
2006

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Recommended Citation

Daniel I. Morales, *A Matter of Rhetoric: The Diversity Rationale in Political Context*, 10 CHAP. L. REV. 187 (2006).

Available at: <https://digitalcommons.chapman.edu/chapman-law-review/vol10/iss1/4>

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A Matter of Rhetoric: The Diversity Rationale in Political Context

*Daniel Ibsen Morales**

INTRODUCTION

The scholarly discourse regarding affirmative action in higher education has gone awry, becoming shrill¹ and calcified.² The discussion has come to focus excessively on the formal and the philosophical aspects of the program (What doctrine properly justifies it? Is the program moral?³ Does it go far enough?⁴), while neglecting to consider, in a serious and methodical way, how the *realpolitik* of American race relations might be brought to bear on these more “academic” considerations. Instead of analyzing affirmative action in the shadow of platonic notions of justice, propriety, or fairness, legal academics should consider what race-based remedies are feasible in light of current political leanings, or whether affirmative action in higher education is effectively creating a more integrated workforce. A full consideration of the way in which legal reasoning intersects with the political dispute surrounding affirmative action would lead scholars towards these more productive paths of inquiry.

The problem of affirmative action scholarship written in a political vacuum has become all the more acute in the wake of

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¹ See Lino A. Graglia, *Fraud by the Supreme Court: Racial Discrimination by a State Institution of Higher Education Upheld on “Diversity” Grounds*, 36 LOY. U. CHI. L.J. 57, 81 (2004); see also Brian T. Fitzpatrick, *The Diversity Lie*, 27 HARV. J.L. & PUB. POL’Y 385, 397 (2003).

² See generally James Boyd White, *What’s Wrong With Our Talk About Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927 (2002) (locating the problem of racial discourse in a failure to come to terms with history).

³ See Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 685, 685 (2004).

⁴ See Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1224 (1991).

former Justice Sandra Day O'Connor's majority opinion in *Grutter v. Bollinger*,⁵ the landmark decision that upheld the use of race-conscious admission policies at the University of Michigan Law School. That decision relied on the so-called "diversity rationale" for affirmative action, which holds that race-conscious admissions programs are constitutionally permissible where an educational institution seeks to racially diversify its student body for the purpose of ensuring that a variety of viewpoints are represented in campus discourse.⁶ Notably, this rationale excludes the possibility that a university might implement affirmative action programs in order to carry out a vision of social justice that seeks to compensate victims of past or current discrimination.

While the diversity rationale occupies a prominent place in extra-legal discourse,⁷ its use as a basis for authorizing affirmative action is heavily disfavored in academic circles. Emblematically, one prominent conservative scholar entitled his terse, anti-*Grutter* screed, *Fraud by the Supreme Court*.⁸ In keeping with the hyperbole of the title, the article set out to claim that *Grutter* was, in essence, the first sign of the legal apocalypse; its total disregard for the rule of law would, in the author's opinion, cause the "entire legal system . . . to denigrate into a farce."⁹ The article located *Grutter's* fraudulence and deviance from traditional norms of jurisprudence in its unwillingness to adhere to minimal standards of honesty.¹⁰ "Honesty," in the author's view, would have meant dubbing affirmative action reverse discrimination carried out in the name of a faddish social movement.

In itself, the depth of this reaction on the part of conservatives should not be particularly surprising; they have waged an assault against affirmative action for at least the past decade.¹¹ But the extent to which the conservative opinion on these subjects is widely shared by other academics is quite surprising. After all, few scholars of any political persuasion would stand by the *Fraud* author's side as he advocates altering the Fourteenth Amendment in an effort to reign in judicial "activists."¹² Never-

⁵ 539 U.S. 306, 343 (2003).

⁶ *Id.* at 328-30.

⁷ It has become nearly mandatory for major institutions to have committees on race and gender which are nearly always referred to as committees on diversity. See, e.g., Kirkland & Ellis LLP, Diversity, <http://www.kirkland.com/OurFirm/diversity.aspx> (last visited Oct. 20, 2006); Coca-Cola Company, Diversity, <http://www2.coca-cola.com/ourcompany/ourdiversity.html> (last visited Oct. 20, 2006).

⁸ Graglia, *supra* note 1, at 57.

⁹ *Id.* at 81.

¹⁰ *Id.*

¹¹ See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 nn.1-3 (1996).

¹² Lino Graglia, *Altering 14th Amendment Would Curb Court's Activist Tendencies*,

theless, prominent liberal scholars like Jed Rubenfeld, Sanford Levinson, Kim Forde-Mazrui, and Jack Balkin agree that the diversity rationale is a rhetorical sham used to justify a program whose proper constitutional authority rests on other theories.¹³ Indeed, the scholarly distaste for diversity is so strong that I would hazard that the vast majority of American law professors believe it to be an illegitimate constitutional basis for affirmative action.¹⁴

This paper locates the source of this surprising consensus in the failure of scholars of all political persuasions to consider how the discourse of American racial politics restricts the institutional capacity of the Court. This charged atmosphere limits the scope and species of remedies that the Court can authorize, and, equally important, what rhetorical form such authorization can take. The power of racial minorities is so limited that to successfully protect these groups, the Court—the only political institution insulated from politics—must use its expressive power to steer the public discourse in ways that work to affirm the tenuous political footholds that racial minorities have managed to gain. As this article will show, the affirmative action rationales favored by the academy would catalyze political conflict and likely lead to affirmative action's repeal, whereas the diversity rationale works to minimize such discord.

This article will prove this thesis by presenting a theory of American racial politics that closely reflects the reality of limited minority political power, illustrating how other rationales for affirmative action conflict fatally with that political reality, and, finally, reading *Grutter* in a way that highlights how the decision successfully navigates this difficult political terrain. By reading *Grutter* in this way, I will ultimately show that the diversity rationale is the most effective means of securing the interests of racial minorities in the face of limited political and economic clout, as well as continuing racial prejudice. By taking this particularized tack, however, this paper aims to push scholars to expand the definition of legal reasoning to include decisions, like *Grutter*, that require a rhetoric that is more political than classically legal.

AUSTIN-AMERICAN STATESMAN, July 10, 2005, at H1.

¹³ See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427–28 (1997); SANFORD LEVINSON, WRESTLING WITH DIVERSITY 55, 46 (2003) (quoting e-mail from Jack Balkin to Sanford Levinson stating that diversity is a code word for claims to past mistreatment); Forde-Mazrui, *supra* note 3, at 750 n.224.

¹⁴ See Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979) (stating that the author has never met a professional academic who believes that diversity for education's sake motivates preferential admission).

I. MAJORITARIAN PROBLEMATICS: HOW TO SAFEGUARD MINORITY RIGHTS WITHIN A DEMOCRATIC CULTURE

This section begins with a practical question: How can the Supreme Court secure minority rights in a culture that conceives of democracy in a majoritarian way? In our democratic system the legal or philosophical justification for protecting minority rights of any kind—criminal, political, religious or racial—will always reveal the central anxiety of representational government: Where is the proper boundary of the popular will?¹⁵ Thoughtful consideration of minority rights in a democratic system, of course, has a long history; the American founders, for their part, were terrified of democracy's tyrannical potential.¹⁶ Still, in the popular imagination, democracy means populism: one person, one vote, never mind the rest. Americans are terribly skeptical of those institutions that would thwart their will. It is not accidental that our constitutional tradition has moved teleologically toward more direct democracy; ours is a nation suspicious of the "knowing" elite.

This ardent populism will always remain in tension with a Constitution presided over by an unelected court. Elites, those usually seeking to restrain the popular will, have sought to justify the anti-populist role of the Supreme Court by offering baroque theories of judicial review, theories that give learned expression to what is a uniquely democratic anxiety. Alexander Bickel, in his famous treatise on our constitutional government, *The Least Dangerous Branch*,¹⁷ dubbed this particular tension the "countermajoritarian difficulty."

In that book, Professor Bickel did manage to find a place for the Supreme Court in American democracy, but he left the "difficulty" essentially unresolved, and it continues to be a generative tension in constitutional theory. Still seeking resolution, other celebrated scholars, especially John Hart Ely,¹⁸ have built on Professor Bickel's work to the point where a canon of theory now defends the Supreme Court's power to protect minority rights. As with Bickel, though, Ely's tortured "political process theory" of

¹⁵ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-19 (1962).

¹⁶ THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison); see also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1523-24 (1990).

¹⁷ Bickel, *supra* note 15, at 16.

¹⁸ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 136 (1980) (presenting a "process" theory of judicial review allowing for the Supreme Court to intervene where democracy is dysfunctional).

judicial review does not resolve the "difficulty" at all. Indeed, both Ely's and Bickel's work might be best thought of as symptoms of the countermajoritarian difficulty, rather than cures. Nevertheless, this article presumes that the Supreme Court should play a significant role in defending—and even advancing—minority political gains,¹⁹ a role that is especially salient where "discrete and insular minorities" are concerned.²⁰

We should at this point inject a shot of legal realism into what has been a strictly abstract analysis. The countermajoritarian difficulty tangibly concerns the Justices of the Supreme Court in few cases, as the vast majority of the Court's docket mobilizes the interest of a very narrow constituency. As a result of this generally limited interest, the Court does not directly confront its countermajoritarian role except in very exceptional cases; the proximity of the "difficulty" to the consciousness of the Court is a function of the intensity of the democratic gaze, if you will. The more lay interest in the case at bar, the more cognizant the justices are of their countermajoritarian role.

In those rare instances of intense public scrutiny, the Court is forced to confront its paradoxical institutional role head-on. As the only institution that can adequately safeguard minority rights or political gains, it has an implicit duty to do so because, unlike elected representatives, the Justices will continue to sit in their capacity on the Court even in the face of majority discontent. Even so, this very advantage means that its institutional capacity is extremely limited in a representative democracy because its authority is ever-questionable. The only way that it can fend off criticism and maintain its institutional credibility is to use its rhetorical or expressive power to persuade the masses. To persuade effectively, however, the Court must craft its opinions with a public audience in mind. Such a task necessarily requires a keen understanding of how the Court's arguments will play out in the public sphere.

This method of persuasion is essential because for all that constitutional theorists like Bickel and Ely have accomplished in constructing a philosophical backbone to support the countermajoritarian role of the court, these theories will only persuade the academically inclined. And even among the thoughtful, the pull of a simple majoritarian view of democracy is quite strong. As a result, the countermajoritarian difficulty is not something that

¹⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that "discrete and insular minorities" might require more judicial protection).

²⁰ See Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 *YALE L.J.* 529, 538 (1997) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

can be transcended through theory; it will always be a concrete locus of dispute.

Accordingly, the strict-constructionist approach to judicial review preys on the populist weaknesses of academic theories like Ely's.²¹ Most destructively for liberals who wish for the court to aggressively police majority excesses, the position of the strict constructionists is much more readily intelligible to a lay audience, in part because the theory's principal author, Antonin Scalia, explicitly shares the majoritarian ethos.²²

By fixing the Constitution's meaning in a particular historical moment, strict constructionists avoid, as much as possible, the process of adapting constitutional meaning to contemporary life. Indeed, strict constructionism does an end-run around the countermajoritarian difficulty by constructing the myth that answers to constitutional questions are foreordained. Under strict constructionism there is no "difficulty" because the Supreme Court is not exercising any real power. The Court's hands are tied; it is merely doing the will of the law.²³

The elegance of strict-constructionist jurisprudential philosophy, especially when compared to the complexity of liberal theories, is a significant tactical advantage outside the academy. In its distilled form, this conservative approach ends up looking like common sense: implement the law as written because words mean what they say. There is no similarly succinct way to advocate that the Court should intervene where politics deals too harshly with a disfavored group. Liberal theories, like Ely's, lose nearly all of their persuasive value when reduced to a sound bite, the dominant structure of public political discourse. Strict constructionism, on the other hand, is even more powerful in that truncated form.

Indeed, Bickel's succinct neologism for the problem of judicial review is itself symptomatic of the larger problem that liberal theories of jurisprudence have in insinuating themselves into the public sphere: try having a cocktail party conversation with non-lawyers about the "countermajoritarian difficulty."

In the same way, liberals have a very difficult time conveying to the culture at large the need for substantive, rather than merely formal, remedies for racism. The colorblind principles es-

²¹ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853-55 (1989) (using the contrast between the complexity of the liberal approach and the simplicity of originalism to dismiss the possibility that liberals like Ronald Dworkin could create a workable constitutional theory).

²² See Sunstein, *supra* note 20, at 530, 533.

²³ See Scalia, *supra* note 21, at 854; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

poused by conservatives, of course, perfectly reflect the intuitions and the policy preferences of the American majority. The common-man appeal of conservative rhetoric is typified by the conservative refrain that affirmative action constitutes “reverse discrimination.” Framing affirmative action in those terms is designed to tap in to the commonplace notion that “two wrongs do not make a right.” Never mind that the “wrongs” are rather different in scope.

