First, critics charge that affirmative action places students in educational institutions where they can't compete.[45] While a student may perform admirably in a state college of moderate scholastic reputation, this view argues, the same may not be said of this same student in an elite schools, where she will have to compete with the very same students that outperformed her academically prior to admission. And worse yet, these programs will ultimately lead society to take a disdainful view towards minority graduates, as they will be viewed as less qualified, even after attaining their degrees.[46]

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43. *See, e.g.*, United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144, 173-74 (1977) (Brennan, J., concurring) (explaining that benign racial classifications may have adverse consequences, as they may be "viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification").

This is one of the leading objections about affirmative action plans. Without more, this argument is not enough. *See* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 54 (1976) ("It is a truism—only because it is true—that a practice may be unwise or even unfair and yet not be unconstitutional."); Rubenfeld, *supra* note 28, at 456 ("Affirmative action surely is unfair to whites, sharply and deeply so. . . . But constitutional law is not moral philosophy, and unfairness is not unconstitutionality.").

44. For a poignant example, see the Court's approach to standing in the racial districting cases of the last ten years, where the Court appears to have relaxed standing requirements in order to allow litigants to challenge the state actions in question. *See* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 311 (1995-96) (criticizing the Court's "inability to articulate and identify a concrete harm").

45. *See* STEPHAN & ABIGAIL THERNSTROM, AMERICAN IN BLACK AND WHITE (1997); Lino A. Graglia, *"Affirmative Action," Past, Present, and Future*, 22 OHIO N.U.L. REV. 1207, 1216 (1996); Scalia, *supra* note 34; Thomas Sowell, *Are Quotas Good for Blacks?*, 65 COMMENTARY 39 (1978).

46. *See* Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 571-72 (1975). *But see* Regents of the University of California v. Bakke, 438 U.S. 265, 400 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (arguing that, as all admitted students must satisfy the same degree requirements, all degrees are equal, whether the student benefited from affirmative action or not).

Advocates defend their support for affirmative action practices by pointing to the benefits of "identity role models," individuals in positions of influence who "teach black children that they too can realistically aspire to social accomplishment."[47] The overarching concern to which "role-model theory" is directed is self-defeatism, the view that societal discrimination engenders negative and pessimistic ideas about the world and one's chances of success. Our pessimism clouds our self-judgment, and the world around us offers little resistance; we look for those like us, those who have braved the elements and succeeded, yet cannot find anyone. Hence, on this view, it is beneficial for minority children to see teachers of their own race, or for minority employees and the public at large to see members of minority groups in managerial and other influential positions. Their mere presence, on this rendition of "role model theory," is enough.[48]

From this discussion, it should be clear why the debate is considered "boring"[49] and "steril[e]"[50] by many. On its terms, it offers little guidance, much less a dispositive argument. Dan Farber captures the debate in a simple paragraph:

> Opponents consider affirmative action to be reverse discrimination, charging that racial discrimination is equally wrong regardless of the race of the victim. Supporters retort that the relationship between African Americans and whites is hardly symmetrical, and that racial preferences are necessary to remedy discrimination, to provide role models for the disadvantaged, and to increase diversity. Opponents, in turn, attack these arguments as normatively wrong or empirically false. Although little new can be said about these arguments, the dispute continues with no sign of resolution.[51]

When debated along these lines, the controversy is certainly sterile. The debaters simply go around in circles, reframing familiar arguments in new and creative ways.[52] In fairness, this ob-

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47. Gutmann, *supra* note 26, at 131-32. Seen differently, this defense also falls under the "social benefits" category. Gutmann labels this view "diversity role models." In her own words: "[D]iversity role models teach all children and adults alike that blacks are accomplished contributors to our society from whom we may all learn." *Id.* at 132.

48. This justification has not fared well. *See* Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (rejecting the "role model theory" as a basis for justifying a racial classification).

49. Rubenfeld, *supra* note 28, at 427.

50. Farber, *supra* note 27, at 894.

51. *Id.* at 893-94.

52. *See* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1845 (1996) (asserting that the debate "has gotten repetitive, and morbidly so."); Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 159 (1994) (remarking

servation applies with equal force to the federal judiciary. Rather than elevating one policy preference over another, in the name of the Constitution, it is clear to us that the courts should defer these decisions to those state actors with the knowledge and expertise in this area. That means that the courts should defer to the decisions of our institutions of higher education, as guided and controlled by their boards of regents and ultimately by their state legislatures and their state Constitutions. This conclusion remains unaffected by the legal arguments made against race conscious policies, which we examine in the next section.

B. THE JUDICIAL PARADOX

The Supreme Court joined the affirmative action debate early on, acting under its implicit authority to protect the Fourteenth Amendment's hopelessly indeterminate language. While doing so, and much to the chagrin of race consciousness supporters, the Supreme Court has struck down affirmative action plans from institutions of higher education,[53] local governments,[54] and even Congress.[55]

In acting this way, the modern Court invites comparisons to the *Lochner* era, a time when the Court actively pursued its policy aims despite scarce constitutional support.[56] This judicial reaction raises interesting puzzles and conundrums. Dairy and pulpwood industrialists, to provide a well-documented example, can raid their legislatures and ask for legislative spoils;[57] so can, for that matter, optometrists and ophthalmologists.[58] Racial minorities, conversely, can not do the same.[59] The Equal Protection

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that the combatants "have worn deep grooves repeating the same basic arguments and counterarguments over and over").

53. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see also* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

54. *See* Richmond v. Croson, 488 U.S. 469 (1989).

55. *See* Adarand Constructors Inc, v. Pena, 515 U.S. 200 (1995).

56. *See* Morton J. Horwitz, *The Supreme Court, 1992 Term- Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 40 (1993) ("By tying its holdings to such reified concepts as 'content neutrality' and 'color blindness,' the current Court threatens to repeat the errors of the most infamous of premodern Courts, the Lochner Court."); *id.* at 102-09 (directing his argument specifically to the race cases); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 336-37 (1997) (equating the racial gerrymandering cases to the *Lochner* era).

57. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

58. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

59. This is puzzling for a number of reasons. To name a few: we understand ourselves as members of groups, not as individuals. Perhaps we *should* understand ourselves

Clause stands in the way of legislation enacted for the benefit (and we suppose, yet skeptically,[60] the invidious disadvantage) of racial minorities.

