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"Constitutional Justice" or "Constitutional Peace"? The Supreme Court and Affirmative Action

Robert J. Delahunty*

Abstract

The "problem of constitutional evil" is the topic of a recent and provocative book by historian and law professor Mark Graber. The problem arises because the formation and the maintenance of constitutions such as ours require concessions by one group of citizens to another group who, in the eyes of the former, are committed to radically unjust practices. In the case of the formation of our own Constitution, the most fundamental of such concessions was the compromise under which slavery was guaranteed constitutional protection, at least where it already existed. Despite their deep misgivings over slavery, opponents of that institution considered it necessary to create constitutional accommodations for it in order to secure the benefits of a federal Union. Graber argues that as our history unfolded during the period before the Civil War, the nation's leadership sought to maintain a "constitutional peace" that preserved the Union, despite deepening sectional disagreements over the justice of slavery and over the extent to which the Constitution required its protection. In the effort to secure "constitutional peace," the antebellum Supreme Court, particularly in the Dred Scott decision, played a pivotal role. Abraham Lincoln's election in 1860 signaled the victory of those who rejected the Court's attempt to broker a "constitutional peace," and who instead sought to limit and confine what they saw as a grave "constitutional injustice."

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Graber's categories can be used to illuminate contemporary constitutional debates over racial preferences: The choice between "constitutional justice" and "constitutional peace" structures the debate over affirmative action no less than the debate over slavery. Now as then, two fundamentally different conceptions of justice have come into conflict. One conception of justice would prohibit the government from using race-sensitive measures except in those narrow circumstances in which individual offenders and individual victims of racial wrongs could be identified; the other conception would require a reparative program in which the government, as the political representative of American society, would be liable for the persisting effects of historic harms inflicted on collective groups—and especially on African Americans. Sensing the potential for widespread racial polarization that could ensue from the adoption of one or the other of these vying conceptions, the Supreme Court has sought instead to devise a formula that would produce a generally acceptable "constitutional peace." Particularly through the work of two influential conservative "centrists"—Justices Powell and O'Connor—the Supreme Court has come to limit the "remedial," backward-looking use of racial categories to narrow circumstances, but to permit a nonremedial, forward-looking use of race that involves no attribution of liability for past or persisting racial injustices. In effect, the Court has sought to change the national conversation over racial justice into a conversation over the methods of forming political, legal and business elites. While the Court's "affirmative action" formula has thus far appeared to bring a substantial measure of "constitutional peace" over racial questions, the issue of "constitutional justice" has not gone away.

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I. Introduction

Anyone trying to track the path of the Supreme Court’s affirmative action decisions on the subject of race might soon feel lost in a maze. Even after allowing for the uncertainties necessarily involved in developing a new body of law; changes in the Court’s membership; the evolution of the views of individual justices; and the pragmatic need for the Court to test the reactions of other governmental actors and the general public to its rulings on the extremely sensitive issue of racial preferences, the course of the Court’s decisionmaking—from its fractured 1978 ruling in *Regents of the University of California v. Bakke*¹ to its closely divided outcomes in *Grutter v. Bollinger*² and in last term’s *Parents Involved in Community Schools v. Seattle School District No. 1*³—seems erratic, wayward, and even incoherent.⁴ At least three main paradoxes are likely to strike the observer.

The Applicable Standard of Review. First, the Court seems to have lurched from what looks like an "intermediate" standard of review of racial classifications used in 1980’s split decision in *Fullilove v. Klutznick*;⁵ to something more like "strict scrutiny" in 1986’s also split decision in *Wygant v.*

1. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (holding that to satisfy the Fourteenth Amendment, racial classifications in state medical school admissions must be necessary to promote a substantial state interest).

2. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that the Equal Protection Clause does not prohibit the University of Michigan Law School’s narrowly tailored use of race in admissions decisions because there is a compelling interest in having the educational benefits that flow from a diverse student body).

3. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767 (2007) (stating that Seattle public schools cannot determine admission to public school based on race).

4. For a survey, see Katherine C. Naff, *From Bakke to Grutter and Gratz: The Supreme Court as a Policymaking Institution*, 21 REV. POL’Y RES. 405 (2004).