Such frames are powerful because affirmative action is not just another countermajoritarian program. Affirmative action and other programs that implicate race are doubly vexing. Not only do they produce the general anti-populist anxiety just discussed, i.e., the countermajoritarian dilemma, they also throw the American narrative—unceasing economic and social progress, radical equality of opportunity—into crisis by bringing to the forefront the race-based inequality that is generally repressed to sustain that myth.

The visceral quality of visual stimulus makes race²⁴ a particularly effective way to reveal the American narrative’s mythological character, and, as a result, create a nationwide bout of cognitive dissonance.²⁵ How can the United States be a country of equals when one can see with her own eyes that people of color are so disproportionately poor, uneducated, and jailed?

The potency of race as the primary signifier of American inequality has been amplified by the proliferation of media that bring depictions of disparity to leafy, isolated suburbs where all is (seemingly) well. There is nothing contemporary about this phenomenon; television also played a crucial role in Martin Luther King, Jr.’s civil rights strategy. Indeed, one way to conceptualize what happened during the civil rights movement is to say that the visualization of black oppression through new technology created fissures in the American narrative that were so large that they had to be closed. In today’s media-saturated environment, where newspaper readership remains in free-fall, Americans engage with their world in a way that is increasingly visual, rendering race an even more potent signifier than it was in the

²⁴ Though race is considered largely a social construct, there are, nevertheless, visual cues that allow race to be a functional basis for racism and racial classification, even if these break down upon close inspection.

²⁵ Psychology’s cognitive dissonance theory, which holds that individuals have a need for consistency in their thoughts and beliefs, supports this idea. See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (Stanford Univ. Press 1962) (1957); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 336 n.77 (1987) (attributing the “development of attitudes concerning race” at least partially to “the search for coherence”).

1960s.²⁶

The reader should have little trouble conjuring the latest public visualization of American racial disparity; it occurred when Hurricane Katrina hit New Orleans, Louisiana. When the citizens of New Orleans, the vast majority of them poor and black, were left behind after the storm, the national discourse undertook a discussion of why these people, so visibly distinct from the American majority, were left to fend for themselves. The social construction of America as a land of equals can only exist if each individual blinds herself to the color of the inequality she sees before her; the public consumption of images from an event like Hurricane Katrina makes such willful blindness more difficult to sustain, because it conflicts so blatantly with the predominant myth of American equality.

These are among the more benign reasons that the adjudication of racial issues is overdetermined. The resolution of racial issues is also fraught because negative racial attitudes, conscious and unconscious, persist in American society. These attitudes allow people to construct counter-narratives that account for the inequality exposed in situations like Hurricane Katrina by blaming the victims for mishandling their own lives.²⁷ Thus, the fact that those left behind in New Orleans were predominantly black comes to signify the inferiority of people of color, not a collective problem for which all Americans must take responsibility. From this racist viewpoint, the existence of affirmative action is intolerable: why are they, those people society marks as "less than," entitled to special dispensation?

Public discussions about race are charged, then, because they are highly disruptive to the public's workaday notions of our society, especially racist ones. The abstract colorblindness that Americans are socially required to cultivate runs up against what citizens see with their own eyes. The Court's role in such cases should be to steer the public discourse in a way that alleviates this dissonance by mending the national narrative of equality. Needless to say, for a court to alleviate such dissonance in a way that serves the interest of racial minorities is a delicate process.

In the specific case of affirmative action in higher education,

²⁶ See KENNETH L. KARST, *LAW'S PROMISE LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 69 (1993) (commenting that "television's pervasive reach" is in large part responsible for society's ingrained images of crime that "prominently featur[e] the faces of young black men").

²⁷ See, for example, Bill O'Reilly's comments regarding Hurricane Katrina: "Many, many, many" hurricane victims who failed to evacuate New Orleans are "drug-addicted. . . thugs." *The Radio Factor*, (Westwood One radio broadcast Sept. 13, 2005), available at <http://mediamatters.org/items/200509150001> (last visited Sept. 25, 2006).

the narrative stakes are higher still for the Court because of the unique role that universities now play in the American mythos. Today's university is both the architect and the signifier of the American meritocracy.²⁸ The public has come to view universities as the gatekeepers to the American dream, and as social levers that promise a nation free of permanent, old-world, class stratification. A Supreme Court decision that even implicitly questions the objectivity or the desirability of this imagined society of merit would provoke extreme reactions; so embedded is meritocracy in the American sense of self that an attack on it is an attack on the country's sense of being. Coupling a suggestion of merit's subjectivity, as some scholars have, with an effort to justify racial preferences will be still more inflammatory.²⁹

All this is to say that the task of justifying affirmative action in higher education is among the most difficult that a Supreme Court can face, not because the program is unworthy or constitutionally unconscionable, but because its adjudication causes a painful bout of national self-reflection. The vulnerable state of the national psyche in these periods of public discourse requires the Court to issue a decision aimed at the public³⁰ that will mend and restore the national narrative. The diversity rationale is perfectly designed to diffuse this public tension and steer public discourse in a way that leaves America's mythical self-image intact, while giving minorities the tiniest amount of race-based wealth transfer.

Thus, the role of the Supreme Court in these cases is not to explicate the "truth" of affirmative action, as the professoriate would prefer, but to preserve the program through the judicious and politic use of language designed to influence public perceptions. Such delicacy is particularly exigent because affirmative action is constitutionally permissible, but not constitutionally mandated. Because the Court cannot, in this case, legislate the policy as a constitutional requirement, it must use its expressive

²⁸ See James Traub, *Ivory Tower Intrigues: The Pseudo-Meritocracy of the Ivy League*, SLATE, Oct. 24, 2005, <http://www.slate.com/id/2128377/> (reviewing JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 549 (2005) ("The selection process at elite universities is widely understood as the outward symbol, and in many ways the foundation, of our society's distribution of opportunities and rewards.")). Jerome Karabel's book argues that America's top universities "legitimate[] the established order as one that rewards ability and hard work over the prerogatives of birth." *Id.*

²⁹ It is somewhat surprising that preferences for legacies do not inspire the same degree of animus as preferences based on race. Legacy preferences in particular undermine the cherished American myth of the self-made man. Plainly, class-based animus is less prevalent than racial animus in the United States, or perhaps legacy is a factor in admissions at so few public colleges that the animus against it is not very widespread.

³⁰ It is journalists who translate court decisions into a format that the layperson can parse.

power to shape the public discourse in a way that allows legislative permission to stand. In this way, the Court may comply with its role to protect discrete and insular minorities. If the legal problem is so constructed, the diversity rationale can be seen for what it is: an effort to engage the political sphere in order to protect minority political gains.

II. JUDICIAL OPINIONS AS RHETORICAL PERFORMANCES

Judicial opinions are rhetorical performances. The critic who essays an assessment of any performance, whether dramatic or judicial, must be aware, among other things, of the particular role assigned to the actor, the likely audience for the performance, and the effects sought by the performer.³¹

As a result of limited minority power, as well as the entrenched interests of the majority, the judicial opinion authorizing affirmative action must be a rhetorical performance *par excellence*. The Court must deploy its rhetoric in a way that shapes the public discourse, and thereby stabilizes (as much as possible) the political conflict surrounding the program in a way that benefits minorities. Yet, even as the diversity rationale furthers this objective, critics have assailed the rationale, calling it destructive, pretextual, or dishonest. In part, these critiques result from the failure of academics to follow Professor Levinson's advice;³² the professoriate seldom takes full account of the context in which the Supreme Court authors an opinion. Instead, academics nearly always evaluate the Court's pronouncements as if they, academics themselves, were the Justices' primary audience. Indeed, most constitutional scholarship operates under the fiction that the persuasive values of the academy should actually dictate the Court's jurisprudence.³³

Cass Sunstein's scholarship is a notable exception to this critical solipsism. His book, *Legal Reasoning and Political Conflict*, argues that there is a fundamental distinction between legal reasoning, i.e., what judges must do, and the enlightenment-inspired, exegetical impulse that animates the scholarly mission.

³¹ Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 187 (Peter Brooks & Paul Gewirtz eds., 1996).

³² In this author's view, Levinson fails to follow his own advice when he critiques the diversity rationale without considering who the audience for Supreme Court affirmative action decisions actually is. See LEVINSON, *supra* note 13, at 55-61.

³³ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) (arguing in part that the Court's Fourth Amendment jurisprudence is incoherent and has become unmoored from the historical understanding of what the Fourth Amendment was designed to do, i.e., to protect citizens from *unreasonable* searches and seizures). While erudite and persuasive, the book does not account for the possibility that what the author sees as logical faults in Fourth Amendment jurisprudence, like Miranda warnings, may have practical salutary effects in the real world.

Professor Sunstein argues that where courts are faced with conflicts that may be resolved on a number of levels, i.e., the philosophical, the moral, the religious or the narrowly legal, they should always choose the lowest possible level of resolution and seek to reach an accord on that basis. This kind of reasoning is, of course, a staple of common-law jurisprudence, but by adding a good dose of political theory to those traditions, Sunstein manages to re-christen this method the use of "incompletely theorized agreements."³⁴

A prime example of the damage that courts may do when they fail to use incompletely theorized agreements, and seek instead to resolve disputes in the manner of academics, occurred twenty years ago in *Bowers v. Hardwick*,³⁵ the consensual sodomy case recently overturned in *Lawrence v. Texas*.³⁶

In *Bowers*, two men were arrested for engaging in consensual sex under a Georgia anti-sodomy statute that generally went unenforced. In the majority decision, the Court upheld Georgia's right to prohibit consensual sodomy based on the long history of its proscription in America and throughout the world. The Court put forth this rationale at a time when the gay rights movement was suffering a huge setback. The spread of AIDS in the early 1980s was widely blamed on homosexuals, a belief that only served to further stigmatize the group.³⁷

Sunstein's view is that *Bowers* should have been decided in the plaintiff's favor, but on the exceedingly narrow grounds that the state of Georgia should not be allowed to suddenly enforce a long-dormant law.³⁸ In this way, the Court would have stayed out of the political debate entirely by promulgating a highly formalistic judgment. Instead of taking that minimalist tack, however, the Court not only ruled against the plaintiffs, it engaged in a gratuitously callous analysis that only served to stir the pot of political conflict by emphasizing the long-standing religious and historical prohibition of same-sex sodomy.³⁹ By engaging in this

³⁴ See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-38 (1996).

³⁵ 478 U.S. 186 (1986).

³⁶ 539 U.S. 558 (2003) (holding that states may not criminalize consensual sex between adults of the same sex).

³⁷ Cecilia Chung, *Welcome to San Francisco Pride Week!*, ASIANWEEK.COM, June 22, 2001, http://www.asianweek.com/2001_06_22/opinion1_voices_prideweek.html (noting that the gay and lesbian rights movement began in the 1960s, but suffered a huge setback in the 1980s when AIDS was largely blamed on homosexuals).

³⁸ SUNSTEIN, *supra* note 34, at 156 ("Realistically speaking, the ban on consensual homosexual sodomy is a weapon by which police officers and others harass people on invidious grounds. The existence of unenforced and unenforceable sodomy laws, used for purposes of harassment, is objectionable under the due process clause for that reason.")

³⁹ *Bowers*, 478 U.S. at 192-194 (stating that proscriptions against homosexual sodomy "have ancient roots").

high-level historical and religious discussion, the Court did damage to the gay rights movement by authorizing the states' prohibition of the plaintiff's conduct on grounds "higher" than the law. Reifying such historical and religious theories in the form of a judicial opinion stoked religious conservatives, who had already constructed their anti-homosexual animus on a religious foundation. Moreover, by taking such a strong position on an emerging socio-political issue, and then grounding that position in a historical rationale that fell outside of its institutional expertise, the Court also ran the risk that the tide would turn against the decision, and that its understanding of history might have been flawed, as, indeed, *Lawrence* later found.

Beyond illustrating the dangers of over-zealous judging, *Bowers* also highlights the difficulty judges have in predicting future social changes. Presumably, few of the Justices in the *Bowers* majority could have imagined the extent to which gay Americans would become accepted in American society, much less that in some states homosexuals would win the right to marry.

For all its grandstanding, however, *Bowers* did not change the terms of the gay rights debate; it only affirmed the viewpoint on one side of the divide. Such an outcome is typical of judicial incursions into a broader discourse;⁴⁰ even on those few occasions where Supreme Court opinions do address a wider audience, the Court seldom manages to define the terms of the public debate. This lack of discursive command should not surprise, though. In light of the common-law understanding of a judge's role, as well as the judiciary's mandated isolation from politics, judges generally have a difficult time figuring out how their judgments will interact in the world outside the nation's courthouses. Sunstein believes that this disadvantage supports his theory of minimalist jurisprudence by proving that the task of evaluating the reception of an audience outside the judiciary is beyond the judicial ken.⁴¹ In his view, the political discourse should be left, as much as possible, to politics.⁴²

In its most extreme form, then, Sunstein's minimalist theory of jurisprudence allows no room for the Court to make any juris-generative pronouncements, or to take on the role the Court properly played in *Grutter*. Indeed, Sunstein believes that the Court in both *Bowers* and *Lawrence* exceeded its institutional ca-

⁴⁰ Even Justice Scalia acknowledges the public eye watching over the Court in certain cases. See Scalia, *supra* note 23, at 1178 (emphasizing the importance of drawing distinctions in cases that seem similar but end in different results in order to satisfy a "sense of justice" in the community).