This is an ultimately perverse paradox, especially in light of our nation's troubled racial history. Under modern equal protection doctrine, once the Court determines that a group has been previously disadvantaged, the government's power *to help* this group is severely restricted. And in fact, when the government does choose to act, such legislation is subject to strict review, and is generally deemed unconstitutional. As David Strauss writes, "[t]his cannot possibly be the right approach."[61]

Four approaches are worth considering. First, go back to the constitutional source of dispute. When the Court turns to the Constitution, the text provides scant support: "No State shall . . . deny to any person within its jurisdiction the equal protection of

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as individuals, aside from our ethnic and racial ties. *See* Jürgen Habermas, *Multiculturalism and the Liberal State*, 47 STAN. L. REV. 849 (1995) (arguing that the central issue in the race consciousness debate is whether "citizens' identities as members of ethnic, cultural, or religious groups publicly matter, and, if so, how can collective identities make a difference within the frame of a constitutional democracy?"). Yet, without more, and to echo argument made in the previous section, this is hardly a concern of constitutional dimensions. Further, all classifications will always hurt individuals in some respects; thus, why are racial classifications so pernicious, in terms of winning and losing, getting in or not, in ways that other classifications are not? *See* Fiss, *supra* note 24. To its detriment, and ultimately our own, the Court does not say.

60. *Cf.* McCleskey v. Kemp, 481 U.S. 279 (1987) (refusing to intervene in favor of black defendants in the face of a study that, at least at the time the Court held the case, concluded that "defendants charged with killing whites were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks"); City of Memphis v. Greene, 451 U.S. 100 (1981); Washington v. Davis, 426 U.S. 229 (1976); Palmer v. Thompson, 403 U.S. 217 (1971).

In this vein, Mark Strasser argues that a double standard exists for discrimination cases, with the Court more worried about the effects of benign discrimination policies. This double standard, he continues, will not promote the racial acceptance and harmony that the Court claims to want." Instead, this double standard "cannot help but promote the view that the Court does not want to rectify past injustice or even extirpate inappropriate views about race, but rather wants to maintain the status quo or, perhaps, the status quo of a bygone era." Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 403 (1994); *see* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (arguing that the affirmative action backlash ultimately boils down to racism); JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996).

61. David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 13; *see* Rubenfeld, *supra* note 28, at 471 ("Affirmative action, with all its costs and imperfections, is not inconsistent with the commitment made by this nation when it enacted the Fourteenth Amendment. On the contrary, there is a reason why Congress enacted 'colored relief' legislation at the same time this commitment was laid down. The reason is justice — constitutional justice.").

the laws."[62] Without more, it is hard to know what to make of this clause.[63] The text speaks of the denial of equal protection, implicitly pointing away from a legal regime where laws are enforced unequally, to the detriment of disfavored persons.[64] From this language, the facts in *Yick Wo*, where a local statute was applied to Chinese Americans with a vengeance, but hardly ever to whites, appear to be what the framers had in mind.[65] As a facial matter, the equal protection clause does not speak directly to racial preferences.

A second leading argument, originalism, also helps modern critics little. According to this interpretive method, constitutional adjudication turns on the intention of the framers of the document. While this methodology freezes constitutional meanings, its proponents hail this fact as its greatest virtue.[66] Under this guideline, affirmative action plans would appear to pass constitutional scrutiny. It is well documented, for example, that the Reconstruction Congress passed a great deal of color conscious legislation during the time it debated and drafted the 14th Amendment.[67] For those who speak in terms of racial discrimination in general, such as modern affirmative action critics, it is clear that such an understanding of the clause is nowhere preordained. In fact, the history of the Fourteenth Amendment would draw a clear distinction between the discriminatory acts. In other words, the clause would apply only to invidious racial

62. U.S. CONST. amend. XIV.

63. For a classic discussion of the equality principle, and the various difficulties inherent in its judicial application, see Joseph Tussman & Jacobus tenBrock, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

64. *Cf.* West, *supra* note 27, at 129 (arguing that "the plainest possible meaning of the Fourteenth Amendment mandate that no state shall deny to any citizen 'equal protection of the law' is that no state may deny to any citizen the protection of its criminal and civil law against private violence and private violation").

65. Yick Wo v. Hopkins, 118 U.S. 356 (1886). In *Yick Wo*, the Supreme Court struck down a racially neutral city ordinance against wooden laundry buildings enforced almost exclusively against Chinese owners.

66. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("Originalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.").

67. *See* Rubenfeld, *supra* note 28; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. R. 477, 556-65 (1998); *see also* Eric Foner, *The Supreme Court's Legal History*, 23 RUTGERS L. J. 243, 247 (1992) ("If I act as an amateur legal scholar, the Supreme Court justices act as amateur legal historians. . . . [Court decisions] suggest that [the justices] have a great deal to learn about the real original purposes of the Reconstruction Congress and the Fourteenth Amendment.").

discriminations rather than to all classifications made along racial lines.[68] As we argue below, affirmative action is invidious neither in theory nor in practice.

A third argument takes advantage of the open-ended text. In the words of Justice Scalia: "The ascendant school of constitutional interpretation affirms the existence of what is called the Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society."[69] This is an interpretive tool that most conservative commentators and jurists view with great scorn,[70] for obvious reasons. Adherents of the "Living Constitution" view worry about "the supremacy of the human dignity of every individual,"[71] and view the Supreme Court "as the voice and conscience of contemporary society."[72] To the critics, these are but justifications for interposing one's subjective preferences on legitimate and authoritative democratic outcomes.

This position is intuitively appealing to many, especially those distrustful of majorities. Placed in historical context, this argument has gained much support following the advent of the Warren Court. The pressing concern this view must address, of course, centers on the discovery of any such values by independent federal judges. Specifically on the question of affirmative action, for example, critics are quick to point out that public opinion polls strongly suggest that most racial groups, even racial

68. *See, e.g.*, The Slaughter-House Cases, 83 U.S. 36 (1873); Strauder v. West Virginia, 100 U.S. 303 (1879).

69. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997); *see* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

70. As Justice Rehnquist observed long ago, this argument places judges as "a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country." Rehnquist, *supra* note 69, at 698.

To be fair, progressives do not have proprietary rights over "living constitution" arguments, and critics can now point to the Warren Court era and smile, secure in the knowledge that the roles appear to have shifted. All we should ask is for a little more candor; after all, as Rubenfeld writes, "they are calling on courts to render the kind of judgment about justice (beyond the letter of the law, beyond original intent) that elsewhere they deplore." Rubenfeld, *supra* note 28, at 432.

71. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

72. Quoted in Rehnquist, *supra* note 69, at 695; *see* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979) ("The function of a judge is to give concrete meaning and application to our constitutional values.").

minorities, object to the idea of racial preferences.[73] From this apparent reality, one may plausibly argue that affirmative action programs violate some amorphous American notion of shared constitutional values. Paradoxically, this is a sensible way to understand the Court's long-standing derision to race-conscious measures.