5. See *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (giving "appropriate deference" to Congress in weighing the constitutionality of a congressional spending program employing racial and ethical criteria), *overruled in part by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

Jackson Board of Education;⁶ to a reviewing standard that appeared to be full-blooded "strict scrutiny" in 1989's *Richmond v. J.A. Croson Co.*;⁷ then back to "intermediate" review in 1990's *Metro Broadcasting, Inc. v. FCC*;⁸ then back again to "strict scrutiny" in 1995's *Adarand Constructors, Inc. v. Peña*,⁹ which explicitly repudiated *Metro Broadcasting*; to an application of "strict scrutiny" in *Grutter*¹⁰ that seemed much closer to "intermediate" review than to a traditional "strict scrutiny" that was nearly always "fatal in fact." In its most recent decision on the topic, *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court (with Chief Justice John Roberts and Justice Samuel Alito having respectively replaced Chief Justice Rehnquist and Justice O'Connor) veered yet again: Over vigorous dissent, it affirmed a full-throated application of a traditional strict scrutiny standard to the race-based student assignment plans of two defendant public school districts.¹¹

Remedial Versus Nonremedial Justifications. Second, the Court also wavered when deciding what rationales it would consider acceptable when examining a government's justification for this kind of race-conscious action. In particular, the Court seems to have gone back and forth between requiring the government to prove a remedial purpose and allowing the government to

6. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (stating that any racial classifications are justified only by a "compelling governmental interest" and the means chosen must be "narrowly tailored to the achievement of that goal." (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), and *Fullilove*, 448 U.S. at 480)).

7. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1986) (utilizing "heightened scrutiny" in ruling as unconstitutional a city plan requiring prime contractors with city construction contracts to subcontract at least 30% of the dollar amount to one or more Minority Business Enterprises).

8. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 654–65 (1990) ("We hold that benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."), *overruled by Adarand*, 515 U.S. at 227.

9. See *Adarand*, 515 U.S. at 227 ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.")

10. See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (stating that government-imposed racial classifications are constitutionally permissible if "narrowly tailored to further compelling governmental interests").

11. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751–52 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."); see also *id.* at 2751–68 (plurality opinion) (applying strict scrutiny to the facts); *id.* at 2774 (Thomas, J., concurring) ("We have made it unusually clear that strict scrutiny applies to every racial classification." (citations omitted)); *id.* at 2789 (Kennedy, J., concurring) (noting that classifications of individuals by race are subject to strict scrutiny).

rely on some other rationale—most famously, educational diversity. Thus, Justice Powell's opinion in *Bakke*, while acknowledging that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination[,]"¹² also imposed stringent conditions before such a rationale was available: (1) race-conscious remediation could not be addressed to what Powell called "societal discrimination"—a concept that he characterized as "amorphous . . . [and] ageless in its reach into the past;"¹³ (2) such remediation had to be based upon "findings of constitutional or statutory violations;"¹⁴ and (3) the governmental actor in question had to be institutionally "competent" to make such findings—a test that, according to Powell, particular "segments of our vast governmental structures," like the state medical school defendant in *Bakke*, could not satisfy.¹⁵ Having made remedial purposes difficult to establish, Powell then proclaimed that "the educational diversity valued by the First Amendment" or "beneficial educational pluralism" was, indeed, a compelling governmental purpose, for the achievement of which the conscious use of racial classifications might be a legitimate means.¹⁶

But in *Bakke*, Powell wrote for himself alone, and the cases between *Bakke* and *Grutter* generally indicated (with the notable exception of *Metro Broadcasting*) that the government would need to demonstrate some form of remedial purpose. In *Croson*, for instance, Justice O'Connor, writing here for a plurality, stated that "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."¹⁷ Justice Stevens, concurring in part in *Croson*, understood Justice O'Connor to have ruled that "a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong."¹⁸ And in *Metro Broadcasting*, Justice O'Connor protested in dissent that "[m]odern equal protection doctrine has recognized only one [compelling] interest [in race-conscious governmental action]: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest."¹⁹ Before *Grutter*, some lower courts had interpreted the

12. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

13. *Id.*

14. *Id.* at 308–09.

15. *Id.* at 309.

16. *Id.* at 316–17.

17. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

18. *Id.* at 511 (Stevens, J., concurring).

19. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting).

Supreme Court's post-*Bakke* decisions to hold that "non-remedial state interests will never justify racial classifications."²⁰ So, also, had some scholarly commentators.²¹ Justice O'Connor herself acknowledged in *Grutter* that "our affirmative-action cases decided since *Bakke* . . . might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action."²²

"Goals" Versus "Quotas." Third, in addition to its fluctuating decisions as to the standard of review in affirmative action cases and the acceptability of nonremedial governmental purposes, the Court's willingness to permit race to be used in some settings as a "plus factor" in a selection process, when coupled with its expressed hostility to the use of race for a "quota," seemed incongruous. As Chief Justice Rehnquist pointed out in his dissent in *Grutter*, the University of Michigan Law School's use of race in its admissions process functioned exactly like an unacknowledged "quota":

20. *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996); see also *Milwaukee County Payers Ass'n v. Fiedler*, 922 F.2d 419, 421–22 (7th Cir. 1991) (finding that "a majority of the Justices of the Supreme Court believe that racial discrimination in any form, including reverse discrimination, is unconstitutional when done by states or municipalities, unless the purpose is to provide a remedy for discrimination against the favored group").