⁴¹ SUNSTEIN, *supra* note 34, at 177.

⁴² *Id.* at 7.

capacity.⁴³ In his view, the Court should have invalidated the Texas anti-sodomy statute in *Lawrence* without overruling *Bowers*.⁴⁴ In this way, the Supreme Court would only reflect substantial changes in social norms, without seeking to further modify those norms, or further catalyze the movement that led to the initial shift.

Sunstein's view of *Lawrence*, however, is overly cautious and damaging to those groups that encounter significant societal discrimination or a denial of full individual rights. There is a middle-ground between the social-obliviousness exemplified by *Roe v. Wade*⁴⁵ (where the Court's impatience led to a thirty year conservative backlash) and the extraordinarily timid casuistry that Sunstein advocates.

In this author's view, *Lawrence* occupies that terrain. By following the fundamental shift in social attitudes, *Lawrence* manages to avoid a devastating political backlash.⁴⁶ Yet, the decision still pushes social mores forward by using official language to grant dignity to homosexual acts.⁴⁷ The *Lawrence* majority could only have accomplished this task by disavowing the callous rhetoric in *Bowers*, and replacing it with a narrative affirming homosexuals' shared humanity. Further, by formulating deliberately opaque rhetoric that may be used by other courts to expand the rights granted in *Lawrence*, the Court gave state courts a powerful tool to further amplify the scope of gay rights. True, this move has led to controversy. In the wake of the Massachusetts Supreme Court's decision granting gay marriage, in part based on *Lawrence*, many states passed constitutional amendments banning the practice.⁴⁸ While passage of those amendments is unfortunate, at least states are having meaningful political discourse about the subject of gay rights. Progress cannot occur without controversy.

⁴³ See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (2003) (arguing that *Bowers* and *Lawrence* should have been decided on grounds of desuetude or equal protection, rather than substantive due process).

⁴⁴ *Id.* at 32.

⁴⁵ 410 U.S. 113 (1973).

⁴⁶ *Lawrence* has created a backlash, but it is nothing compared to what happened in *Roe*. The very fact that those who object to gay marriage have succeeded in passing amendments limiting the definition of marriage illustrates the difference; *Roe* foreclosed political debate and change, whereas *Lawrence* catalyzed it.

⁴⁷ *Lawrence*, 539 U.S. at 578.

⁴⁸ Thomas Roberts & Sean Gibbons, *Same-Sex Marriage Bans Winning on State Ballots*, CNN.COM, Nov. 3, 2004, <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/>. However, the states that passed the amendments were so conservative that it is unlikely their state courts would have required gay marriage in the first place. These amendments merely formalize what was *de facto* true prior to their passage. *Id.*

Indeed, something real must appear to be at stake for Americans to engage in serious, difficult political conversation. If the Court were to apply Sunstein's judicial minimalism, those conversations would remain repressed because a minority group, like homosexuals or African-Americans, cannot easily force the hand of a majoritarian legislature. It is appropriate that the specter of *Roe* haunts Sunstein's minimalist theory, but *Lawrence* is not another *Roe*. *Roe* was damaging because it was so totalizing that it left no room for public discourse. *Lawrence* on the other hand leaves significant room for debate, while giving the polity the incentive to have the debate in the first place. *Lawrence* represents, in my view, a cautious, or, if you will, conservative progressivism that moves social mores forward without annihilating the ties that bind Americans together.

Lawrence also does not signify the limits of the Court's productive discursive political power, because, like *Bowers*, *Lawrence* did not change the terms of the public debate. *Lawrence* may have shaped and catalyzed gay rights discourse, but the polity still talks about gay rights using the same essential language. *Lawrence* became an occasion to discuss homosexuality generally—for politicians and advocacy groups on the right to decry the so-called "gay agenda," and for those on the left to show their solidarity with the gay-rights cause.⁴⁹ The case did not fundamentally alter this dynamic.

On occasion, though, the Court can reframe an issue in a way that actually reformulates American political discourse. Justice Powell's concurring (*de facto* controlling) opinion in *Regents of the University of California v. Bakke*⁵⁰ did just that. Powell's articulation of the diversity rationale for affirmative action altered forever the way that this nation discusses issues of race, and indeed, of difference generally. The diversity frame is

⁴⁹ See Associated Press, *Quotes on Gay Sex Ban Ruling*, June 26, 2003, available at <http://www.sodomylaws.org/lawrence/lawrence.htm>. Including quotations such as the following:

"If the people have no right to regulate sexuality then ultimately the institution of marriage is in peril, and with it, the welfare of the coming generations of children." Tom Minnery, vice president of public policy at Focus on the Family.

"Today's Supreme Court decision overturning a Texas law against homosexual sodomy is a defeat for public morality and America's families. This ill-conceived decision will have serious repercussions upon public health and welfare in Texas and other states that still criminalize sodomy." Rev. Louis P. Sheldon, chairman of Traditional Values Coalition.

"This ruling opens the door for new advances toward full equality and should be viewed as a challenge to legislators to help pass important legal protections for GLBT (gay, lesbian, bisexual and transgender) Americans—like employment nondiscrimination laws and comprehensive hate crimes legislation." Elizabeth Birch, executive director of the Human Rights Campaign.

⁵⁰ See 438 U.S. 265 (1978).

so pervasive that it is nearly impossible to have a debate about affirmative action without discussing diversity, even if only to discredit it. This is particularly true because nearly every major American institution—businesses, schools, non-profits, law firms, the military—frames issues of race, gender, class, affirmative action, *ad infinitum*, as issues of diversity.⁵¹

What is so brilliant about diversity, and what makes the frame so effective, is that it is highly politic. Diversity talks about difference in a way that affirms commonality and community. Diversity also fits in neatly with the American myth of the cultural melting-pot. Most importantly, though, for a glass-half-full nation, diversity is *positive*, hopeful, and validating; it manages to convey a sense that we are all different and all the same. The term “difference,” on the other hand, a plausible linguistic substitute for diversity, has only negative cultural connotations. Difference lacks any communal connotation; it just emphasizes a kind of solitary individualism that is antithetical to the American creed: *e pluribus unum*.

For all this country’s homogeneity, xenophobia, racism, and self-segregation, people are taught that our diversity is a positive, even a constitutive American asset. Indeed, these beliefs, in part, facilitate the American process of immigration and integration. You can be an American *and* hold on to essential elements of your past identity, even as that past gradually recedes. By contrast, in Europe, immigrants can never be considered truly European.

As a result, it would be “un-American” to be against diversity: to do so would be inconsistent with a central part of the American sense of self, contrary to the American narrative, if you will. We frequently see similar rhetorical techniques in political debate. Advocates of a certain political position frame that position in a way that no one can say that they are against it without seemingly betraying widely-held social mores. The classic case occurs in the abortion rights context. What American can say they are against “choice” or oppose “life”?

Thus, Justice Powell’s diversity rationale is a prominent example of a court not just shaping or catalyzing the public discourse to serve the interests of minorities, but substantially altering it. Diversity succeeds because it is perfectly adapted to thrive in our culture; it renders a difficult and painful national discussion about race largely irrelevant. With diversity, affirmative action became something that enhanced an education and

⁵¹ See, e.g., *supra* note 7; *infra* note 88 and accompanying text; *infra* note 137 and accompanying text.

the workplace, not a discussion about the terrible and endless debt that white people owed to minorities, especially African-Americans.

As Kenneth Karst argues in *Law's Promise, Law's Expression*, "[t]he clear subtext of Justice Powell's *Bakke* opinion was that he was out to save affirmative action. He plainly thought that 'diversity' admissions would blur the lines of racial division" by dismantling the opposition between merit and racial preference.⁵² Diversity, then, is a way to define race as a meritorious characteristic that adds something to the educational and social experience. In this way, the diversity rationale seeks to persuade the white audience that is being asked to bear the "burden" of affirmative action that it is, in fact, benefiting from the program.

In a sense, then, unlike in *Lawrence*, the Court's aggressive reformulation of racial discourse is in fact consistent with the normative foundation of Sunstein's minimalist jurisprudence. Sunstein advocates a minimalist approach because, normatively, he believes the Court should not "crowd out" political discussions or foment any political controversy or change; the Court's role is to soothe passions. This kind of politically restorative effect is something that *Grutter's* permutation of Powell's diversity rationale achieves, but without minimalism. Indeed, the results could not be achieved through such an approach. Judicial minimalism fails when politics are dysfunctional because, in such cases, political deliberation cannot proceed on a productive course.

This dysfunction is obvious in the case of racial discourse: Speaking openly about any form of compensation for current or past race discrimination is not possible in American democracy. Racial minorities are too powerless to force the discussion, lacking numbers and financial clout, and the American up-by-your-bootstraps ethos is antithetical to condoning an overt handout on the basis of race. Given that the Court is the only institution that can adequately defend minority rights, because of its counter-majoritarian role, the Court should involve itself in the political sphere in the way that O'Connor did in *Grutter*. This involvement is particularly crucial given that, unlike in the gay rights area, minorities have secured full, formal civil rights. Those are the rights that most Americans think of as constituting equality. The substantive benefit that affirmative action confers is not obviously consistent with that conception of equality; it looks like favoritism, not corrective action.

⁵² See KARST, *supra* note 26, at 105.

A. Why Affirmative Action is Still Important to Racial Minorities

To view the diversity rationale as an uncommon rhetorical move that is essential to the effort to safeguard minority political gains, one must of course subscribe to the idea that affirmative action is a worthwhile policy. Given its well-elaborated pitfalls, however, it is hard for academics to see it that way. Indeed, affirmative action could only be deemed a policy worth keeping if one takes on the perspective of the marginalized. Only from that point of view would a program aimed mainly at the most well-off within the group be deemed worth maintaining.

It is an understatement to say that only elite minorities benefit from affirmative action. Only 52% of Latinos and 56% of black students graduate from high school each year.⁵³ Of these, a mere 23% of black students and 20% of Latino students graduate with enough preparation to apply to a four-year college. Needless to say, white students graduate from high school and attend college in much higher numbers.⁵⁴

In the face of this stark inequality, the enormous discursive energy spent on affirmative action as it applies to higher education appears farcical: so much fuss over such a minor attempt at historical remediation. Prominent scholars like Richard Delgado⁵⁵ openly question whether all this talk siphons energy away from advocacy for more substantive and broad-based remedial measures. From an economic perspective, distributing minority gains to the relatively privileged within the group is regressive. A more efficient redistributive scheme would utilize limited minority political capital in order to help those worst off in the group hierarchy, leaving the minority elite to fend for itself in the academic marketplace.

Despite affirmative action's facially regressive effects, however, a large percentage of minorities favor the program.⁵⁶ On its face, such support might appear to be a simple case of false consciousness. Lower-class blacks and Latinos use the ascendancy of elites that look like them as a proxy for evaluating their own mobility or success, sustaining a myth of minority advancement, even as conditions have, in fact, changed little for blacks and La-

⁵³ See Jay P. Greene & Marcus A. Winters, *Public High School Graduation and College-Readiness Rates: 1991–2002*, at 3 (Manhattan Inst. for Policy Research, Working Paper No. 8, 2005), available at http://www.manhattan-institute.org/html/ewp_08.htm.

⁵⁴ *Id.*

⁵⁵ See Delgado, *supra* note 4, at 1222.

⁵⁶ See ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* 147–69 (1997) (examining poll data on affirmative action programs).

tinios since the civil rights movement.⁵⁷

But is this really false consciousness? Is there a better reason for most minorities to support affirmative action? If one takes a larger view of what the fall of affirmative action would signal about the state of minority political power, it is more plausible to argue that minorities are in a better position to advocate for further political gains with affirmative action still intact. For marginalized minorities who derive political power only by advocating as a unified whole,⁵⁸ it would be foolish to seek the abolition of a politically-conferred advantage, even if it is sub-optimal. Experience with discrimination, poverty and inequality has dissuaded people of color from being optimistic about the possibility of garnering more resources in affirmative action's absence. From this perspective, going backward—that is, ridding themselves of affirmative action—to move forward is unappealing and reckless. Giving up affirmative action in order to expose the gross inequality of our system would require the sacrifice of whatever limited advantage affirmative action conferred, hurting real students and citizens in the workforce in the service of the improbable possibility that an absence of minorities in higher education would inspire more substantive political and social change.

One must also account for the reaction to affirmative action's fall by the white majority. Given the prevailing reality of white domination, the loss of affirmative action would only serve as further evidence of the majority's power. The absence of minorities in America's universities would be read as proof of inferiority rather than a symptom of a fundamentally damaged system. True, minorities might be emboldened by such a defeat to fight harder in the political arena, but they might also be merely defeated.⁵⁹

In short, affirmative action is important for minority interests because it is the only tangible advantage that racial minorities have wrested from the political system. That African-Americans, Latinos, and other underrepresented minorities have not been able to gain more from politics is an argument for maintaining affirmative action, not ending it. We should ultimately interpret the meagerness of affirmative action as a symptom of

⁵⁷ See DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 7-8 (2d ed. 1980).