However, public opinion polls are not as definitive as critics imply. In fact, competing accounts suggest exactly the opposite: a strong racial divide exists on the question of affirmative action, with blacks showing solid support for the programs, while whites oppose them strongly.[74] Therefore, these constitutional values are not, as critics posit, universally shared after all, but judicially imposed on the basis of personal attitudes.[75] Taken in its strongest form, then, the "Living Constitution" also fails to offer a much-needed argument.

A final argument focuses on the moral failings of race-conscious practices. Interestingly, this is the leading critique, however unacknowledged, against race conscious measures. Critics seldom couch their criticisms in these terms, yet their arguments implicitly fall under this interpretivist school. Justice Scalia and his fellow interpretivist travelers lie closer to Ronald Dworkin's moral constructionism than they ever acknowledge.

The argument is deceptively simple. In the words of Alexander Bickel, "a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice."[76] This is perhaps the strongest constitutional attack on affirmative action. Anything that derogates a person's dignity cannot possibly be a good thing, and it is not a great leap to conclude that the Constitution has something to say about it. Unfortunately, the argument goes wholly unsupported, its truth seemingly indisputable.

Our national disdain for quotas of any kind, especially racial ones, is well known. The nomination of Lani Guinier's to head

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73. *See* Scalia, *supra* note 34; Sowell, *supra* note 33.

74. *See* DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS (1996).

75. It is hardly disputable that a Court majority dislikes race conscious measures, and its doctrinal stance stems from this position. The law does little work for the Court here, and attitudes drive the analysis. For a general rendition of the attitudinalist view, see JEFFREY ALLAN SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

76. BICKEL, *supra* note 20, at 133; *see* Cohen, *supra* note 42.

the Justice Department's Civil Rights Division provides an unfortunate example. In a world dominated by sound bites, her opponents were quick to brand her, if undeservedly, as "a quota queen."[77] The label stuck, and her nomination was soon withdrawn. Interestingly, while the label stuck, arguments against quotas themselves were seldom, if ever, made public.

The same goes for affirmative action programs. Essentially, critics present an argument against race consciousness (and implicitly against quotas) grounded on interrelated notions of merit, discrimination, and innocent victimhood. The basic argument runs like this: schools make admission decisions based mostly on grades and aptitude test scores, and those with better quantitative qualifications deserve admission. When students in the applicant pool are compared against one another, or when seats are set aside for race conscious purposes, some students with inferior qualifications are still offered admissions, thanks in great part, if not solely, to preferences accorded on the basis of race. Those hypothetical students, who would have been offered admission but for the affirmative action program, are discriminated against, innocent victims of social engineering practices.[78]

This argument ultimately tries to prove too much. For example, the most damning charge against affirmative action policies is the notion of merit. As the critics present their case, merit must determine the disbursement of seats to our prestigious pub-

77. *See* Stephen Carter, *Foreword*, *in* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY vii (1994).

78. This view is exemplified by Justice Scalia's dissent in *Johnson v. Transportation Agency*, a Title VII case:

> the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals — predominantly unknown, unaffluent, unorganized — suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.

Johnson v. Transportation Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting). While Scalia's views were voiced in a dissenting opinion, we have little doubt that today they carry a majority of the Court. *See also* Fullilove v. Klutznick, 448 U.S. 448, 530 n.12 (1980) (Stewart J., dissenting) (arguing that innocent white workers should not be made to pay "for the sins of others of their own race"); Roger Pilon, *Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues*, 45 AM. U. L. REV. 775, 789 (1996). *But see* RONALD J. FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION (Stephen L. Wasby ed., 1992) (disagreeing with this characterization of victimhood, since minorities would have had a larger proportion of society's goods in a nonracist environment, which the real world is not); Jerome McCristal Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, the NAS, and Apartheid*, 41 DEPAUL L. REV. 1141 (1992) (explaining that affirmative action is necessary to redress past hiring practices, and is not unfair to "innocent" whites); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (defending the position that arguments about "innocent white victims" are grounded on racist ideology).

lic institutions. Few would argue this point. "Merit" must certainly determine how precious positions in higher education institutions must be allotted. The crux of the argument is in defining exactly what merit entails. Constructed narrowly, scholastic merit is a matter easily quantified, and gauged simply by grades and aptitude test scores.[79] Higher test scorers are consequently seen as deserving of their seats. A critique of this narrow view is easy.[80] A more expansive definition would encompass various

79. *See* Ellia Cose, *The Color Bind*, NEWSWEEK, May 12, 1997, at 58, 59; *see, e.g.*, Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1322 (1986). And yet, even Douglas' dissent in *DeFunis*, while abhorring racial classifications of any kind, is still willing to leave the matter of qualifications to the discretion of school administrators. This results from his skepticism about the value of the criteria traditionally used, and their impact on minority students. *See* DeFunis v. Odegaard, 416 U.S. 312, 320. One of the nation's foremost opponents of affirmative action agrees. Ward Connerly, the infamous University of California regent, says it is "absurd" for schools to rely on grades and test scores alone. Julian E. Barnes, *A Surprising Turn on Minority Enrollment*, U.S. NEWS & WORLD REPORT, Dec. 29, 1997, at 34. For a recent study on the LSAT and its predictive value, see William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975 (2004).

80. Amy Gutmann argues, for example, that simply because someone qualifies for a given position does not mean that they merit it. *See* Gutmann, *supra* note 26, at 119. Specifically in the case of higher education, for example, many individuals qualify for a seat in an entering class. The ultimate decision as to the admission itself must follow from the qualifications in question, but not automatically. Injustice does not follow from selecting a given candidate from a pool of qualified applicants. As long as the stated qualifications are met, applicants who fail to gain admittance may not claim that the process has treated them unjustly. If it were otherwise, as Gutmann explains, society "would . . . [be] hostage to the job preferences of qualified people." *Id.* at 120.

For a sampling of the many criticisms of the merit principle, see BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION 102-06 (1996); Dworkin, *supra* note 5; PHILIP GREEN, THE PURSUIT OF INEQUALITY 168-76 (1981); CHARLES R. LAWRENCE III AND MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 91-111 (1997); Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream that is America*, 23 HASTINGS CONST. L.Q. 1115, 1123 (1996) ("[M]erit and fairness are deployed in ways that mask the real issues, white entitlement and patriarchy."); Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U.L. REV. 1159, 1172 (1996) (explaining that "'merit' must include all that makes a person deserving of entrance. Because the importance of diversity, merit often should include what a person will add to the education of other students"); Gutmann, *supra* note 26 at 106; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1766-77 (1993); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2052 (1991) (arguing that meritocratic standards are a "gate built by a white male hegemony that requires a password in the white man's voice for passage"); Kenneth L. Karst & Harold W. Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 962 (1974); Kennedy, *supra* note 33, at 1322-23, 1333 n.20; John Morrison, *Color-blindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313 (1994); Yxta Maya Murray, *Merit-Teaching*, 23 HASTINGS CONST. L.Q. 1073 (1996); Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251 (1995) (criticizing merit and efficiency, and specifically the weak predictive strength of tests in the employment context);

other criteria, including whatever obstacles a student overcame throughout her educational life, life and educational opportunities, the performance of extracurricular work, and even race.[81] A resolution of this debate over merit in particular, and affirmative action in general, seems nowhere in sight.[82]