21. See Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 998–99 (1993) ("[I]t is clear that [under *Croson*] a state government minority preference program is unconstitutional absent a demonstration of a compelling state interesting remedying past unlawful discrimination."); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 429–30 (1998) (expressing doubt that even remedial interests will justify affirmative action). But see Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1747–49 (1996) (stressing that because "[i]ntegrated education . . . advantages all students in a distinctive way," diversity alone can serve as a justification for race classifications in university admissions).

22. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); see also Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1353–54 (2002) (describing the development of modern equal protection jurisprudence). Levinson states:

The development of modern equal protection jurisprudence . . . has left vanishingly little room for government allocation of benefits or burdens on the basis of race. In its recent affirmative action decisions, for example, the Court has been willing to permit government to distribute benefits on the basis of race, if at all, only to the extent necessary to compensate for the burdens of past discrimination. . . . [The Court] has held, for instance, that only racial harms that can be traced to specific, well-documented acts of past discrimination can be remedied by affirmative action benefits. . . . The Court has also limited specific government units or institutions to remedying only those racial harms resulting from their own discrimination (or, perhaps, from private discrimination within their jurisdiction). . . . The Court has come close to insisting that the beneficiaries be the very same individuals who were victimized by past discrimination, not merely different individuals of the same race (whether ancestors or contemporaries of the beneficiaries).

Id.

[T]he correlation between the percentage of the Law School's pool of applicants who are members of the three [preferred] minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers. . . ." The tight correlation . . . must result from careful race based planning by the Law School.²³

And in *Gratz v. Bollinger*,²⁴ *Grutter*'s companion case, Justice Souter, in dissent, expressed bewilderment that the majority saw a meaningful distinction between the policy of the University of Michigan's undergraduate college, which forthrightly awarded twenty points of the 100 points needed for admission to applicants from three minority groups, and the policy of the University's law school, which purported to treat the race of applicants from these same groups merely as a "plus factor."²⁵ In effect, Rehnquist and Souter were both asking (as scholarly commentators had asked before²⁶ and were to ask later²⁷) why the Court should seem to have rewarded governmental disingenuousness and opacity and to have disfavored transparency in governmental practices.²⁸

23. *Grutter*, 539 U.S. at 383–85 (Rehnquist, C.J., dissenting).

24. See *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (concluding that the University of Michigan's use of race in freshman admissions decisions was not narrowly tailored to achieve a compelling interest in diversity and thus violated the Equal Protection Clause).

25. *Id.* at 295 (Souter, J., dissenting); see also Samuel Issacharoff, *Law and Misdirection in the Debate Over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 28–29 (2002) (describing the district court's reliance "on statistical testimony to find that law school admissions officers placed a heavy emphasis on race, despite the law school's efforts to characterize the racial preferences as no more important than any other 'diversity' factor").

26. See, e.g., GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 89–90 (1985) (describing Justice Powell's *Bakke* opinion as relying on a "subterfuge").

27. See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) (discussing Justice Ginsberg's dissent in *Gratz* that suggests honesty does not seem to be the best policy in the majority's opinion); Robert P. George, *Gratz and Grutter: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1635 (2003) (asking "how can it be constitutionally permissible to do 'through winks, nods, and disguises' what it is unconstitutional to do honestly and above board?"); Richard D. Kahlenberg, *The Conservative Victory in Grutter and Gratz: The University of Michigan Affirmative Action Admissions Cases*, JURIST, Sept. 5, 2003, <http://jurist.law.pitt.edu/forum/symposium-aa/kahlenberg.php> (last visited Nov. 29, 2007) (arguing that the *Gratz* and *Grutter* decisions undercut the "principle of openness and transparency in a democratic society") (on file with the Washington and Lee Law Review); Abigail Thernstrom & Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, 21 CONST. COMMENT. 251, 258–61 (2004) (reviewing the Court's reasoning for the different outcomes in *Gratz* and *Grutter*).

28. Despite the criticisms of Chief Justice Rehnquist, Justice Souter, and commentators, however, the Court in *Seattle School District* seemed to cleave to the purported distinction between "goals" and "quotas," finding the defendant school districts' plans flawed because

I believe that these apparent paradoxes and inconsistencies in the Court's affirmative action jurisprudence can largely be explained in such a way that an underlying consistency eventually emerges. The explanation I shall offer draws upon a pair of analytical categories developed in Mark Graber's fascinating recent book, *Dred Scott and the Problem of Constitutional Evil* (2006). Specifically, my explanation will deploy Graber's concepts of "constitutional justice" and "constitutional peace" to make sense of the Court's affirmative action decisions. In Part II, I will review and elaborate on Graber's theory, which finds its original application in the constitutional disputes over slavery in the period before the Civil War. In Part III, I will discuss the conflicting notions of "constitutional justice" that have dominated the public controversy over race-conscious affirmative action. In Part IV, I will examine three of the Supreme Court's leading affirmative action cases—*Bakke*, *Adarand*, and *Grutter*—in light of the concepts of "constitutional justice" and "constitutional peace." In Part V, I will argue that these cases represent the Court's eventual decision to value "constitutional peace" more than "constitutional justice."