⁵⁸ See CATHY J. COHEN, *BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS* 10 (1999) (stating that African Americans have traditionally secured political gains by linking their fates to one another).

⁵⁹ See *id.* at 9 (noting that African Americans' linked fate enables group mobilization for important issues, but also that "the majority of African Americans still lack the political, economic, and social resources necessary to participate actively in" the political process.)

how little power blacks, Latinos and other racial minorities actually have. Given that limited power, the Court is the only institution that can effectively steer the political discourse in a way that allows minorities to retain their foothold in the meritocracy.

III. THE SCHOLARLY CRITIQUE OF DIVERSITY

As the reader has no doubt gathered, the diversity rationale for affirmative action has never found favor among law professors. It would not be hyperbolic to claim that diversity is so unpopular in the academy that the infirmity of the reasoning in Justice Powell's *Bakke*⁶⁰ opinion is one of the few subjects upon which the vast majority of constitutional scholars can agree.⁶¹ Indeed, UCLA's Kenneth Karst appears to be the only prominent constitutional scholar who actively supports it.⁶² Of course, despite this consensus, scholars arrive at their disapproval from different directions.⁶³

The critique of the diversity rationale comes in four basic flavors. The least troubling comes from the far right. These scholars, perhaps most prominently Lino Graglia, believe that formal equality is all that the Constitution and the Civil Rights Act require and permit.⁶⁴ From this normative perspective, affirmative action is impermissible racial discrimination and the diversity rationale is a devious lie that furthers an unconstitutional program.⁶⁵

The second group, which includes the vast majority of scholars, consists of liberals who believe in the substantive goal of affirmative action, that is, in helping to achieve a more egalitarian society, but believe that the diversity rationale is an illegitimate or dishonest constitutional basis for the program.⁶⁶ Critics from the mainstream left object to diversity because they find the rationale intellectually or morally unfulfilling.⁶⁷

The third group is headed by Stephen L. Carter, who in his book, *Confessions of an Affirmative Action Baby*,⁶⁸ expressed his

⁶⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

⁶¹ See, e.g., LEVINSON, *supra* note 13, at 14, 16; Graglia, *supra* note 1, at 58-59; Peter H. Schuck, *Affirmative Action: Past, Present and Future*, 20 YALE L. & POL'Y REV. 1, 34-35 (2002).

⁶² Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 373-75 (2003).

⁶³ See, e.g., Rubinfeld, *supra* note 13, at 445-46; LEVINSON, *supra* note 13, at 55; Graglia, *supra* note 1, at 58-59; Schuck, *supra* note 61, at 27.

⁶⁴ Graglia, *supra* note 1, at 57.

⁶⁵ *Id.*

⁶⁶ LEVINSON, *supra* note 13, at 55-56.

⁶⁷ *Id.*

⁶⁸ STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991).

concern that affirmative action, and the diversity rationale in particular, stigmatized all minorities by casting doubt on their abilities and implying that there is one monolithic minority perspective.⁶⁹ Justice Thomas is also a prominent, though more extreme, exponent of this view.⁷⁰

The fourth and last group offers the most compelling critique of affirmative action, making two related points. The first, most prominently made by Richard Delgado, argues that the conceptual framework of affirmative action casts underrepresented minorities in the role of beneficiary and scripts whites as patrons.⁷¹ A full implementation of the radical critique of merit⁷² (the idea that the dominant group has constructed the criteria that constitute merit with the express function of maintaining its dominant position),⁷³ the argument goes, would lead to affirmative action's outcomes without reinforcing prevailing views of white superiority. The second point, mostly insinuated by critical race scholars, is that underrepresented minorities should be wary of any program, like affirmative action, that works to uphold the fundamental structure of power by making minimal redistributive concessions.⁷⁴ This last critique has plainly Marxist, though not necessarily revolutionary, implications. Affirmative action, in this view, is a palliative (or opiate, if you will) that assuages minority aspirations just enough to prevent oppressed groups from pressing for more radical change.⁷⁵

Despite the normative differences between these perspectives, however, they have in common the formal belief that the law should speak some form of "truth." That is, these scholars share the belief that the Court should provide a rationale for or against affirmative action that follows logically from underlying principles, or formal readings of relevant texts. The possibility that such a "logical" argument may not persuade an audience

⁶⁹ *Id.* at 2.

⁷⁰ See *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., dissenting).

⁷¹ Delgado, *supra* note 4, at 1224-25.

⁷² See Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990). For example, he states that we can only rank articles "within a particular genre" and that "[t]he vast majority of recognizable genres . . . have a specifically white, ideologically moderate or conservative history. . . . built into their rules." *Id.* at 754. See also Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 951 (1991).

⁷³ Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201, 1207-08 (2003). This is a Foucaultian phenomenon where the diffusion of power works to uphold the essential dynamic of domination. The radical critique of merit does not suggest that there is a conspiracy to create discriminatory criteria of "merit"; the phenomenon is more insidious than that because it occurs *without* any conscious coordination.

⁷⁴ See Delgado, *supra* note 4, at 1224.

⁷⁵ See *id.*

outside of the academy, or worse, that it may interfere with political discourse in a way that damages the interest of those whom the program is designed to protect, is not within view of diversity's critics. As discussed in section I, *supra*, the politically independent academic bias towards the exegetical is difficult to overcome. Academics of either political persuasion rarely consider the possibility that the promulgation of what Sunstein calls "incompletely theorized agreements"⁷⁶ is an essential part of law's functionality.

This failure to consider the full context of the Supreme Court's institutional role is particularly damaging where affirmative action is concerned because minority legal gains are so tenuous that a mistake in form, a failure to craft a legal rationale that effectively persuades the proper audience, will mean a failure in substance; the majority will rally against the program and seek to repeal it.⁷⁷

A. The Right: Blinded by Colorblindness

Most of the scholars on the right who oppose affirmative action possess a strong and uncritical belief in the ideal of a colorblind society⁷⁸ and do not seriously engage the idea that racism may be endemic to our "meritocracy,"⁷⁹ or consider racism a real and pervasive phenomenon. Further complicating the perspective of the right is their general belief in an originalist or strict-constructionist approach to constitutional interpretation. It is inherently difficult for such a theory to make room for the rights of racial minorities, because the perpetuation of slavery precipitated a pivotal compromise at the Constitutional Convention. For all their foresight and wisdom, the Founders were also men of their time who, in order to form a "more perfect" union, agreed to overrepresent and subsidize southern states by counting a slave as 3/5ths of a person. Instructively, though Justice Scalia,

⁷⁶ See SUNSTEIN, *supra* note 34, at ch. 2.

⁷⁷ Unsurprisingly, despite the political sensitivity of *Grutter*, such mobilization is occurring. In Michigan, Jennifer Gratz, the former *Gratz* plaintiff, has spent the last three years working full-time to rally Michigan voters to pass a ballot initiative prohibiting Affirmative Action in Michigan universities. Opponents of the measure emphasized that the only reason that they had a chance of preventing its passage is because they had spent millions to reframe the issue, emphasizing the negative effects an affirmative action ban would have on women and on Michigan's economic competitiveness. This political effort to reframe the issue illustrates how important such frames are to safeguarding minority rights. Without this reframing, passage of the initiative in a state that has a white majority would be a *fait accompli*. See Tamar Lewin, *Campaign to End Race Preferences Splits Michigan*, N.Y. TIMES, Oct. 31, 2006, at A1.

⁷⁸ See Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* in CRITICAL RACE THEORY: THE CUTTING EDGE 35 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

⁷⁹ Kennedy, *supra* note 72, at 709-10; Delgado, *supra* note 72, at 945-46.

originalism's most powerful proponent, believes that *Brown v. Board of Education*⁸⁰ was rightly decided, he has admitted that the decision cannot be squared with his own approach to constitutional interpretation.⁸¹ In itself, this failure strongly suggests that it will be difficult for decisions regarding race to follow standard jurisprudential rules. Yet, as a result of their formal and normative commitments, most conservatives do not take arguments that locate an active role for the Court in defense of minority rights very seriously.⁸²

Put more pointedly, conservative scholars are generally untroubled by America's persistent racial inequality. This lack of concern prevents these scholars from engaging their jurisprudential philosophy with the social reality of racial disparity. As a result, many of these scholars feel free to conduct a crusade against affirmative action with moral conviction. Implicitly, this conviction is driven by empathy for those whites who were passed over in the admissions process in order to admit an underrepresented minority applicant. These whites are cast as the "innocents" in the right's affirmative action passion-play.⁸³ The devilish villain is the liberal academic establishment that, some conservatives argue, continues to support affirmative action only to save itself from the embarrassment its members would feel in preaching liberal values to a lily-white congregation. From this perspective, mere shame, and not a normative commitment to social justice, is the primary motivating force behind affirmative action.

The diversity rationale gets under the skin of these scholars because (to their credit) they understand how effectively the rationale changes the terms of the affirmative action debate.⁸⁴ Conservatives would prefer not to discuss diversity at all. Their arguments against affirmative action would persuade the white majority much more readily if they could bypass diversity and simply dub affirmative action race-based discrimination, where

⁸⁰ 349 U.S. 294 (1955).

⁸¹ Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER, Mar. 28, 2005, at 40 (stating that Scalia has admitted that his originalist interpretation of the Constitution cannot be squared with *Brown v. Board of Education*).

⁸² See, e.g., ELY, *supra* note 18, at 135 (commenting on the view of some conservatives that "the Court's role in protecting minorities should consist only in removing barriers to their participation in the political process.").

⁸³ See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 298-99 (1990) (arguing that the diversity rationale paints whites as innocents and therefore damages America's racial discourse).

⁸⁴ See Graglia, *supra* note 1, at 57 (discussing the idea that the "diversity" rationale for affirmative action has become merely a tool for higher learning institutions to prevent embarrassment by admitting minorities).

whites suffer in place of people of color. If, alternatively, the program were grounded in a history of discrimination, conservative scholars could assert the innocence of current generations, making the case that whites of today should not pay for the sins of their fathers. Many of these scholars are plainly chagrined to have to devote their energies to dismantling the diversity rationale, which they consider to be a bald-faced lie.⁸⁵

All of these normative beliefs are well shrouded by this group's formal commitments; they position themselves as advocates for neutral principles in a world they perceive to be equal. Moreover, these scholars tend to downplay the fact that the Supreme Court does not mandate affirmative action; in public school settings, at least, the program can be abolished by the legislature or in ballot initiatives.⁸⁶ Indeed, some liberal scholars argue that the Court's scrutiny of affirmative action is inappropriate because the program is already subject to democratic safeguards. Conservatives may shy away from this discussion because the diversity rationale makes legislative advocacy much more difficult for conservatives. Lobbying is tougher when liberal opponents can say that legislators who abolish affirmative action are against diversity.

Plainly, the normative perspective of this article is far removed from the viewpoint of conservative scholars on racial issues, and this article does not pretend to proselytize to this flock. It will, however, illustrate to conservatives how affirmative action works to facilitate many of their other strongly-held convictions. Most prominently, affirmative action solidifies the fundamental order of American society, an order which continues to favor the white elite in nearly every way, and of which nearly all of these critics are a part. That stable social order would be most disrupted by affirmative action's absence. Contrary to the view of some conservatives, affirmative action is less about saving professors from the embarrassment of fewer black students than it is about giving some substance to the myth of equal opportunities for American social advancement. As Justice O'Connor rather candidly put it in *Grutter*, universities and law schools

represent the training ground for a large number of our Nation's leaders. . . .

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership *be visibly*

⁸⁵ See *id.* at 80–82. See also Fitzpatrick, *supra* note 1, at 397.

⁸⁶ See Graglia, *supra* note 1, at 59–64. Though Graglia concedes that affirmative action is constitutionally permissible, he still insists that a plain reading of the Civil Rights Act should lead the Court to conclude that any discrimination based on race is impermissible by statute.

open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.⁸⁷

Affirmative action, quite apart from being a threat to the prevailing social order, plays a prominent role in maintaining that order's essential structure. The glut of amicus briefs the Court received from the American establishment⁸⁸ defending the law school's position is strong evidence of the veracity of these assertions.

If anything, the transparency with which *Grutter* put forth its view that affirmative action is socially stabilizing should spur the mainstream left to join critical race scholars in questioning whether a program that is so well favored by the establishment is something for which progressives should be comfortable advocating. Indeed, it is a testament to the centrism of the American scholarly discourse that conservatives can even make these arguments against racial preferences in the face of evidence that such preferences serve establishment interests so very well.

Conservatives should also consider how damaging and costly it is to maintain a society with a permanent underclass. It is easy to forget that racial tensions have produced substantial violence and destruction of property in this country before.⁸⁹ In fact, affirmative action in the university setting was initiated in order to dampen increasing black militancy. Harvard, Yale and Princeton only began admitting students of color in significant numbers at the historical moment when the black power movement gained traction in the political sphere.⁹⁰ Blindness to the social implications of a formal legal policy, then, can be highly disruptive to other normative preferences of conservative scholars, like law and order.