Furthermore, critics of racial preferences couch their strongest objections in the universally-derided language of discrimination. The concern here is not about invidious discrimination as commonly understood,[83] where members of the majority race purposefully degrade those in the minority, but rather discrimination against whites. On this view, race conscious policies are a form of reverse discrimination against those persons who are kept from receiving deserved benefits. In the words of a Michigan state legislator, referring to the University of Michigan's affirmative action policy: "[w]e believe that discrimination is widespread and the discrimination is so blatant, that it would be an easy case to win in a court of law."[84] Yet how exactly are

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cf. Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995) *with* Frank Wu, *From Black and White and Back Again*, 3 ASIAN L.J. 185, 215 (1996) (arguing that Sherry and Farber's "radical critique of merit" is a straw man).

81. *See also* Karst &. Horowitz, *supra* note 80, at 967 (defining individual merit as the "selection of attributes common to a group [ ] according to a perception of social needs"); Murray, *supra* note 80, at 1075 (arguing for the concept of merit teaching, which the author defines as "the expansion of our current definition of merit to include the contributions of previously silenced voices").

82. The Supreme Court has provided conflicting messages on this issue, at least in the context of employment practices. On the one hand, the Court has approved affirmative action plans whenever specific instances of discrimination by government, unions, or employers can be established. Conversely, the Court has also held that governmental entities may not attempt to remedy prior employment discrimination through race conscious layoffs because the burden on innocent victims is too heavy. *See* Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

83. *See, e.g.*, Brest, *supra* note 43, at 6 ("[T]he antidiscrimination principle disfavors race-dependent decisions and conduct — at least when they selectively disadvantage the members of a minority group.").

84. John A. Woods, *Lawmakers Attack U-M Admissions*, THE ANN ARBOR NEWS, May 2, 1997, at A1 (quoting Michigan state representative Deborah Whyman). Months later, she reiterated this view: "Many parents pay taxes to fund an educational establishment that may discriminate against their children in admissions or employment." Deborah Whyman, *The Courage to Reform Affirmative Action*, DET. NEWS, July 14, 1998, at 6A. From her position, notice how little we know: discrimination is bad, and schools must stop discriminating among applicants. To be fair, she is only concerned with *racial* discriminations of any kind, a position she equates to a "constitutional right." *Id.*

And yet, right after she writes that schools discriminate on a racial basis, she tells us that she "find[s] this extremely unfair," and that this "was the main reason for [her] amendment [to the state education budget, prohibiting the use of race during the college admission process]." *Id.* As long as we are debating the policy wisdom of affirmative action practices, we commend Rep. Whyman for acting on the strength of her moral convictions. Once she turns her attention to the Constitution, she might still be correct, but

race conscious policies discriminatory in a constitutionally relevant sense?

Here's an easy hypothetical for higher education: as the founder of a major university, you have twenty open seats for the incoming medical school class. As it happens, you receive over one hundred applications for the twenty spots. Under what basis do you assign your scarce medical school seats? You may decide to award ten of your seats in the incoming class to tall people; or brown eyed people; or those living in Appalachia; or foreign citizens, or Long Islanders, to compensate for their rugged, unhealthy existence in such unforgiving parts of the world; or to Latinos. Of those who don't get accepted by the university, many have a better record than these ten students who have been accepted. How is the your policy discriminatory in any way? What's the discrimination, exactly?[85] Any policy the university adopts will discriminate.[86] Going strictly by LSAT's and GPA's discriminates against those with bad grades or LSAT scores, or those who simply test badly, or those who do not test well under timed conditions.[87] We don't mean to be unduly flip about this position; upon reflection, this point is hardly as outra-

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she fails to proffer an argument to support her position.

85. *See* Fiss, *supra* note 24, at 109 ("[N]ot all discriminations can be prohibited: the word 'to discriminate,' once divested of its emotional connotation, simply means to distinguish or to draw a line."); *cf.* Gutmann, *supra* note 26, at 126 ("Nondiscrimination means that equal consideration should be given to all qualified candidates so that candidates are chosen on the basis of their qualifications, where qualifications are set that are relevant to the *legitimate social purposes* of the position in question.") (enphasis added).

86. Thus, to argue that racial quotas bring "a cost in injustice," without more, makes little sense. BICKEL, *supra* note 20, at 132; *see* AARON B. WILDAVSKY, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS 239 (1979) ("positive discrimination is fundamentally wrong"). Michael Levin, *Negative Liberty*, *in* LIBERTY AND EQUALITY 84 (Ellen Frankel Paul, Fred D. Miller, Jr., & Jeffrey Paul eds., 1985) (equating benign with invidious discrimination). All criteria discriminate in one way or another. The question instead centers around the justifications for using certain criteria over others. Race, in and of itself, is not any better or any worse than some of the criteria currently used. Affirmative action critics need an argument, not conclusions. *See* RONALD DWORKIN, LAW'S EMPIRE 395 (1986) ("[I]f race were a banned category because people cannot choose their race, then intelligence, geographical background, and physical ability would have to be banned as well."); PETER KNAPP ET AL., THE ASSAULT ON EQUALITY 150 (1996) (complaining about the "massive affirmative action programs for the privileged," e.g., "preferential admissions for alumni children, graduates of elite prep schools, and old-boy networks of contacts which make information about a job or school available – both in education and in business"); Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1172 (1996) (explaining that LSATs and grades often fail to predict a great deal, yet pass for standard accounts of objective merit).