II. *Constitutional Evil, Peace, and Justice*

A. *Dred Scott and Constitutional Evil*

Mark Graber's provocative (and often provoking) account of "the problem of constitutional evil"²⁹ arises from reflection on "the practice and theory of sharing civic space with people committed to evil practices or pledging allegiance to a constitutional text and tradition saturated with concessions to evil."³⁰ Despite the awareness that others who share our Constitution may use it to secure or entrench what we view as radical injustices—slavery (or free speech for abolitionists), abortion (or the denial of it), capital punishment (or its absence), redistributive economic policies (or pervasive inequality)—we may nonetheless find compelling political reasons to sustain an ongoing political

"under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753 (2007). Indeed, Justice Kennedy's opinion might even be read as expressing a conscious preference for at least some measure of disingenuousness and opacity in the governmental use of race (although he does not make this suggestion in the context of defending the purported distinction between "goals" and "quotas"). See *id.* at 2796–97 (Kennedy, J., concurring) (defending the use of "indirection" by governmental authorities seeking to avoid "racial isolation in their schools" even if those methods were "inefficient" and did not address "the problem in candid fashion").

29. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 1 (2006).

30. *Id.*

community with them.³¹ In a constitutional system, which some political actors believe protects such injustices or evils, it will be necessary to "negotiate and renegotiate constitutional meanings"³² with those whose positions we find abhorrent. Compromise becomes pervasive throughout our political and legal life, as we bargain over constitutional structures, rules, and practices.³³ The appalling alternatives to "constitutional peace"—violence, secession and civil war—force us to accept a constitutional order that (in our view) accommodates radical evil.³⁴

Graber argues that in many circumstances, the choice of "constitutional peace," even at the cost of tolerating what we see as "constitutional injustice," is the correct one. Forming and maintaining a constitution may take precedence over improving or perfecting it, and the political compromises necessary to originate or maintain a constitution may require acquiescence in what some of the parties see as radical evil.³⁵ Our 1787 Constitution required those who considered slavery to be a horrifying injustice to accept it and extend protections to it: No slavery, no Union.³⁶ The original bargain was thereafter continually, and sometimes bitterly, renegotiated, as disputes arose over how far the Constitution embodied a pro-slavery or an anti-slavery position.³⁷ The Missouri Compromise represented the outcome of an early phase of bargaining over slavery's constitutional status, but the correct reading of that Compromise remained disputed: Did it signify that Congress could ban slavery in the territories, or that the South's consent was needed if Congress were to do so, or that the free and slave states were bound to share the territories? Likewise, in Graber's view, the Supreme Court's *Dred Scott* decision marked an attempt to

31. *Id.* at 1–2.

32. *Id.* at 2.

33. *Id.*

34. *Id.*

35. *Id.* at 3.

36. *Id.* Despite his anti-slavery views, even Justice Joseph Story considered that the Constitution, as a prerequisite to the union of the states, embodied a "fundamental" recognition of the rights of slave owners. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 611 (1842); see also Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087, 1097–99 (1993) (discussing Justice Story's majority opinion in *Prigg*).

37. GRABER, *supra* note 29, at 4; see also Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977, 989–91 (1995) (discussing the constitutional analysis of a leading anti-slavery theorist who construed the Constitution in light of the Declaration of Independence and the natural rights doctrine); Levinson, *supra* note 36, at 1099 (discussing Frederick Douglass's theory of constitutional interpretation). For an argument that slavery came to acquire broader protection under the antebellum constitution than the Framers had intended, see DON E. FEHRENBACHER, *SECTIONAL CRISIS AND SOUTHERN CONSTITUTIONALISM* 113–36 (1995).

find a constitutional compromise that would stabilize (and, in his view, did in fact stabilize) the antebellum regime.³⁸

Graber dramatizes the pre-Civil War conflict between the proponents of "constitutional justice," who read the Constitution to permit Northern majorities in Congress to limit the expansion of slavery into the territories, and proponents of "constitutional peace," who demanded that any resolution of that question command bisectional approval, by inviting his readers to choose between two candidates for the Presidency in the election of 1860—Abraham Lincoln, representing "constitutional justice," and John Bell, representing "constitutional peace."³⁹ Lincoln read the Constitution to permit his sectional, Republican movement to accommodate the constitutional evil of slavery no more than was necessary—to permit its continued existence in the slaveholding South, but to ban it everywhere else in the Union.⁴⁰ Bell sought to preserve the Union, even at the cost of giving an outvoted, slaveholding South the power to veto outcomes preferred by a Union-wide political majority, in the hope that the Union's persistence would eventually lead to the peaceful abandonment of slavery.⁴¹ In Bell's view, the intractable disputes over slavery should not have prevented Americans from realizing the military and economic benefits that a peaceful national union could provide.⁴² Graber makes a surprisingly powerful case for preferring Bell to Lincoln as President:

38. GRABER, *supra* note 29, at 39.

39. *Id.* at 241–43.