⁸⁷ *Grutter v. Bollinger*, 539 U.S. 306, 332–33 (2003) (emphasis added).

⁸⁸ See Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516), 2003 WL 399056; Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516) 2003 WL 1787554.

⁸⁹ See, e.g., Kevin R. Johnson, Hernandez v. Texas: *Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 165 (2005) (discussing the "Zoot Suit" Race Riots); *Police Make Arrests at Neo-Nazi Rally*, MSNBC.COM, Feb. 25, 2006, <http://msnbc.msn.com/id/11562166/>.

⁹⁰ See JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 407 (2005).

For an example of a multicultural world *sans* affirmative action, conservatives should look to France. The Gauls have taken a radically formalistic approach to racial equality. Apart from forbidding affirmative action, the French do not even collect government statistics organized by race or ethnicity;⁹¹ they take the metaphor of blind justice quite literally. Yet the recent riots in Paris's cités, Corbusian housing projects outside the city center filled with Arab and African immigrants who were granted citizenship but who lacked any real possibility of belonging to French society, are forcing French leaders to consider that formal equality may be worthless, and even counter-productive, unless it facilitates the material advancement of racial minorities and allows them to fully integrate into French society.⁹²

As a result of the riots, the French are considering implementing an aggressive affirmative action program.⁹³ Acknowledging the power of the visual, just four months after the November 2005 riots, the French passed the Equal Opportunities act, which requires the Conseil Supérieur de l'Audiovisuel (CSA), France's broadcasting regulatory authority, to ensure the promotion of minorities to on-screen television roles.⁹⁴

Moreover, scholars on the right and left who value social stability should not seek to devalue or trivialize the power of aesthetics. Humans are highly visual creatures,⁹⁵ and as a result, aesthetics can have a substantive effect in stabilizing the power structure. In a state with democratic ideals, whose citizens receive their news mainly through television, people want to see those who look like them in positions of power. When people like Justice Thomas dismiss affirmative action as aesthetic window dressing, they miss the point (or understand it too well).⁹⁶ Of course, the aesthetic power of affirmative action is only positive when you believe that the current social order is, fundamentally, worth preserving. Whether it is in the interests of minorities to

⁹¹ David Orland, *Connerly's Racial Privacy Initiative: The Unhappy French Connection*, VDARE.COM, May 28, 2003, http://www.vdare.com/misc/orland_racial_privacy.htm; Thomas J. Sugrue, *Burn, Bébé, Burn*, DISSENT MAGAZINE, Winter 2006, <http://www.dissentmagazine.org/article/?article=150>.

⁹² John von Heyking, *The Riots of Ramadan*, JOHN M. ASHBROOK CENTER FOR PUBLIC AFFAIRS, November 2005, <http://www.ashbrook.org/publicat/guest/05/vonheyking/ramadan.html>.

⁹³ See Associated Press, *French Presidential Hopeful Visits U.S.*, Sept. 9, 2006, available at <http://www.townhall.com/News/NewsArticle.aspx?ContentGuid=e93fc0a0-ded4-417e-a16e-5ef9736e002c>.

⁹⁴ See Jeremy Harding, *Color Bind*, COLUM. JOURNALISM REV., July–Aug. 2006, at 40, available at <http://www.cjr.org/issues/2006/4/harding.asp>.

⁹⁵ Approximately half of the human brain is dedicated to processing visual stimuli. Human Health Research, *Vision*, <http://www.salk.edu/faculty/research/vision.php> (last visited Sept. 29, 2006).

⁹⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., dissenting).

continue to participate within these structures of power is a pressing question that is beyond the scope of this article.

B. The Liberal Mainstream

The liberal mainstream reluctantly embraces affirmative action as a policy but believes that a more "honest" constitutional rationale would better validate minority interests by emphasizing how the legacy of slavery and a history of colonialism and xenophobia have damaged underrepresented minorities in a way that requires compensation.⁹⁷ Professor Kim Forde-Mazrui is typical of these scholars when he writes:

The pursuit of diversity is not only less effective at remedying past discrimination than pursuing the latter goal directly, it may ultimately doom the remedying of past discrimination by creating the illusion that past discrimination has been remedied when it has not.⁹⁸

Forde-Mazrui is particularly concerned with the increase in recent African and Jamaican immigrants enrolling at elite schools like Harvard. This troubles Forde-Mazrui because he wants affirmative action to be "just," and in his view justice means that scarce compensatory resources should be distributed to those who have actually suffered historical injustice perpetrated by citizens of the United States.⁹⁹ From this vantage point, recent African immigrants, who are not descended from American slaves, are taking away resources that more properly belong to others.¹⁰⁰ Or, alternatively, if such immigrants meet ordinary admissions criteria, that institutions are counting these applicants towards their racial goals and not increasing the proportion of black descendants of American slaves.

Diversity diminishes the possibility of historical remediation in this view because diversity, at least in elite circles, is simply code for historical remediation, yet applicants seeking the preference are not required to present any proof that they are actually descended from slaves.¹⁰¹ Thus, when Harvard reports in brochures and to its trustees that X percent of its students are black, elites assume that the admissions office is implementing proper remediation measures, when in fact those resources have gone to many people that have suffered no past "harm."¹⁰²

⁹⁷ See Forde-Mazrui, *supra* note 3, at 685 (arguing that affirmative action is justifiable as a means of making amends for past harm); see also Rubinfeld, *supra* note 13, at 471.

⁹⁸ Forde-Mazrui, *supra* note 3, at 750.

⁹⁹ *Id.* at 709-10.

¹⁰⁰ *Id.* at 744, 749.

¹⁰¹ See LEVINSON, *supra* note 13, at 46.

¹⁰² This view is a bit limited in that it ignores the fact of present discrimination, when it is clear that such discrimination would apply to recent immigrants as well. Moreover,

Jed Rubenfeld criticizes diversity from a different angle. In Rubenfeld's view, diversity's "duplicity" attracts unnecessary attention to the policy:

Pleading diversity of backgrounds merely invites heightened scrutiny into the true objectives behind affirmative action. This heightened scrutiny would quite properly reveal the existence of a race- or group-related purpose, rather than a genuine interest in achieving a representative diversity of perspectives.¹⁰³

Professor Rubenfeld believes that sincere concern for diversity of perspectives would require institutions to give preference to neo-Nazi and Christian fundamentalist applicants.¹⁰⁴

Despite their differences, then, Rubenfeld and Forde-Mazrui agree that diversity harms affirmative action because it has a distorted relationship to the legitimate philosophical underpinnings of what should be a remedial program. They argue that this distortion harms the reputation of affirmative action, works against the possibility of social justice, and invites unwarranted controversy and contentiousness.

Apart from these rhetorical concerns, most liberal scholars also believe that other policies would better compensate underrepresented minorities while avoiding the discriminatory pitfalls of affirmative action. For instance, Professor Rubenfeld argues forcefully that affirmative action is a constitutionally permissible program while confessing that

[i]f I had to choose, I 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.¹⁰⁵

Though Rubenfeld is careful to separate his opinions about the formal propriety of affirmative action from the normative wisdom of implementing the program, his policy suggestion and his distaste for the diversity rationale have their roots in the same political misapprehension.

From an objective viewpoint, Professor Rubenfeld, Professor Forde-Mazrui and other liberal academics are correct that af-

nearly all Africans, whether enslaved or not, were negatively affected by western colonization and the slave trade.

¹⁰³ Rubenfeld, *supra* note 13, at 471–72.

¹⁰⁴ *Id.* at 471. Is it really the case that universities cannot legitimately value the perspective that minorities carry with them—first hand experience of the effects of a racialized society—over the often reactionary and freely chosen beliefs of Christian Conservatives and Neo-Nazis? In any event, in the case of Christian conservatives applying to elite, largely secular universities, strongly-held beliefs are usually plus factors on admissions committees.

¹⁰⁵ *Id.*

firmative action and the diversity rationale are sub-optimal political outcomes. The program itself does little to ameliorate the centuries of discrimination that were so damaging to blacks,¹⁰⁶ it raises questions about the performance of racial stereotypes and the possibility of stigma, and it may calcify racial identity in a socially undesirable way. Moreover, it is vulnerable to the under-inclusiveness argument: Why is racial diversity privileged over other forms? Worst of all, the program appears to fully satisfy no particular constituency because it is compromised on all sides.

But Forde-Mazrui and Rubenfeld's policy alternatives, each of which would require an expensive and sustained national focus on the plight of blacks and other underrepresented minorities, imply that they have critiqued affirmative action and diversity without having seriously considered what kind of race-based remediation programs are politically possible in twenty-first century America. This lack of consideration is surprising, as the impossibility of implementing a program that fulfills either of these professor's utopian suggestions should be quite plain.

The past twenty-five years of American political history have been defined by a growing political consensus, spurred by the Republican party, that the central idea of the Great Society—that government can play an active and positive role in helping its citizens—is bankrupt. In accord with this shift, affirmative action itself, a program that costs very little, has been under siege during the same period. It is highly unlikely that in this political climate a white majority would implement a radical program designed primarily to aid negatively-racialized minorities.¹⁰⁷

For a more concrete example of the difficulties more "substantive" remediation would encounter, consider the suggestion that school funding be equalized between racial groups, or at

¹⁰⁶ Professor Rubenfeld argues that helping African-Americans should be the chief goal of affirmative action. *Id.* at 471–72. This perspective is limited and he fails to appreciate the extent to which other minorities, particularly Latinos, also have a long history of second class status. See Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the NeoLiberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 491–93 (2004) (reviewing GEORGE YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE (2003)).

¹⁰⁷ It is true that some political attention has been paid to the plight of inner-city schools by the "compassionate conservative" Bush administration, but even that example proves my point. No Child Left Behind is a mandate for superior performance without any money to fund the remediation that the law requires. Scores have gone up in some jurisdictions, but per-pupil funding has not come close to being equalized. And in some ways equal isn't even enough. As Forde-Mazrui contends in his article, there are all kinds of socializations and day to day interactions that black children lack and white children have; to really reach the goal of equality of opportunity would require a "massive infusion of resources into poor black communities" for several generations. See Forde-Mazrui, *supra* note 3, at 749–50.

least significantly improved. In the absence of a state or federal supreme court decision that mandates equal school funding, individualistic parents will continue to be unwilling to subsidize the educations of students outside of their self-segregated (by race and class) school district boundaries. Even with such a court decision (highly unlikely even in the most liberal states), parents with means would lobby for lower property taxes or private school vouchers. This change would shift suburban school districts from a *de-facto* private school model, where small segregated community boundaries keep out the poor and the non-white, to an actual private school model, where taxes will subsidize private education or simply be lowered to allow parents to buy that education themselves. The well-entrenched freedom to direct a child's education¹⁰⁸ will ensure that the Court would not prevent this migration from occurring. Moreover, marginal minority communities do not possess the political or economic capital to fight against these outcomes.

The failure of liberal scholars to understand how tightly circumscribed minority political power is prevents them from considering the likely possibility that affirmative action—meager and problematic as it is—is all that the polity can implement. Once scholars acknowledge this possibility, the notion that the rationale for affirmative action should satisfy the preferences of academia diminishes. Instead, the way in which a rationale for affirmative action interacts with the political sphere, where minorities are embattled, becomes paramount.

With this change in criteria, nearly all the philosophical criticisms that liberal scholars wield against the diversity rationale become virtues. In particular, diversity's conceptual flexibility, the fact that it can mean nearly anything and be inclusive of an infinite array of characteristics, is a terrific asset in the political arena; if everyone is "diverse" in one way or another, preferences are less threatening. For her part, Justice O'Connor uses this flexibility with great skill in *Grutter*. But before we delve into a close analysis of diversity's myriad benefits, it will be useful to uncover the political flaws of grounding affirmative action in the preferred liberal rationales, ones that emphasize dark histories or continued discrimination.

1. The Shortcomings of Historically Anchored Affirmative Action Rationales

There is a legend at Yale Law School that upon learning of Ronald Reagan's re-election in 1984—in a race that was widely

¹⁰⁸ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972).

regarded a *fait accompli*—a member of the faculty exclaimed to another professor “How could this man be reelected? I don’t know a single person who voted for him and none of my friends knows anyone who voted for him. Do you?” The answer from his colleague, of course, was no, he did not know a single person who supported Ronald Reagan. Whether or not this story is true (and it likely is not), it continues to circulate around the law school, serving as a cautionary tale to those who enter Yale’s cloistered environs: beware that you do not come to believe that the ideas and values expounded upon within these walls bear any direct relationship to the world outside of them.

Though Yale is particularly guilty of divorcing theory from practice, the legal academy as a whole has become more like Yale, not less.¹⁰⁹ The failure of liberal scholars to critically assess their favored rationales for affirmative action stems directly from this inability to appreciate that their values may differ significantly from those of the public at large. What is particularly troubling about this difficulty is that in law, unlike, say, Philosophy or English, this ivory-tower distance will frequently have a negative impact on the quality of legal scholarship because the law is not a system of reasoning that the academy actually governs. The negative impact of this myopia is clearly illustrated by scholarship that advocates for an affirmative action rationale grounded in a history of racial exclusion or evidence of continued discrimination.