87. *See* Henderson, *supra* note 79.

geous as it might first seem. Compare, for example, the argument posited by Karst and Horowitz:

> Whether "merit" be defined in terms of demonstrated achievement or of potential achievement, it includes a large and hard-to-isolate ingredient of native talents. These talents resemble race in that they are beyond the control of the individual whose "merit" is being evaluated. If racial classifications are "suspect" partly for this reason, then it may be appropriate to insist that public rewards for native talents be justified by a showing of compelling necessity.[88]

Basing admission decisions on high-test scorers, for example, must be justified in some way, if the discrimination argument is to be considered at all. We accept certain discriminations, under the guise of merits and "proper standards," yet not others. Are these accepted discriminations intended to reward those with the best records? Or are they simply predictors of future success? If seen as rewards, then rewards and punishments may be handed out for a number of different reasons aside from the ones presently used. Notions of just desert are not self-evident to all, especially those at the bottom of the societal hierarchy, those shut out from the admission process. And if predictors of future success, well, why not simply use the Myers-Briggs Type Indicator, which purports to assess our personal strengths and styles, or a battery of aptitude tests, which may measure the type of employment for which individuals are best suited? These are not easy questions.[89]

To the charge that university officials discriminate against certain applicants on the basis of race, then, the counter argument is too obvious: schools discriminate, must discriminate, on a number of different predetermined criteria. These criteria vary from one institution to the next, to be sure, but all schools take a diverse number of criteria into account. Therefore, an argument

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88. Karst &. Horowitz, *supra* note 80, at 962. *See* LAWRENCE & MATSUDA, *supra* note 80, at 104-05; Richard Wasserstrom, *The University and the Case for Preferential Treatment, in* SOCIAL JUSTICE AND PREFERENTIAL TREATMENT: WOMEN AND RACIAL MINORITIES IN EDUCATION AND BUSINESS 16, 19-25 (William T. Blackstone & Robert D. Heslop eds., 1977).

89. Such difficulties, in fact, may lead one to conclude that we should select people on a strictly random basis, by way of a lottery. *See* DeFunis v. Odegaard, 416 U.S. 312, 344 (1974) (Douglas, J., dissenting) ("Conceivably, an admissions committee might conclude that a selection by lot of, say, the last 20 seats is the only fair solution [to the problem raised by racial preferences in the context of college admissions]"); Lani Guinier, *The Real Bias in Higher Education*, N.Y. TIMES, June 27, 1997, at A19 ("One alternative is for schools to set a minimum test score as acceptable and then hold what is in effect a lottery for admission among the applicants who meet the minimum standard.").

positing the reasons why schools may discriminate on all these other issues, but not on a racial basis, is necessary. The critics seldom offer one.

II. *GRUTTER* AND DEFERENCE

This Part situates the Court's recent decision in *Grutter v. Bollinger*, the law school affirmative action case, within the context of race consciousness as a question of social policy, not constitutional law. This Part analyzes the Court's decision in *Grutter* and explains why the decision proved surprising in many ways. In the end, it ultimately defends the Court's holding of deference as proper within the context of admissions to educational institutions.

A. THE APPLICATION OF DEFERENCE

In *Grutter v. Bollinger*, the Supreme Court concluded that the University of Michigan Law School's affirmative action program did not violate the Constitution.[90] The Law School had argued that race-conscious admissions were necessary to achieve student body diversity and to attain a "critical mass" of students of color.[91] The central questions in the case of course were whether diversity is a compelling state interest and if so, whether the Law School's use of race was narrowly-tailored.

In resolving the issue of the centrality of race-conscious admissions to the University's educational mission, the Court stated that the "Law School's educational judgment that . . . [racial] diversity is essential to its educational mission is one to which we defer."[92] The Court offered two justifications to support its decision to defer to the Law School's statement that diversity is necessary to its educational mission. First, the Court relied upon the "long recognized" tradition of academic freedom. As Justice O'Connor stated, "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[93] Consequently, universities have a right, grounded in notions of aca-

90. Grutter v. Bollinger, 539 U.S. 306 (2003).
91. *Id.* at 329.
92. *Id.* at 328.
93. *Id.* at 329.

demic freedom and freedom of speech and association, to define and implement their mission.

The Court nevertheless had to determine whether the Law School had a compelling need for attaining a diverse student body. The Court had no difficulty concluding that "attaining a diverse student body is at the heart of the Law School's proper institutional mission."[94] Moreover, the Court was quick to recognize that whether racial diversity is important to the educational mission of a law school or university involves "complex educational judgments in an area that lies primarily within the expertise of the university."[95]

Second, the Court was also persuaded by the evidenced amassed by the Law School that racial diversity is important to the educational mission of a university.[96] The Court maintained that the benefits of racial diversity "are substantial."[97] They include the promotion of cross-racial understandings, the dissolution of racial stereotypes, and the intellectual exchanges that are the result of a having classroom discussions that are informed by individuals of a "variety of backgrounds."[98]

The Law School's assertions were supplemented by supporters who confirmed the benefits of racial diversity that were advanced by the Law School and who propounded additional benefits of racial diversity. For example, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[99] Further, "high-ranking retired offices and civilian leaders of the United States military" have testified to the importance of racial diversity in higher education to the mission of the armed forces.[100]

In view of all of this evidence, the Court held that the Law School's justification for its raceconscious admissions process was compelling and that the Law School's judgment on its educational mission was worthy of deference in the absence of a lack

94. *Id.*
95. *Id.* at 328.
96. *Id.* ("The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*.").
97. *Id.* at 330.
98. *Id.*
99. *Id.* at 308.
100. *Id.* at 331.

of "'good faith' on the part of [the] university," which is "'presumed"' unless there is "'a showing to the contrary."'[101]

With respect to the narrow tailoring prong of strict scrutiny, the Court delineated three factors that are relevant to successfully traverse the narrow tailoring analysis. First, a university cannot use a quota system[102] or use race in a mechanical and inflexible manner.[103] Second, the process must guarantee that each applicant is subject to individualized consideration.[104] Individualized consideration means that each applicant must have the opportunity to meet the stated criterion and that the university "cannot insulate applicants who belong to certain racial or ethnic groups from the competition for admission."[105] Third, race cannot be "the defining feature" of the application process.[106] If diversity is the relevant evaluative criterion, "all factors that contribute to student body diversity [must be]... meaningfully considered alongside race in admission decisions."[107] Put differently, while race may be on the menu, it cannot be the main course and it certainly cannot be the only offering on the menu.

The Court concluded that the Law School did not violate any of these three elements of the narrow-tailoring analysis. First, while the Law School expressed a goal of attaining a critical mass of underrepresented students of color, the Court resolved that this goal—which required the law school to be conscious of the race of individuals in its applicant pool, the race of the individuals to whom it extended offers, and the race of the individuals who accepted the Law School's offer of admissions—was not the functional equivalent of a quota. The Court reasoned that to the extent that attaining a critical mass of underrepresented students of color was a legitimate goal—which the Court concluded that it was if achieving student diversity was a compelling interest—the school is entitled to pay "[s]ome attention to numbers" and the "relationship between numbers and

101. *Id.* at 343.

102. *Id.* at 334 ("To be narrowly tailored, a race-conscious admission program cannot use a quota system.").

103. *Id.* (noting that a "truly individualized consideration demands that race be used in a flexible, nonmechanical way"); *see also id.* at 337.

104. *Id.* at 336-37 ("When using race ... in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual.").

105. *Id.* at 334.

106. *Id.* at 337.