40. This bald statement requires qualification. Lincoln's views on the Constitution and slavery may arguably have undergone some changes (at least in emphasis) in the period between his February 1860 address at the Cooper Institute in New York City and his First Inaugural Address in March 1861. In the earlier speech, Lincoln appeared to have suggested "for the first time . . . that slavery might be incompatible with the . . . Constitution." JAMES TACKACH, *LINCOLN'S MORAL VISION: THE SECOND INAUGURAL ADDRESS* 25 (2002). On the later occasion, however, Lincoln put far greater weight on the preservation of the Union than on the moral or legal aspects of slavery. *Id.* at 32. Reinhold Niebuhr seems to have represented Lincoln's dominant pre-War position correctly when he said:

In the political order justice takes an uneasy second place behind the first place of the value of internal order. In reviewing Lincoln's hierarchy of values, one must come to the conclusion that his sense of justice was strong enough to give that value an immediate position under the first purpose of national survival.

Reinhold Niebuhr, *The Religion of Abraham Lincoln, in LINCOLN AND THE GETTYSBURG ADDRESS: COMMEMORATIVE PAPERS* 72, 83–84 (Allan Nevins ed., 1964). Lincoln's public condemnations of slavery, even where it was entrenched, as a great moral evil were repeated and unswerving from at least 1854 onwards. RICHARD CARWARDINE, *LINCOLN: A LIFE OF PURPOSE AND POWER* 69 (2006).

41. GRABER, *supra* note 29, at 248–49.

42. *Id.* at 247–48.

Constitutional theory is about how political regimes are maintained as well as about how they are improved or perfected. Lincoln's constitutional perfectionism was limited to persuading Americans that the United States would be a more just society if the Constitution were interpreted as being committed to emancipation. John Bell's adequate constitutionalism more realistically engaged the problem of preserving a political order wracked by disputes over slavery.⁴³

On Graber's interpretation, a vote for Lincoln would signal a decision, in all likelihood, for war; and the outcome of any such war was uncertain.⁴⁴ Moreover, even if the Union finally prevailed, the costs of war for both sections might prove to be nearly unendurable—as indeed they did.⁴⁵ A vote for Bell, in contrast, would be a vote for peace—if also for yet further accommodation of what most Northern voters saw as radical constitutional injustice.⁴⁶

Moreover, for the voters in the 1860 presidential election, the choice did not present itself as a stark contrast between "constitutional justice" and "constitutional peace."⁴⁷ While Lincoln voters may have seen the salient choice as one between constitutional justice and constitutional peace, Bell voters could have seen themselves as opting for both constitutional peace and constitutional justice.⁴⁸ As Graber shows, the very notion that "constitutional justice" may be irreconcilable with "constitutional peace" presupposes that there are conflicting conceptions of "constitutional justice," neither of which commands general assent throughout the polity. Indeed, the conviction felt by each side that its interpretation of the Constitution alone reflects "justice" makes the threat to constitutional "peace" even graver.

43. *Id.* at 248.

44. *See id.* at 242 ("Whether the Union would win the war and free slaves in the wake of that victory was not foreseen with confidence in 1860.").

45. *See* J.G. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 538, 543–47 (2d ed. 1969) (describing the deep economic depression of the North as well as the devastation of the South after the War).

46. *See* GRABER, *supra* note 29, at 240–41 ("A vote for Bell was a vote for a racist candidate with no commitment to bringing about the ultimate extinction of slavery, but also a vote against risking foreign or domestic war.").

47. *See id.* at 242 ("The choice between Lincoln and Bell was easier when many Americans believed that slavery was not that bad a practice, that human bondage was on the road to extinction, or that persons of color lacked the capacity to be equal citizens.").

48. *See id.* at 241 ("Bell voters pursue justice when doing so is consistent with the fundamental constitutional commitment to preserving the political regime.").

B. Constitutional Conflict and Compromise Before the Civil War

This was certainly the case in the antebellum United States. Various influences influenced by biblical interpretation,⁴⁹ by conceptions of natural "orders" of humanity,⁵⁰ by constitutional arguments⁵¹ and, latterly, by theories of "scientific" racism,⁵² Americans formed and defended radically antagonistic views of the moral legitimacy of slavery.⁵³ Slaveholding elites, especially in the Deep South, seem generally to have accepted by the 1850s John C.