The appeal of affirmative action rationales grounded in a history of oppression or continuing discrimination is, unfortunately, limited to the liberal scholars who advocate for them. These perspectives have limited persuasive power because liberal legal academics are a unique group of people with values and epistemologies that differ dramatically from most of the American population, and even most college-educated citizens. Law professors generally value rigorous logical thinking, have jobs that are, for the most part, guaranteed for life, and are unusually self-conscious about the privilege they enjoy. Though academics are overwhelmingly white and male, their extreme privilege means that they do not share the insecurities that their less accomplished brethren have felt in the aftermath of the civil rights movement, women’s liberation, and the disintegration of the old social contract guaranteeing long-term employment and generous benefits.

The deep-seated resentments that have emerged from the

¹⁰⁹ See Richard A. Posner, *Madison Lecture: Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998).

transformative "progress" of the past half-century have been exploited brilliantly by the Republican party since the enactment of the 1964 Civil Rights Act. Indeed, President Johnson predicted the electoral realignment that would take place over the coming decades, commenting to an aide that by signing the act he was handing over the South, once a Democratic party stronghold, to the Republican party for "a generation."¹¹⁰

To cultivate the status anxiety that resulted from the emasculating social upheavals of the 1960's, Republicans created a strategy that Kenneth L. Karst dubs the "social issues agenda."¹¹¹ Republicans appealed to the racist, anti-feminist, and, later, anti-gay sentiments of white-male voters by using code words to bring these voters into a fold where their damaged egos could be mended. The central logic of the Republican strategy is to turn white men into victims of the new liberal establishment by convincing them that they are victimized by dogooders who have threatened their hegemony with feminism, affirmative action, and "political correctness."

Affirmative action is particularly threatening to the status of this group of men, especially those among them who are poor or working class. More than any other group, these whites benefited from the social norms that used to prohibit women and minorities from competing with them for jobs. Though it is unlikely that many members of this group could be sold on affirmative action in any form, grounding the program in the victimization of underrepresented minorities is particularly galling to them because they have become accustomed to seeing themselves as victims of 1960s social transformations, and they conceptualize blacks, other minorities, and women as ungrateful or undeserving beneficiaries of those changes. Creating a public discourse about affirmative action based on past or current victimization raises this group's ire and gives them the tools to recruit others into their coalition.

Moreover, an affirmative action rationale rooted in minority victimization allows the program's white male opponents to recruit others to their cause because that justification runs up against other deeply-held and widely-shared American convictions. We can think of these socially constitutive beliefs as an

¹¹⁰ Johnson is said to have told an aide, shortly after signing the Civil Rights Act of 1964, that "[w]e have just lost the South for a generation." John W. Lee, III, *Class Warfare 1988-2005 over Top Individual Income Tax Rates: Teeter-Totter from Soak-the-Rich to Robin-Hood-in-Reverse*, 2 HASTINGS BUS. L.J. 47, 125 (2006).

¹¹¹ KARST, *supra* note 26, at 27-28 (arguing that the Republican party has tapped into this race animosity quite successfully by using code words that support its social issues agenda).

expanded version of the "American narrative" that I alluded to earlier in this article. In this narrative, our history is a parade of economic, social and political advancement, and the meritocracy is fair and just, because economic outcomes are linked to hard work and persistence, not the accident of birth.

These myths, coupled with our laissez-faire economic system, result in a populace that believes that people control their own destinies¹¹² (fatalism is for the Europeans). F. Scott Fitzgerald's famous line, "[t]here are no second acts in American lives,"¹¹³ may be the most inapposite American popular quotation. Americans are highly adept at reinvention; second acts are commonplace, and third, fourth and fifth acts are not unheard of. Americans' self-identity and status are malleable; people do not believe that they are tethered to their pasts. All these beliefs are held by Americans of every race, and every income level, even though nearly every notion is contradicted by statistical evidence or a frank assessment of our history.¹¹⁴

Given, then, the American aversion to history, conviction that hard work can will us out of any circumstance, and penchant for self-reinvention, it is unlikely that a wealth-transfer policy directed on the basis of race, emphasizing a terrible history of slavery and discrimination, will gain traction in the court of public opinion; it is un-American to dwell on the negative, ugly past. Such an argument, enshrined in a political opinion, would lead to the kind of unproductive political conflict engendered by *Bowers* and *Roe*.

2. The Difficulty with the Continuing Discrimination Rationale

The other liberal suggestion, that the Court ground affirmative action in social science research illustrating how conscious and unconscious discrimination continue to adversely affect underrepresented minorities, is also wrongheaded. In essence, adopting such a rationale requires the Court to publicly accuse most Americans of being racist. A discourse framed by such an accusation will be even more inflammatory than one framed by a history of discrimination because there are now strong social norms against overt racism. Accusing people of being racist is a

¹¹² See Schuck, *supra* note 61, at 30 (reflecting the view of some affirmative action opponents who acknowledge a history of racial deprivation, but who believe that in recent years blacks have made "stunning political, economic, and social advances" that suggest that "special preferences are no longer warranted").

¹¹³ F. SCOTT FITZGERALD, *THE LAST TYCOON* 163 (Edmund Wilson ed., 1941).

¹¹⁴ See *Class Matters: A Special Section*, N.Y. TIMES, May 15, 2005, <http://www.nytimes.com/indexes/2005/05/15/national/class/> (supporting the conclusion that Americans misapprehend the extent of American socio-economic mobility).

prescription for contentiousness because people refuse to believe that they harbor racial bias. Even in cases where people do admit to holding racial stereotypes, they do not conceptualize them as stereotypes; they believe them to be true. In this way, discrimination is invisible to the majority that perpetrates it.

Ironically, this denial of bias is growing stronger just as evidence of bias has grown more concrete. Mahzarin Banaji, a psychology professor at Harvard, has conducted path-breaking work that proves how deep-seated and wide ranging our unconscious biases are.¹¹⁵ According to her studies, Americans hold strong negative biases against racial minorities, the elderly, and social groups to which they do not belong.¹¹⁶ Despite the strength of her research and the persuasiveness of her analysis, however, Professor Banaji's own Harvard undergraduates refuse to believe that they themselves actually harbor these biases.¹¹⁷ Professor Banaji's students do not doubt her research, of course. On the contrary, most of them believe that America is rife with racism; they just do not believe themselves to be racist.¹¹⁸ Indeed, according to Professor Banaji, her students become quite defensive when she confronts them about their results on her bias tests. If the most privileged and intelligent undergraduates in the world are touchy about confronting their own unconscious bias, it is highly probable that the public at large will be even more unwilling to accept that their way of perceiving the world is biased in important ways.

Another recent study also uncovered significant bias against job applicants with "black" first names. In "Are Emily and Greg More Employable than Lakisha and Jamal?"¹¹⁹ co-authors Marianne Bertrand and Sendhil Mullainathan found that Emily and Greg enjoyed a sizable advantage over their counterparts with traditionally African-American names. Bertrand and Mullainathan sent out nearly five thousand resumes in response to help wanted ads in the *Boston Globe* and the *Chicago Tribune*. The resumes were equalized for qualifications, though no resume sent to the same employer was identical; the most significant difference between the resumes was whether the applicants names

¹¹⁵ See Mahzarin Banaji, *Ordinary Prejudice*, PSYCHOLOGICAL SCIENCE AGENDA, Jan.-Feb. 2001, at 8, available at www.apa.org/science/psa/jan01.pdf.

¹¹⁶ *Id.* at 9; see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1513-14 (2005) (discussing and cataloging implicit bias studies by Banaji and others).

¹¹⁷ Banaji, *supra* note 115, at 8.

¹¹⁸ *Id.*

¹¹⁹ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal?* 1, (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2004), available at <http://post.economics.harvard.edu/faculty/mullainathan/papers/emilygreg.pdf>, (showing that similarly qualified black candidates are disfavored even when their educational qualifications are significantly superior to white candidates).

were typically "white" or "black."

The authors found that "white" applicants were 50% more likely to receive a request for an interview than "black" applicants with equivalent qualifications.¹²⁰ More distressingly, while white applicants with higher quality resumes received 30% more callbacks as a result of their qualifications, black applicants garnered a smaller gain for the same increase in qualifications.¹²¹ Put succinctly, according to the authors, "the gap between White and African-Americans widens with resume quality."¹²² Again, despite strong social norms that discourage discrimination on the basis of race, the authors of this study found evidence of pervasive racism, even without direct visual stimulus. All these biases, however, are likely invisible to those who hold them.

This invisibility is doubly pernicious. First, it weakens the resolve to implement affirmative action programs because most people will not believe that race discrimination still exists when they do not see for themselves the evidence of overt discrimination. Second, the weakened resolve to implement affirmative action works to consolidate the existing racial order, further entrenching the invisible biases that created these racial disparities in the first place. Under these conditions, an affirmative action program anchored in history or evidence of continuing discrimination is destined to fail.

To further complicate matters, a backward-looking rationale or one based on evidence of continuing discrimination invites empirical scrutiny by structuring affirmative action in a way that encourages people to think of the program as a means of repaying the debt owed by whites to disadvantaged minorities. This "debt" frame is explicitly favored by Professor Forde-Mazrui, and implicitly favored by other liberal scholars who approve of affirmative action and disapprove of the diversity rationale. These scholars favor this structure because it is familiar: every lawyer thinks of equity in terms of tort law. Attorneys are trained to ask: "How can we make the plaintiff whole? By what amount has the plaintiff been harmed?"

The problem with applying this formulation to affirmative action in higher education is that the public process of calculating the individual "damages" that each person deserves would quantify people in a way that most Americans would consider grotesque.¹²³ Even assuming that such individualized considera-

¹²⁰ *Id.*

¹²¹ *Id.* at 3.

¹²² *Id.*

¹²³ See Peter Skerry, *The Strange Politics of Affirmative Action*, THE WILSON

tion were possible, the calculations involved are daunting and uncomfortable. One would need to quantify the amount of bias that every individual minority actually encounters in order to discern the size of the societal debt that needs to be repaid. Such a calculus raises countless questions: Does society owe a debt to Puerto Ricans and Mexicans (for de facto colonialism), but not to certain first generation Cuban-Americans, who are relatively well off? Do Latinos without accents and more "European" features get less preference than mestizos and other Latinos with more "indigenous" features? What about Latinos without a Spanish surname? Do dark-skinned blacks inspire more racial animus than light-skinned blacks?

The empirical resolution of such questions may make for an interesting econometric exercise, but it is too complex and racially essentializing to be politically viable. These are discussions that the judiciary cannot have. Minorities would not want to be subjected to such an analysis, or they would bicker about the values assigned to different characteristics, and whites, who mostly do not believe that racism exists, would object to paying off the "debt" in such a complex way. Again, from the American perspective, complexity may be a sign of fraudulence. Put simply, quantifying harm in this way runs against the American preference for self-definition. Americans want to present their personal stories on their own terms; no one wants to be just another number. Justice O'Connor sensed the importance of this value.¹²⁴ This difference alone explains why she voted to overturn the Michigan undergraduate program, which used an explicitly numerical approach to admissions, and upheld the law school's "whole student" approach in *Grutter*. It is unimportant whether the different approaches produced differences in fact, *Grutter* properly locates some metaphysical procedural value in the holistic, non-numerical approach practiced at the law school.

This analysis of the pitfalls of more "academic" rationales for affirmative action also illustrates why the judicial rationale for affirmative action is so important. Affirmative action is being asked to do what is nearly impossible. It must seek to solve a problem that no one, excepting those who lack political and economic power, as well as a few elites, believes to exist. Plainly, under these conditions, a politically persuasive affirmative action policy cannot be constructed by assembling past and present social science data to make an empirical case for compensation and redistribution. On the contrary, the rationale that validates af-

QUARTERLY, Winter 1997, at 39, 40, available at http://www.brookings.edu/gs/Skerry_aa.pdf.

¹²⁴ *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

firmative action needs to be constructed around the viewpoint of the majority. By implementing the program without an explicitly empirical focus, the program can survive by staying off the political balance sheet, where scrutiny of the policy's intricacies could lead to its abolition. The Court should embrace diversity precisely because that rationale is silent on the deeper contradictions and difficulties surrounding a subject—race—that is taboo.

3. The *Grutter* Dissent and the Problem with Numerical Emphasis

The *Grutter* dissent illustrates the problems with a rhetoric that encourages a numerical approach towards affirmative action, taking as their starting point a deconstruction of the University of Michigan law school's stated interest in attaining a critical mass of minority students. "[C]ritical mass," the dissent claims, is a "veil" that obscures the law school's attempt at "naked . . . racial balancing."¹²⁵ In particular, a close look at the law school's numbers leads the dissenters to conclude that black applicants are favored over Latinos with higher qualifications. The implication of this finding, from the dissenter's point of view, is that a program that discriminates *between* underrepresented minorities must be pernicious.