107. *Id.* at 337.

achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted."[108]

The Court also concluded that the Law School treated each applicant as an individual. Each applicant is evaluated on the basis of their ability to contribute to relevant criteria including diversity.[109] Moreover, the Law School's evaluation of the applicant's diversity is not limited to racial diversity but also included geographic diversity among other diversity considerations.[110] Having navigated these shoals successfully, the Law School's program was deemed worthy of the Court's blessings.

B. *GRUTTER'S* DEFERENCE AS DIVERGENT

The Court's decision in *Grutter* to defer to the judgment of the administrators at the University of Michigan that attaining racial diversity is a compelling state interest and the Court's application of strict scrutiny was surprising for a number of reasons. First, the Court's prior modern precedents had interpreted the Equal Protection Clause in an extremely formalistic manner to severely narrow the ability of state actors to engage in race-based decisionmaking. Prior to *Grutter*, strict scrutiny appeared to serve as a talismanic incantation whose very utterance portended its dire consequences.[111] Thus, the phrase made famous by the late Gerald Gunther that strict scrutiny is "strict in theory but fatal in fact."[112] "With the possible exception of *Easley v. Cromartie*,[113] the Court had never sustained a racial classification against an equal protection challenge and the application of strict scrutiny."[114] Strict scrutiny as a concept and as constitutional analysis was characterized—erroneously as we shall argue below—as a mechanical and wooden test that simply meant unconstitutional.

Second, the Court had taken great pains to stress the necessity and importance of judicial review of state classifications on

108. *Id.* at 336 (internal quotation marks omitted).
109. *Id.* at 337.
110. *Id.* at 338.
111. *See, e.g.*, Bernal v. Fainter, 476 U.S. 216, 220 & n.6 (1984).
112. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).
113. 532 U.S. 234, 237 (2001).
114. Guy-Uriel E. Charles, *Affirmative Action and Colorblindness From the Original Position*, 78 TUL. L. REV. 2009, 2010 (2004).

the basis of race. The Court articulated two general values vindicated by judicial review. The first value reflected the Court's skepticism that state actors can deploy carefully the explosive devices that are racial classifications. For example in *City of Richmond v. Croson*,[115] the Court through Justice O'Connor stated that the purpose of searching judicial 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."[116] Similarly, in *Adarand Constructors, Inc. v. Pena*,[117] again in an opinion by Justice O'Connor, the Court stated that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[118] The Court went on to note that "all governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."[119] Strict scrutiny assured that "a government classification based on race, which 'so seldom provide[s] a relevant basis for disparate treatment,' is legitimate, before permitting unequal treatment based on race."[120]

The second value underscores the Court's concern that racial classifications "carry the danger of stigmatic harm." Racial classifications may "promote notions of racial inferiority and lead to a politics of racial hostility."[121] Similarly, in *Shaw v. Reno*, the Court stated that "classifications of citizens solely on the basis of race . . . threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."[122] Because of those dangers, the Court has sought to evaluate strictly state action that involves racial categorizations. As the Court stated in *Croson*, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or

115. 488 U.S. 469 (1989).
116. *Croson*, 488 U.S. at 493.
117. 515 U.S. 200 (1985).
118. *Adarand*, 515 U.S. at 224.
119. *Id.* at 227.
120. *Id.* at 228.
121. *Croson*, 488 U.S. at 493.
122. Shaw v. Reno, 509 U.S. 630, 643 (1993).

'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[123]

The Court's decision to defer to the University in *Grutter* may have been surprising for at least a third reason. Because the Court distrusted the state's judgment in using racial classifications, the Court had steadily narrowed the available justifications for state action on the basis of race. In *Bakke*, Justice Powell argued that remedying societal discrimination was not a compelling state interest.[124] In *Wygant v. Jackson Board of Education*,[125] the Court concluded that providing teachers as role models for students of color could not justify state action on the basis of race.[126]

In the post-*Bakke* world one could count on two justifications for racial categorization by the state: remedying past discrimination and the diversity rationale. Following *Bakke*, many justices in both *Croson* and *Adarand* raised questions as to the continued validity of both rationales. For example in *Croson*, Justice O'Connor remarked that racial classifications exact severe constitutional costs "[u]nless they are strictlyreserved for remedial settings."[127] This is a statement that must be understood from the context of Justice O'Connor's dissent in *Metro Broadcasting, Inc. v. Federal Communications Commission*,[128] where she maintained, "[u]nder . . . strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection has recognized only one interest: remedying the effects of racial discrimination. The interest in increasing diversity of broadcast viewpoints is clearly not a compelling interest."[129] Instructively, Justice O'Connor went on to exclaim:

> [T]he interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior. And it will prove impossible to distinguish naked preferences for members of particular races from preferences for members of particular races because they possess certain valued views: No matter what is purpose,

123. *Croson*, 488 U.S. at 493.
124. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307-310 (1978).
125. 476 U.S. 267 (1986).
126. *Wygant*, 476 U.S. at 274-76.
127. *Croson*, 488 U.S. at 493.
128. 497 U.S. 547 (1990).
129. *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting).

> the Government will be able to claim that it has favored certain persons for their ability, stemming from race, to contribute distinctive views or perspectives.[130]

In *Croson*, Justice Scalia maintained emphatically that race-conscious state action is always unconstitutional except in one circumstance. As he argued, the state can only use racial categories when "necessary to eliminate their own maintenance of a system of unlawful racial classification."[131] In *Adarand*, Justice Scalia advanced this position even more forcefully. He stated:

> In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debor race. . . . To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produce race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

While Justice Scalia's vision—as depicted in *Croson* and *Adarand*—was more aspirational that actual and more normative than descriptive, he nevertheless articulated what was widely perceived to be the inexorable direction of the Court's race jurisprudence. Indeed, so clear was the trend line of the Court's race doctrine that the Fifth Circuit in *Hopwood v. Texas*[132] struck down the University of Texas Law School's affirmative action program on the ground that diversity is not a compelling state interest.[133] That court stated, "we see the case-law as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would contravene precedent that we are not authorized to challenge."[134]

The *Hopwood* court was being of course disingenuous and overly dramatic. There was no clearly established case law; the

130. *Id.* at 615-16.
131. *Croson*, 488 U.S. at 524.
132. 78 F.3d 932 (5th Cir. 1996).
133. *Hopwood*, 78 F.3d at 945.
134. *Hopwood*, 78 F.3d at 945-46.

Supreme Court had not held that diversity is not a compelling state interest. No lower court had held that diversity is not a compelling state interest. In fact, *Hopwood* was the first case to so hold. Thus, there was no precedent to challenge. However, the Fifth Circuit in *Hopwood* was clearly anticipating and extrapolating from what was reasonably assumed to be the evident trend of the Court's racial jurisprudence and undoubtedly prodding it along.