49. See, e.g., FRANCIS D. ADAMS & BARRY SANDERS, *ALIENABLE RIGHTS: THE EXCLUSION OF AFRICAN AMERICANS IN A WHITE MAN'S LAND, 1619–2000*, at 32–33 (2003) (stating that proslavery advocates asserted that in *Genesis* "Ham's progeny, condemned to slavery, had been marked by God with black skin to separate them from Noah's more deserving descendants. Blackness thus became a manifest sign not only of inferior status but of the Almighty's permanent displeasure with Negroes"); STEPHEN R. HAYNES, *NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY* 65–104 (2002) (arguing that the various ways advocates of slavery used *Genesis* 9 to support the institution suggests that "proslavery intellectuals were at least as deeply concerned with honor and dishonor as with sex and power"); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812*, at 17–20 (1968) (explaining the use of the biblical story of Ham's curse in *Genesis* 9 and 10 to support slavery); Elizabeth Fox-Genovese & Eugene D. Genovese, *The Divine Sanction of Social Order: Religious Foundations of the Southern Slaveholders' World View*, 55 J. AM. ACAD. REL. 211, 223–24 (1987) ("[I]n a society that was witnessing a dramatic increase in the number of professing Christians, the Bible provided the natural grounding for the moral defense of slavery."); Eugene D. Genovese, "Slavery Ordained of God": The Southern Slaveholders' View of Biblical History and Modern Politics, The 24th Annual Robert Fortenbaugh Memorial Lecture at Gettysburg College 7–19 (Nov. 19, 1985) (describing the origin and development of the scriptural justification of slavery among southern slaveholders); see generally DAVID M. GOLDENBERG, *THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM* (2005).

50. See, e.g., EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 85–86* (Vintage Books 1976) (1974) (describing how some pro-slavery advocates argued that slavery was part of the natural condition of society).

51. See, e.g., GRABER, *supra* note 29, at 18–20 (explaining the constitutional arguments upon which the majority opinion in *Dred Scott v. Sanford* relied); see also Robert R. Russel, *Constitutional Doctrine with Regard to Slavery in Territories*, 32 J.S. HIST. 466, 468–75 (1966) (outlining the various constitutional arguments supporters of slavery employed as justification for the institution).

52. See, e.g., LESTER D. STEPHENS, *SCIENCE, RACE, AND RELIGION IN THE AMERICAN SOUTH: JOHN BACHMAN AND THE CHARLESTON CIRCLE OF NATURALISTS, 1815–1895*, at 264–67 (2000) (summarizing the views of Charleston's circle of naturalists prior to the Civil War regarding the "scientific" theory behind supposed black inferiority); see also John S. Haller, Jr., *The Species Problem: Nineteenth-Century Concepts of Racial Inferiority in the Origin of Man Controversy*, 72 AMER. ANTHROPOLOGIST 1319, 1322 (1970) (detailing several scientific theories of racial inferiority that emerged in pre-Civil War America).

53. For excellent recent surveys of various forms of the antebellum pro-slavery argument, see DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 186–92* (2006), and 2 MICHAEL O'BRIEN, *CONJECTURES OF ORDER: INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810–1860*, at 938–92 (2004).

Calhoun's view that slavery was a "positive good."⁵⁴ Moreover, many American Christians, whether Northern or Southern, found justifications for slavery in the Bible.⁵⁵ Anti-slavery forces, of course, argued strenuously that slavery was a great injustice, contrary both to the Scriptures and to the founding principles of the American republic.⁵⁶ In his first debate with Stephen A.

54. See GRABER, *supra* note 29, at 129 ("By the 1850s, the joy of slavery was a staple of Southern rhetoric, particularly in the Lower South."); see also MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 79 (1998) (asserting that many in the South believed "Southern slavery was a positive good—more moral, humane, productive, and conducive of good social order than Northern capitalism"); DANIEL FARBER, *LINCOLN'S CONSTITUTION* 73 (2003) ("But by the 1850s, leading Southerners proclaimed slavery to be a positive good. For whites, they said, it provided the basis of a distinctive civilization, for blacks, paternalistic and much needed guidance from a superior race."); EUGENE D. GENOVESE, *THE WORLD THE SLAVEHOLDERS MADE: TWO ESSAYS IN INTERPRETATION* 128–36 (Wesleyan 1988) (1969) (stating that the Old South largely accepted the "positive-good" proslavery argument); Fox-Genovese & Genovese, *supra* note 49, at 223 (concluding that the positive good argument swept the south in the 1840s and 1850s and became a "general defense of slavery as the foundation for a safe and proper modern social order").