In fact, however, the law school admissions committee's "balancing" may reflect real differentials between the black and Latino racial experience, precisely the kinds of differences that a hyper-accurate, empirical affirmative action would seek to quantify. There is sociological evidence that blacks may suffer significantly more racial discrimination in American society than Latinos do.¹²⁶ For example, there are probably more Latinos than blacks that can pass for white, African-Americans have a history of slavery that most Latinos lack, and white-Latino intermarriage rates are significantly higher than black-white intermarriage rates, and still climbing.¹²⁷

Yet, as the dissent shows, most Americans would probably be uncomfortable with a public discussion of why some minorities might deserve more preference than others. Supreme Court precedent reflects this discomfort by prohibiting "racial balancing."¹²⁸ If Justice O'Connor had actually adopted a historical or

¹²⁵ *Id.* at 379 (Rehnquist, C.J., dissenting).

¹²⁶ See Delgado, *supra* note 106, at 497–98 nn.48–49.

¹²⁷ Approximately 30% of marriages involving U.S.-born Latinos are inter-Hispanic, while only 7% of blacks marry a spouse of another race. Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriage*, 60 POPULATION BULLETIN, June 2005, at 3, 12, 27, available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>.

¹²⁸ *Grutter*, 539 U.S. at 330.

ongoing discrimination rationale in *Grutter*, she would have had to engage in this debate about differential preferences in the majority decision. Imagine the formal challenges of writing a majority decision that rationalized every inter-racial choice that the law school makes through a complex social-scientific exegesis, like the one presented above. Such discussions might satisfy liberal elites who are comfortable seeing the world in shades of gray, but to the black-white public, these complex explanations would do much to discredit the program and encourage a political movement to prohibit it.

More troubling still, public discussions of differential preferences might serve to divide racial minorities among themselves. Encouraging interracial strife of this sort damages minority interests as a whole because racial minorities can only have significant power by asserting a unified front. The *Grutter* dissent presents its finding in a way that suggests that Latinos should lobby for the spots that blacks "took away" from them or join whites in opposing the program. The dissent fails to emphasize that while Latinos may not receive quite the boost that African-Americans do, Latinos still receive preference relative to many white candidates. Thus, even if Latinos receive less preference, they are better off working with blacks to keep affirmative action than they would be were they to join with whites in seeking to abolish the program.

Blacks in particular fear this emphasis on difference because they have seen potential allies back down before. Whites have a long history of giving other disfavored groups subtle preferences and the promise of future entry into the white race in exchange for that group's refusal to align its interests with blacks.¹²⁹ During the colonial period, slave masters gave certain privileges to their white indentured servants to keep them from uniting with blacks against the landowners (this is, unsurprisingly, a favorite example among Marxists).¹³⁰ Nobel Laureate Toni Morrison expressed this history of differentiation in this way:

If there were no black people here in this country, it would have been Balkanized. The immigrants would have torn each other's throats out, as they have done everywhere else. But in becoming an American, from Europe, what one has in common with that other immigrant is contempt for *me*—it's nothing else but color. Wherever they were from, they would stand together. They could all say, "I am not *that*." So in that sense, becoming an American is based on an atti-

¹²⁹ See, e.g., WILLIAM J. GARDINER, REFLECTIONS ON THE HISTORY OF WHITE SUPREMACY 7–9 (Apr. 28, 2003), <http://www.uua.org/programs/justice/antiracism/Greenfiled%20Group%20Paper.pdf>.

¹³⁰ *Id.*

tude: an exclusion of me.¹³¹

When highly numerical analytic models are applied to race, they will always highlight the significant differences between the racial experiences of distinct minority groups, because such differences do exist. But because the temptation to assimilate into the system by aligning one's interests with the majority is so strong (see, e.g., Jews, Irish, Polish, *ad infinitum*), emphasizing differences between minority groups obscures their shared experiences, preventing them from joining together. Inter-racial solidarity, in short, presents a classic problem of collective action. Minorities must join together in order to create a public good, and through it all members can gain advantage. But members who can pass in certain contexts for the majority race can opt out of contributing to the common pool and thereby undermine the strength of the coalition. Thankfully, it seems as if blacks and Latinos are learning to forge common alliances (see, e.g., the recent Los Angeles mayoral race);¹³² but these will always be tenuous if discourse is structured in a way that magnifies the differences between the black and Latino racial experience.

Lastly, and most importantly for racial minorities, the historical or current bias rationale perpetuates a conception of minorities as damaged, flawed, and deficient. As one scholar put it:

[A] common theme of the last fifty years (but with roots in the writings of W.E.B. Du Bois at the turn of the century) has been the effort by racial liberals to construct African Americans as damaged and to use that "damage imagery" to build support for progressive racial policies. The arguments in favor of school desegregation in *Brown v. Board of Education* and affirmative action in the mid-1960s, for example, were premised in part on the notion that African Americans had been damaged by racial discrimination and segregation.¹³³

While such a conception provides substantial philosophical justification for affirmative action, that rhetoric does harm to the minorities it is designed to help. The concept of diversity, on the other hand, transfigures this damage into a positive characteristic, a battle-scar to take pride in; it is something that grants its victims a special kind of knowledge.

In sum, the pet rationales of liberal scholars do harm to minority interests by inviting a quantitative inquiry, framing the

¹³¹ Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1602 n.59 (1997).

¹³² Brian MacQuarrie, *Black-Latino Alliance Buys L.A. Mayor Candidate*, THE BOSTON GLOBE, May 4, 2005, at A1.

¹³³ Davison M. Douglas, *Justifying Racial Reform*, 76 TEX. L. REV. 1163, 1164 (1998) (reviewing DARYL MICHAEL SCOTT, *CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996* (1997)) (citations omitted).

program in terms of debt, and perpetuating a damaged image of minority populations. That said, these rationales are philosophically and formally much more satisfying justifications for affirmative action. Where the Supreme Court is called upon to protect minority interests, however, their role will necessarily be more political than formally legal. By embracing a rhetoric that seeks to persuade the political majority, Justice O'Connor best serves the interests of racial minorities. Justice O'Connor's adoption of diversity, and even her decision to reject the undergraduate program's numerical emphasis in *Gratz*, were designed to appeal to this constituency. A Court that insisted on legal formalism without a thought to politics would fail in its role to defend and further minority political gains.

IV. HOW *GRUTTER'S* APPLICATION OF THE DIVERSITY RATIONALE DEFENDS MINORITY INTERESTS

With the importance of the public audience in mind, we now turn to Justice O'Connor's opinion in *Grutter*. Much has been made of O'Connor's tendency to look at adjudication from a legislator's perspective. In practice, this point of view has led O'Connor to fashion an ad hoc, pragmatic jurisprudence. This pragmatism, and her notorious penchant for balancing tests,¹³⁴ is frequently a source of scorn within the academy. I will leave for another day a discussion of whether or not such criticisms are warranted. For our purposes, however, this explicitly political point of view is the ideal perspective to bring to writing an opinion that vindicates affirmative action.

Indeed, Justice O'Connor's political radar is so finely tuned that she can detect the needs, insecurities and values of the "public," and fashion her opinion accordingly.¹³⁵ Furthermore, O'Connor undoubtedly knows that it is not really the "public" that shapes its own constitutional discourse (if constitutional scholars barely read any Supreme Court decisions, it is hardly possible that the citizenry does). Public discussion is framed, instead, by journalists and other members of the media elite. The *Grutter* decision is perfectly pitched to this constituency; it appears, like the best of plays, to be self-consciously designed to evoke particular responses in a particular audience. Once we understand that this is O'Connor's intent in *Grutter*, we can ap-

¹³⁴ Richard Brust, *Balancing Act: Her Constitutional Tests and Strategic Concessions Helped Make Sandra Day O'Connor a Force from the Center*, ABA JOURNAL, Sept. 2005, at 34, available at <http://www.abanet.org/journal/redesign/09fscase.html>.

¹³⁵ For purposes of this analysis I will operate under the fiction that we can actually determine O'Connor's intentions from the text and the context in which they were made.

preciate how skillfully she works to manipulate the public discourse.

A. From Decision to Narrative

The Law and Literature movement has sought to wring insight from the observation that lawyers are like novelists because both construct reality by telling stories through language. Though the movement has not sought to compare lawyers and reporters, journalists are also storytellers, spinning verifiable facts into yarns that appeal to their particular readerships. Moreover, unlike novelists, journalists have more than a passing relationship with the law; reporters translate the law into stories that their readership can digest.

This more general audience means that when journalists interpret Supreme Court decisions, they ask different questions than lawyers do. Journalists do not wonder: "Is the decision logically consistent? How will it be received by the lower courts? Does it violate accepted constitutional theory?" Instead, journalists ask what stories the decision tells. Their editors ask, "What is my headline? How do I get the attention of my distractible readership?" With this knowledge of how legal decisions of public importance are consumed, O'Connor has deliberately crafted *Grutter* in a way that tells some stories and buries others. The stories she chooses to tell serve to empower minorities and assuage the egos of the majority. But as with any writer, the stories that O'Connor chooses not to tell are as important as the ones she does. To put it more esoterically, *Grutter* displays a mastery of what Sunstein dubs the constructive use of silence.¹³⁶

What is most ingenious about Justice O'Connor's *Grutter* opinion is the way in which it uses the definitional capaciousness of the diversity rationale, or, if you prefer, the instability of its meaning, to facilitate her narrative project. Diversity allows O'Connor to take all the best arguments for affirmative action, each one logically distinct, and place each under the "diversity" heading. This everything-but-the-kitchen sink approach works because, ultimately, affirmative action's justification comes from a variety of analyses and rationales. When considered individually, the "pros" of any one rationale barely outweigh the "cons." The sum, however, of these diverse rationales makes an effective case for the program.

This kind of summation is unwieldy, though. If fully articulated in a legal opinion it would distract substantially from the

¹³⁶ See SUNSTEIN, *supra* note 34, at 39.

opinion's central holding. With diversity as *Grutter's* primary organizing principle, however, O'Connor was able to argue, without apparent inconsistency, that diversity has positive educational value, allows the American military to defend our interests, provides the citizenry with a representative cross-section of leaders in disparate fields, aids in the formation of good citizens, and that diversity is necessary "[b]y virtue of our Nation's struggle with racial inequality."¹³⁷

B. Diversity as Anti-Story

Ironically, by adopting diversity, the subject of so much hand-wringing in the academy, Justice O'Connor avoided making *Grutter's* rationale the primary subject of public discussion about the decision. Why? Because diversity is old news, so to speak. O'Connor's reaffirmation of a prevailing rationale did not make for an interesting story.

In advance of the decision, there was speculation (hope in some corners) that the Court would use *Grutter* to change course and ground affirmative action in a new rationale. These alternative rationales, had the Court adopted them, would have made for excellent news. Imagine the headlines had *Grutter* endorsed affirmative action as a remedy for continuing societal discrimination: "Racists Every One: The High Court Calls Affirmative Action a Necessity in Racist Nation"; "New Analysis: Are We Racists Without Even Knowing it?"; "Affirmative Action: the Price We Pay for Continued Racism." Historical remediation would also fare poorly: "Past Sins Still Cost, High Court Says"; "Blacks to Whites: Pay Up with Affirmative Action (It's Better than Reparations)." Needless to say, discussions framed in this way would not further minority interests.

C. Narrative 1: Whites Benefit from Affirmative Action and They Can Become Diverse, Too

In its substantive ruling (affirming the use of race-based preferences), *Grutter* unavoidably reinforces the Republican narrative of white victimization. The structure of affirmative action requires that some group pay the cost, and those who pay may easily consider themselves victimized. O'Connor's opinion, however, is designed to minimize this narrative by omitting an explicit elaboration of this story and by emphasizing a distracting counter-narrative that illustrates the many ways in which diversity encompasses experiences and histories that the majority possesses.

¹³⁷ *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).

Like all impact litigation plaintiffs, Barbara Grutter was chosen to be the face of the crusade because she has characteristics that make her a sympathetic victim. First, Ms. Grutter is a woman. A female plaintiff is appealing both because prevailing societal stereotypes view females as commonly victimized and because women were once affirmative action's primary beneficiaries, and in some work contexts still are.

Second, Grutter did well in college, she graduated with a relatively high GPA, but did less well on the LSAT.¹³⁸ Today her GPA would place her in the top 25% of Michigan's law school's admittees, while her LSAT score would place her in the bottom 25%.¹³⁹ These numbers suggest that Grutter had a plausible chance of being admitted to the University of Michigan Law School, but they also contain a subtle subtext. Her high grades signal diligence and effort, while her low LSAT score grants her a humanizing failing.

Finally, Grutter does not fit the profile of the typical University of Michigan student. She is a mother and businesswoman, and when she applied in 1997 she was forty-three years old.¹⁴⁰ These characteristics are the most troublesome for the diversity rationale. In an interview conducted before the Court granted certiorari, Grutter herself described her denial of admission in a way that creates a rhetorical rift between race and diversity: "It was not a diversity issue, it was a race issue," she said.¹⁴¹

Aware of these concerns, O'Connor minimizes Barbara Grutter's sympathetic characteristics by effacing her from the opinion as much as possible. Of course, O'Connor could not leave Grutter out of the opinion entirely because judicial conventions require a factual recitation and summary of the procedural posture, and in this case, the plaintiff's personal characteristics were plainly important to the ultimate disposition. Even so, O'Connor uses the convention to radically dehumanize Grutter. Where news stories preceding the resolution of the case emphasized Grutter's unique personal characteristics, O'Connor's description of the plaintiff renders her characterless. In Justice O'Connor's narrative, Barbara Grutter, mother and businesswoman, becomes "a white Michigan resident who applied to the Law School in 1996 with a

¹³⁸ *Id.* at 316.