C. *GRUTTER'S* CONVERGENCE: AN INTERNAL DEFENSE OF *GRUTTER'S* DEFERENCE

From this perspective, Chief Justice Rehnquist and Justices Thomas and Kennedy understandably decried the Court's decision to defer to the judgment of university administrators on the propriety of raceconsciousness in admissions. *Grutter's* deference is inconsistent with the presumed formalistic application of strict scrutiny that was characteristic of the Court's race decisions. Deference is incompatible with the judicial skepticism, if not downright hostility, that invariably confronted the state's limited justifications for creating racial classifications. Deference is also inconsistent with the general tenor of the Court's jurisprudence, which was to eliminate ultimately—and not sanction—state action on the basis of race.

Nevertheless, is the Court's decision to defer to the judgment of university officials in *Grutter* defensible? In this subpart we offer an internal defense of the Court's decision. We argue that the Court's decision can be defended on doctrinal grounds. Our central point here is that the primary complaint against the Court's decision in *Grutter*—that the Court's deference to the State and its application of strict scrutiny are inconsistent with the Court's prior precedents—elides divergent impulses in the Court's doctrine. One must view *Grutter* not as representing a radical departure from the Court's race jurisprudence, but as the dénouement of an epic battle within the Court on the proper constitutional posture regarding state action on the basis of race that is intended to benefit some citizens of color.[135]

Consider this point from another perspective. As we explain below, one consequence of *Grutter* is that strict scrutiny has become a functional—in contrast to a mechanical—inquiry.[136] Note

135. This question is thoughtfully analyzed in Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

136. For a wonderful analysis of this issue see Michelle Adams, *Searching for Strict*

that a functional inquiry comes closer to the sliding scale model of scrutiny advanced by Justice Thurgood Marshall[137] or the continuum model advanced by Justice Stevens.[138]

One might defend this move on the ground that a functional inquiry is necessary to meet the moral claim that affirmative action makes upon the Constitution. Thus Justice O'Connor explains in *Grutter* that affirmative action is necessitated "[b]y virtue of our Nation's struggle with racial inequality."[139] Moreover, "[i]n 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."Note also that Justice O'Connor's justification for a more flexible application of strict scrutiny mirrors a similar justification offered by Justice Marshall in his dissent in *Croson*.[140]

These are not new debates and Justice O'Connor's move in *Grutter* is not a radically novel move. To support this argument we advance three specific points.

First, while the Court has never held that diversity is not a compelling interest, at least one member of the Court other than Justice Powell had concluded that diversity was a compelling state interest. Specifically, in her concurring opinion in *Wygant v. Jackson Board of Education*,[141] Justice O'Connor set out to explain what she perceived to be the Court's doctrine or approach to state action on the basis of race.[142] She stated that one area of "consensus," "although its precise contours are uncertain," was that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."[143] Moreover, she explained that nothing in the plurality's decision in *Wygant* "necessarily foreclose[d] the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here [before the Supreme Court] to be suffi-

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Scrutiny in Grutter v. Bollinger, 78 TUL. L. REV. 1941 (2004).

137. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 109-10 (1973) (Marshall, J., dissenting).

138. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211-12 (1976).

139. *Id.* at 338.

140. Richmond v. Croson, 488 U.S. 469, 552 (1989) (Marshall, J. dissenting).

141. 476 U.S. 267 (1986).

142. *Wygant*, 476 U.S. at 286-87.

143. *Id.* at 286.

ciently 'important' or 'compelling' to sustain the use of affirmative action policies."[144] Thus, at least as far as Justice O'Connor understood the Court's doctrine in *Wygant*, one of the "core principles"[145] of that doctrine, which enjoyed "a fair measure of consensus,"[146] was that racial diversity in the context of higher education is a compelling state interest.

Hence, the Court's statement in *Grutter* that the "Law School's education judgment that . . . diversity is essential to its educational mission is one to which we defer,"[147] can be interpreted as deference not simply to the University but deference to the Court's prior precedents. From this perspective, one can interpret the Court as acknowledging its prior precedents that state universities have a compelling interest in using race to achieve a diverse student body because the Court already settled the question of the importance of racial diversity to educational institutions.[148] One can also interpret the Court as admitting that the issue of whether universities can determine what is or what is not within its essential to its educational mission has already been settled in favor of the universities.[149] In any event, deference does not arise *ex nihilo*, but is influenced by the Court's prior statements.

Second, the Court had remarked previously that strict scrutiny did not herald fatal scrutiny. For example, in *Adarand*, Justice O'Connor stated for three other Justices, "we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact."[150] Though state action on the basis of race is highly suspect, the "unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality and government is not disqualified from acting in response to it." Thus, "[w]hen race-based action is necessary to further a compelling interest, such action is

144. *Id.* at 287.
145. *Id.* at 287.
146. *Id.* at 286.
147. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).
148. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 (1978) ("The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. [I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this nation of many peoples.").
149. *Grutter*, 539 U.S. at 328 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.").
150. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1985) (internal quotation marks omitted).

within constitutional constraints if it satisfies the 'narrow tailoring test this Court has set out in previous cases."[151] Significantly, in *United States v. Virginia*,[152] in an opinion for the Court, Justice Ginsburg noted this development as reflecting a change in the Court's doctrine.[153] Consequently, when Justice O'Connor stated in *Grutter* that "[s]trict scrutiny is not strict in theory but fatal in fact,"[154] her statement as much acknowledged the Court's doctrine as it created it.

Grutter clarified—a clarification perhaps best appreciated in hindsight—that the concept of strict scrutiny as a mechanical and wooden test, which indicated the genesis as well as culmination of the constitutional inquiry, was misconstrued. Following *Grutter*, it is now more apparent that strict scrutiny is a more flexible and functional inquiry. Race-based actions are subject to strict scrutiny, which means that the state must offer justifications and the Court must examine them to ascertain whether they are compelling and necessary to achieve the stated ends. This is an inquiry in which state justifications are welcomed, accepted, and considered—as opposed to rejected routinely as out of turn.[155]

This understanding of strict scrutiny as teleological and functional makes sense of the Court's prior statements that the purpose of strict scrutiny is to distinguish permissible from impermissible bases for state action on the basis of race.[156] Moreover, a functional inquiry will lead to different results from a mechanical and pre-ordained inquiry. For example in *Croson*,[157] Justice O'Connor stated that the purpose of strict scrutiny is to determine whether racial classifications are "motivated by illegitimate notions of racial inferiority or simple racial politics." If one is to indeed employ this standard—as it is now clear that one must at least employ something resembling this standard—and apply it to *Grutter*, the outcome in *Grutter* becomes apparent and even defensible. While one may vigorously disagree with the use of race by the state in admissions, while one may believe that the message communicated by the use of race in admissions is