In a Senate speech delivered on February 6, 1837, Calhoun had broken openly with the idea that slavery was a "necessary evil," and argued instead that it was a "positive good." He said:

I hold that in the present state of civilization, where two races of different origin, and distinguished by color, and other physical differences, as well as intellectual, are brought together, the relation now existing in the slaveholding States between the two, is, instead of an evil, a good—a positive good

CONG. GLOBE, 24th Cong., 2nd Sess. 154 (1837).

55. See MARK A. NOLL, *THE CIVIL WAR AS A THEOLOGICAL CRISIS* 38 (2006) (describing how many Christians across the nation justified slavery by reference to the Bible). Noll has called attention to an 1850 treatise entitled *Conscience and the Constitution* by Moses Stuart of the Andover Seminary in Massachusetts. Stuart was considered to be the country's leading biblical scholar. Although an emancipationist, Stuart found ample scriptural justification for slavery: Indeed, he warned the abolitionists that they must either "give up the New Testament authority, or abandon the fiery course which they are pursuing." *Id.* at 39. In 1862, Southern Methodist preacher J.W. Tucker told a Confederate audience that "your cause is the cause of God, the cause of Christ, of humanity. It is a conflict of truth with error—of the Bible with Northern infidelity—of pure Christianity with Northern fanaticism." *Id.* See generally PAUL FINKELMAN, *DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH, A BRIEF HISTORY WITH DOCUMENTS* 31–32, 96–128 (2000).

On the other hand, as Abraham Lincoln said in his Second Inaugural Address, "[b]oth [sides] read the same Bible and pray to the same God." MARK E. NEELY, JR., *THE ABRAHAM LINCOLN ENCYCLOPEDIA* 272 (1982). Thus, emancipationists often made biblically-based arguments *against* slavery. See NOLL, *supra*, at 40–72 (describing the abolitionists' biblical arguments against slavery). Historians have recognized a linkage between revivalism and anti-slavery feeling. See Donald G. Matthews, *The Abolitionists on Slavery: The Critique Behind the Social Movement*, 33 J.S. HIST. 163, 164–65 (1967) (stating that it is "generally accepted that the same kind of preaching which forced men to their knees in religions revivals enticed many of them into the antislavery movement").

56. See NOLL, *supra* note 55, at 40–45 (detailing the various biblical arguments put forth

Douglas on August 21, 1858, Abraham Lincoln, even while disavowing that he had any "purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists,"⁵⁷ argued that slavery was fundamentally incompatible with American republicanism:

There is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness. . . . In the right to eat the bread, without the leave of anybody else, which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every living man.⁵⁸

Anti-slavery speakers and writers also feared the domination of what they called the "Slave Power" over our constitutional government and civil liberties.⁵⁹ William Seward defined the central issue of the pre-War period as "whether a slaveholding class exclusively shall govern America,"⁶⁰ while Benjamin Wade characterized the Slave Power as "'an oligarchy' that 'reigns and domineers over four fifth of the people of the South[,] . . . which gags the press'" and that "'restrains the liberty of speech."⁶¹

by the antislavery movement). The abolitionists saw themselves "as latter-day apostles of Jesus Christ, bringing the consummation of his gospel into the New World. . . . They saw themselves as biblical figures, and the accounts they gave of their efforts were suffused with biblical allusions and images." GEORGE MCKENNA, *THE PURITAN ORIGINS OF AMERICAN PATRIOTISM* 135 (2007).

57. Abraham Lincoln, First Debate with Stephen A. Douglas (Aug. 21, 1858), available at <http://www.nps.gov/archive/liho/debate1.htm>. (last visited Nov. 28, 2007) (on file with the Washington and Lee Law Review).

58. *Id.*; see also DON E. FEHRENBACHER, *PRELUDE TO GREATNESS: LINCOLN IN THE 1850'S* 108 (1962). Fehrenbacher states:

[A]s the [Lincoln-Douglas] debates progressed, Lincoln laid increasing emphasis upon the fundamental conflict between those who believed, and those who did not believe, that slavery was wrong. "That is the real issue," he said at Alton. "That is the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world."

Id.

59. See Garret Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 *LAW & CONTEMP. PROBS.* 175, 182–88 (2004) (describing slave power as a "conspiracy of slaveholders and 'dough-faced' Northern politicians (Northerners who sought office and influence by cultivating southern support) to preserve and extend the prerogatives of slaveholders").

60. GRABER, *supra* note 29, at 132 (quoting 4 WILLIAM H. SEWARD, *THE WORKS OF WILLIAM H. SEWARD* 274 (George E. Baker ed., 1884)).

61. *Id.* (quoting Benjamin Wade, *CONG. GLOBE*, 33d Cong., 2d Sess., 751 (1854)).