¹³⁹ See LSAC, Official Guide to ABA-Approved Law Schools, Profile of the University of Michigan Law School, <http://officialguide.lsac.org/OFFGUIDE/pdf/aba1839.pdf>.

¹⁴⁰ Anne Gearan, *Rejected White Law School Applicant Appeals Reverse Discrimination Case to Supreme Court*, THE AFFIRMATIVE ACTION AND DIVERSITY PROJECT, Aug. 9, 2002, <http://aad.english.ucsb.edu/docs/gearan.html>; see Bill Mears, *Supreme Court Hears Affirmative Action Arguments*, CNN.COM, Apr. 1, 2003, <http://www.cnn.com/2003/LAW/03/31/scotus.affirmative.action.advance/>.

¹⁴¹ Gearan, *supra* note 140.

3.8 GPA and 161 LSAT score.”¹⁴² After this cursory description Grutter is further reduced. Her name never again appears in the opinion; she is afterward referred to only as “petitioner.”

This kind of radical reduction, of course, is a staple of legal reasoning. Legal opinions always seek to minimize damaging facts and emphasize favorable ones. O'Connor's description of Grutter is only notable because the rest of her opinion goes to such pains to validate the importance of humanizing applicants by thorough non-empirical consideration. Plainly, O'Connor was concerned that Grutter might become the story; she would surely be interviewed after the Court rendered its decision, just as she was before oral argument. There was no need, then, for the Court to further emphasize Grutter's narrative, especially when it would conflict so obviously with the story that O'Connor was trying to tell.

That story, of diversity's inclusiveness, occupies a primary place in the opinion, directly preceding the declaration of a twenty-five year “time limit” on the program, O'Connor's other strategic concession to the sentiments of whites.¹⁴³ By emphasizing the preference that the law school confers on students who have traveled widely, who speak foreign languages, who have overcome personal adversity or family hardships, or who have pursued careers in other fields,¹⁴⁴ O'Connor shows how diversity includes experiences and accomplishments that happen to, or can be achieved by, all Americans. Further, by analogizing race to other experiences that whites commonly find “enriching,” the benefits of minority perspectives in the academy is made less abstract to those who do not see life through a racial lens. In O'Connor's narrative, then, racial knowledge becomes a subcategory of universal, attainable life experience, rather than a separate, exclusive, and unattainable characteristic.¹⁴⁵

This expansive definition of merit is implicitly contrasted with the much less desirable alternative of an admissions regime that considered only an applicant's LSAT score and GPA, or, like the undergraduate program, one that converted “soft” characteristics into numerical values. In either of the latter two scenarios, applicants are just numbers. Few Americans of any color would prefer to go before an admissions committee as a numerical summation rather than as “whole” person.

¹⁴² *Grutter*, 539 U.S. at 316.

¹⁴³ See *infra* notes 146–150 and accompanying text.

¹⁴⁴ *Grutter*, 539 U.S. at 338.

¹⁴⁵ This frame is in marked contrast to nearly all anti-discrimination laws which emphasize the immutability of race as a basis for granting judicial and legislative protection.

These effects are subtle, and their main purpose is simply to create a storyline that deflects attention from narratives that might emphasize affirmative action's inherent contradictions. Should the journalist or lay reader fail to appreciate these subtleties, however, O'Connor made sure to cap her ruling with a guaranteed headline generator, a few paragraphs of *dicta* that were transubstantiated by reporters into a twenty-five year time limit.¹⁴⁶

D. Narrative 2: Affirmative Action Will End

Time limits are dangerous terrain for the judiciary; indeed, courts have a general aversion to numbers in any context. But Americans like time limits because they provide a sense of closure by marking a point where things will change. O'Connor is careful to structure her affirmative action "time limit" so as to generate headlines, while making it apparent to a legal audience that the limit is not formally binding.

She pulls off this sleight of hand by devoting a few paragraphs to a discussion of case law that articulates why "race-conscious admissions policies must be limited in time,"¹⁴⁷ creating the impression that she will follow this precedent and declare a time limit for affirmative action in higher education. In a nod to her public audience, O'Connor emphasizes that time limits are important because they "assure[] all citizens that the deviation from the norm of equal treatment . . . is a temporary matter."¹⁴⁸

After all this bluster, though, she promulgates a rather toothless limit, stating only that "[w]e [the majority] expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."¹⁴⁹ Plainly, this tepid language will not cause *Grutter* to self-destruct twenty-five years from now,¹⁵⁰ though it will force a future court to be less deferential to universities still granting racial preferences after the lapse of the "limit." Even so, there is nothing in the decision that precludes the Court from granting an extension for the practice if hoped-for gains fail to materialize. To most journalists, however, these legal distinctions will be lost in the race to create attention-grabbing headlines.¹⁵¹

¹⁴⁶ See, e.g., Daniel Mark Fogel, *Expiration Date Is Set*, CHI. TRIB., July 20, 2003, § 2, at 1.

¹⁴⁷ *Grutter*, 539 U.S. at 342.

¹⁴⁸ *Id.* (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, at 510 (1989) (plurality opinion)).

¹⁴⁹ *Id.* at 343.

¹⁵⁰ Surprisingly, Justice Thomas appears to believe that the twenty-five year "time limit" represents an actual holding. *Id.* at 375-76 (Thomas, J., dissenting).

¹⁵¹ E.g., Fogel, *supra* note 146.

In keeping with the rest of O'Connor's opinion, the time limit also serves to empower minorities by suggesting a point at which preferences will be unnecessary, willing by judicial fiat a movement towards equal treatment. Though the deadline is non-binding, O'Connor has created a public expectation that affirmative action, in this context, will end. This expectation means that it will be politically difficult to grant such an extension, even though it is formally possible. The time limit's substantive effect, then, is to make minority underperformance much more pressing, while allowing for an extension of affirmative action in the case that improvements in poorer school districts fail to materialize.

Plainly, this opinion will not catalyze wholesale change in the status of inner-city public schools, but universities are powerful institutions that may now take more aggressive steps to improve the educational pipeline that brings students to their campuses.

In this way, O'Connor has constructed a narrative for consumption by a public audience that seeks to assuage negative sentiment among whites while changing the role of minorities from beneficiaries to patrons. In this tale, it is all students, especially whites, who benefit from the educational enhancements of affirmative action.

E. Narrative 3: Minorities Undamaged

There are reasons for underrepresented minorities to like Justice O'Connor's opinion, other than for its central holding. Most prominently, the diversity rationale "un-damages" minorities by converting race from a stigma into a category of knowledge. O'Connor also manages to elegantly collapse the distinction that the dissenters seek to enact between diversity and merit:

With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.¹⁵²

What is so brilliant about this particular passage is the economy with which it accomplishes three discrete tasks. It manages to place underrepresented minorities on the same level as their white counterparts, stating that all minority students have "been deemed qualified." Then, in the next breath, it subtly

¹⁵² *Grutter*, 539 U.S. at 337–38.

acknowledges how past and present racial discrimination both account for underrepresented minorities' racial knowledge and mandate the need for preference. Thus, effectively, O'Connor incorporates the favored rationales of liberal elites—past and present discrimination—into her opinion, but by wrapping them in diversity's comfortable, non-accusatory embrace, she dampens the sting that they would carry in their full elaboration.

Better still for the status interests of underrepresented minorities, *Grutter* focused attention on the crucial role that these groups play in the American armed services.¹⁵³ O'Connor was only able to highlight the contents of an amicus brief submitted by retired military officers because of the flexibility of her kitchen-sink diversity approach. Under a more traditional structure, this argument could not be accommodated because it is inconsistent with an emphasis on past or present discrimination. These former officers believe that having an officer corps that mirrors the composition of enlisted men and women is imperative for our national security, or, as one commentator put it, a racially integrated officer corps may be "mission critical."¹⁵⁴

This is another line of argument that does double duty. It recasts underrepresented minorities in the role of patriots and thereby raises the stakes of the affirmative action debate. By linking affirmative action to national security at a time when anxiety over security was high, O'Connor knit together the interests of all Americans. Again, by reading *Grutter* as a text aimed at a public audience, we can appreciate how O'Connor is crafting a narrative that affirms and validates the status of underrepresented minorities, while methodically convincing whites that affirmative action is in their interest and even in the best interests of the country.

To her credit, O'Connor's political instincts were spot on. The adoption of the arguments put forth in the military brief garnered significant press coverage, with many media outlets speculating that that brief swung the Court's discussion.¹⁵⁵

F. Narrative 4: Universities Deserve Special Deference

The other prominent story that *Grutter* tells is one that elevates the civic role of universities in order to justify the exceptional legal deference that O'Connor grants them in her opin-

¹⁵³ *Id.* at 331.

¹⁵⁴ See Bryan W. Leach, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 *YALE L.J.* 1093, 1094 (2004).

¹⁵⁵ See LEVINSON, *supra* note 13, at 56–58.

ion.¹⁵⁶ This deference was particularly important for O'Connor to articulate because she wanted to avoid undertaking a detailed statistical inquiry in the text of her opinion. Such an inquiry would have told a story she did not want to tell.

Many critics believe that this deference, as well as O'Connor's refusal to address the "racial balancing" accusations lobbed in the dissent, eviscerate the meaning of strict scrutiny.¹⁵⁷ This group argues that O'Connor simply failed to apply the standard that she said that she was applying. In reality, O'Connor applied the standard, but did not make her analysis public, because the story of that strict-scrutiny application is not something that furthers the substantive interests of minorities.

After all, protecting that interest was her main concern. The strict-scrutiny test was designed to "smoke out" policies that hurt minorities;¹⁵⁸ there is no reason, then, that O'Connor should be forced into a public discussion of that inquiry if that discussion would actually hurt her main constituency in the political realm.

Diversity, then, is more than just a "fig leaf" for affirmative action. The rationale represents a self-conscious judicial choice to present affirmative action in a way that will advance and protect minority rights in a political system that systematically denies underrepresented minorities the ability to lobby for more substantive change.

CONCLUSION: THE REAL PROBLEM WITH THE DIVERSITY RATIONALE AND AFFIRMATIVE ACTION

For those who aspire to the truest form of racial equality, one that would overthrow the master narrative of white dominance, my defense of affirmative action will ring hollow. In essence, I am advocating the adoption of the diversity rationale as a way to appease a white constituency that, from a neutral standpoint, has no right to be appeased. The ultimate story of affirmative action, then, is the story of every liberal reform of a fundamentally unequal system. Derrick Bell told this story nearly twenty-five years ago:

First, blacks are more likely to obtain relief for even acknowledged racial injustice when that relief also serves, directly or indirectly, to further ends which policymakers perceive are in the best interests of the country. Second, blacks as well as their white allies, are likely to focus with gratitude on the relief obtained, usually after a long struggle.

¹⁵⁶ See *Grutter*, 539 U.S. at 328.

¹⁵⁷ See Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459, 468 (2004).

¹⁵⁸ *Grutter*, 539 U.S. at 326.

Little attention is paid to the self-interest factors without which no relief might have been gained. Moreover, the relief is viewed as proof that society is indeed just, and that eventually all racial injustices will be recognized and remedied. Third, the remedy for blacks appropriately viewed as a "good deal" by policymaking whites often provide [sic] benefits for blacks that are more symbolic than substantive; but whether substantive or not, they are often perceived by working class whites as both an unearned gift to blacks and a betrayal of poor whites.¹⁵⁹

For all the work that Justice O'Connor does to mitigate some of the most troubling aspects of this narrative, no judicial opinion can magically refigure a story that has its roots deep in our country's troubled history. I doubt that this nation's original sins—the robbing of virgin territory, the enslavement of a race of people, the subjugation of people who lost battle after battle—can ever truly be overcome; these acts will continue to haunt our nation.

Still, troubling ghosts can catalyze change, and though America remains far from equal, affirmative action in higher education is making things incrementally, but significantly, better. By ensuring that underrepresented minorities are a significant presence on college and university campuses, we are not stigmatizing an entire generation, as some critics would have us believe. Doubts as to the abilities of minorities would persist with or without affirmative action; that is the nature of prejudice. But this prejudice would persist unabated if there were fewer underrepresented minorities passing through the manicured quadrangles of elite colleges and universities. Mahzarin Banaji, the Harvard professor who has shown how unconsciously racist human beings are, has suggested that the only way to overcome these biases is to develop close personal and professional relationships with members of those groups that one harbors bias against.¹⁶⁰ That analysis is the best evidence yet that affirmative action, for all the controversy it causes, may be working to heal this nation and stifle the hauntings of those terrible ghosts.

¹⁵⁹ BELL, *supra* note 57, at 7.

¹⁶⁰ See Kang, *supra* note 116, at 1593.