151. *Id.*
152. 518 U.S. 515 (1996).
153. *Virginia*, 518 U.S. at 533 & n.6.
154. *Grutter*, 539 U.S. 326-27 (internal quotation marks omitted).
155. *Id.* at 327 (noting that "strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context").
156. *Adarand*, 515 U.S. at 227-28; *Croson*, 488 U.S. at 493-94.
157. Richmond v. Croson, 488 U.S. 469, 494 (1989).

one of racial inferiority, less plausible is the contention that the state is motivated by racial inferiority or by racial politics. The most plausible explanation for affirmative action in higher education is the contention that the state is attempting to provide opportunities for some students of color who are the victims of transgenerational past and present racial as well as socio-economic inequalities.[158] Thus, even an ardent foe of affirmative action such as Justice Thomas can express "sympathies" "in some respect" for the state's motivations.[159]

To the extent that strict scrutiny is a functional inquiry and to the extent that the inquiry is premised on rooting out impermissible motives such as those outlined in *Croson*, the likelihood that affirmative action programs will pass strict scrutiny—provided that they are "narrowly tailored"—is quite high. What this point demonstrates is that *Grutter* is not at all aberrational. Indeed, *Grutter* is a product of the Court's doctrinal framework.

Third, not only is the Court's exercise of deference in *Grutter* not inconsistent with the Court's prior cases that apply strict scrutiny to race-conscious state action, one could argue that *Grutter* very much follows from the Court's understanding of what narrow tailoring means with respect to state action on the basis of race. In regards to the Court's affirmative action jurisprudence, the Court's application of the narrow-tailoring prong of strict scrutiny has always been stricter when the state dispenses benefits on the basis of inflexible racial categories designed to favor people of color. Conversely, the Court's application of strict scrutiny has been less strict when the state's use of racial categories is sufficiently malleable that individuals, in addition to people of color, are eligible for the benefits dispensed by the state.

Take Justice Powell's opinion in *Bakke*,[160] which gave rise to the diversity rationale. Justice Powell argued that the constitutional deficiency with the University of Davis Medical School's affirmative action program was that it "focused *solely* on ethnic diversity."[161] Justice Powell went on to note that the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial

158. *See, e.g.*, Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 955-58 (1997).

159. *See, e.g.*, *Grutter*, 539 U.S. at 350 (Thomas, J., dissenting in part and concurring in part)

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

161. *Id.* at 315.

or ethnic origin is but a single though important element."[162] Justice Powell then contrasted the Davis affirmative action program with the Harvard affirmative action program.[163] As he remarked, famously, in the Harvard program, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."[164] Even though Harvard's affirmative action program categorized on the basis of race, it was sufficiently flexible—unlike the one at Davis—that it permitted all applicants, irrespective of their race or ethnicity, to be eligible for the state benefit—admissions to the University.[165]

For Justice Powell, the constitutional command that government treats citizens as individuals and not as members of racial groups[166] is operationalized—as a definitional matter—by the requirement that the government can only use race as one factor among many. Individualized determination implies a process by which individuals are able to compete for state benefits and make a case for themselves that they are eligible to receive the benefit in question in light of the state's stated criteria.[167]

Justice Powell's framework for addressing the limits of state action on the basis of race has been employed by the Court in subsequent cases. For example in *Croson*, the case dealing with Richmond's 30% subcontracting set-aside for preferred subcontractors of color, Justice O'Connor explained that the constitutional infirmity with Richmond's is that it

> denie[d] certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their

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162. *Id.* at 315.

163. *Id.* at 316-17.

164. *Id.* at 317.

165. Justice Powell explained:

> The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. . . . In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily the same weight.

Id.

166. *Id.* at 289 ("It is settled beyond question that the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.") (internal quotation marks omitted).

167. *Id.* at 318.

> race. To whatever racial group these citizens belong, their "personal right" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.[168]

Similarly, in the racial gerrymandering case of *Miller v. Johnson*,[169] the Court held that while the state may be aware of race when it draws districting lines, the state only violates the violates the Constitution when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[170] However, when the state considers race along with a number of other race-neutral factors such as compactness, contiguity, the maintenance of political subdivisions, the state does not run afoul of the Constitution.

Consider here *Easley v. Cromartie*,[171] another racial gerrymandering case. In *Easley*, and in the face of clear evidence that the state was influenced in part by racial factors, the Court concluded that race did not predominate in the drawing of the congressional district in question because race was considered along with a host of other factors including political considerations "coupled with traditional, nonracial districting considerations."[172] The Court's racial gerrymandering cases, including *Easley*, as well as its affirmative action cases exemplify the framework laid out by Justice Powell in *Bakke*: when the state uses rigid racial categories that only benefit people of color, the Court does not defer to the state's purpose and strict scrutiny tends to be rather strict.[173] But where the state shows flexibility and uses race among various other considerations, the Court has tended to provide the state with the benefit of the doubt and to apply less than fatal review. Thus, *Grutter* is not persuasively open to the charge that the Court discarded its prior precedents in failing to apply strict scrutiny as fatal scrutiny to the state's racial classification.

168. Richmond v. Croson, 488 U.S. 469, 493 (1989).
169. 515 U.S. 900 (1994).
170. *Miller*, 515 U.S. at 916.
171. 532 U.S. 234 (2001).
172. *Easley*, 532 U.S. at 257.
173. *See* Gratz v. Bollinger, 539 U.S. 244 (2003).

CONCLUSION

This essay does not take a position about the wisdom or moral failings of race conscious programs. We join those who argue that the use of race in public policymaking is a moral question. More specifically, decisions about the composition of an incoming university class are multifaceted and necessarily involve myriad factors and judgments, moral and otherwise. These are also policy decisions of the highest order. We argue that this is a role for which our universities are well suited. Absent a showing of bad faith,[174] universities must be trusted to make these difficult choices. This is not to say that universities retain unbounded and unlimited authority in this area, as change in admissions policies may be exacted through the legislature or the boards of regents, or through the initiative process. From all of these choices, it is clear to us that the courts' role must be concomitantly diminished.

In taking this view, we find company with the Supreme Court's *Grutter* opinion, as the Court grounded its holding on a view of deference to institutions of higher education as well as deference to its prior decisions. We agree with the Court on this point, and also agree that the Court's prior decisions do not foreclose its ultimate holding. While somewhat surprised by the opinion, we believe that race conscious decision making is one of those areas for which "[j]udges have no more capacity than the rest of us to determine"[175] its moral soundness. In *Grutter*, a slim majority of the Court agreed.

174. *See* Grutter v. Bollinger, 539 U.S. 306, 348 (2003).
175. *Too Many Morally Charged Questions in Court*, *supra* note 2.