III. "Constitutional Justice" and Affirmative Action

A. Corrective and Distributive Justice

Like the debate over slavery, the debate over affirmative action is framed by opposing conceptions of moral—and constitutional—justice. Our analysis of this opposition may properly start with Aristotle's classic treatment of the idea of justice in Book V of his *Nicomachean Ethics*.

There Aristotle distinguishes between two contrasting forms of justice: "corrective justice" and "distributive justice."⁶² Both forms of justice involve the conception of fairness or equality ("*to ison*").⁶³ Injustice consists in the absence of fairness or equality and arises when one person has too much or too little in relation to another.⁶⁴

Each form of justice assumes a different baseline for measuring equality or fairness. Corrective justice takes as its baseline the condition in which each person holds what lawfully belongs to him or her.⁶⁵ Injustice arises when one person inflicts a harm on another that deprives the latter of what is due to him, thus upsetting the relationship of equality.⁶⁶ The law "corrects" this inequality by requiring the offender to make the injured party whole, by restoring the equality that existed before the former's wrongdoing occurred.⁶⁷

[C]orrective justice . . . does not treat the situation being adjudicated as a morally neutral given and then ask what is the best course for the future, all things considered. Rather, because the court aims to correct the injustice done by one party to the other, the remedy responds to the injustice and endeavours, so far as possible, to undo it.⁶⁸

62. ARISTOTLE, *NICOMACHEAN ETHICS* 111 (W.D. Ross trans., 1966) ("[O]ne kind [of justice] is that which is manifested in distributions of honour or money or other things that fall to be divided among those who have a share in the constitution . . . and . . . one is that which plays a rectifying part in transactions between man and man.").

63. See Ernest J. Weinrib, *Corrective Justice*, 77 *IOWA L. REV.* 403, 404 (1992) ("Justice, both corrective and distributive, involves the achievement of *to ison*, which in Greek signifies both fairness and equality.").

64. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 *U. TORONTO L.J.* 349, 349 (2002).

65. See *id.* ("Corrective justice . . . features the maintenance and restoration of the notional equality with which the parties enter the transaction. This equality consists in persons' having what lawfully belongs to them.").

66. See *id.* ("Injustice occurs when, relative to this baseline [each party having what lawfully belongs to them], one party realizes a gain and the other a corresponding loss.").

67. See Weinrib, *supra* note 63, at 409 ("Corrective justice requires the actor to restore to the victim the amount representing the actor's self-enrichment at the victim's expense.").

68. Weinrib, *supra* note 64, at 350.

Corrective justice is inherently bipolar: It involves restoring two parties—a violator and a violated—to the relationship that existed between them before the violation.⁶⁹

Distributive justice for Aristotle consists in the division of some benefit or burden (he cites honors and money) in accordance with some criterion that measures the relative merits of the distributees.⁷⁰ Aristotle notes that although the idea that burdens and benefits should be distributed according to "merit" is universally accepted, the criterion of "merit" is contested: "[D]emocrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with excellence."⁷¹ As with corrective justice, distributive justice requires the establishment of a form of equality or what Aristotle calls proportionality: For instance, he says, in a business partnership it will require that pay-outs from common funds be made "according to the same ratio which the funds put into the business by the partners bear to one another."⁷² Distributive justice, unlike corrective justice, is not concerned with the relationship between exactly two parties; it involves a comparison of two or more parties who all stand to gain or suffer from the distribution of a common benefit or burden.⁷³

B. Corrective Justice and the Question of Collective Responsibility

The contemporary debate over affirmative action is structured by disagreements over both distributive and corrective justice. Confusingly, both debates are often collapsed into the single question, whether or not the Constitution is "color blind."

We may deal with the disagreement over distributive justice briefly. Most commonly, opponents of affirmative action favor a "meritocratic" criterion of distribution, as determined, e.g., by scores on standardized tests, for such goods as law school admission or job promotion. Proponents of affirmative action, on the other hand, seek either to undermine that conception of "merit," e.g., by

69. See Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 197–98 (2000) (discussing the elements of corrective justice).

70. *Id.* at 408.

71. ARISTOTLE, *supra* note 62, at 113.

72. *Id.* at 114.

73. See Weinrib, *supra* note 63, at 408–10 (explaining that whereas distributive justice operates between two or more parties, corrective justice operates solely within a two-party relationship).

questioning the fairness, objectivity, or predictive value of standardized tests;⁷⁴ to enlarge it so that it includes racial or ethnic considerations; or to confine it to being only one of several "factors" that may properly be considered in making a distributive decision.

The second pole of the debate over affirmative action consists in a disagreement over corrective justice. This disagreement is at least as intractable as that over distributive justice, if not more so; further, it raises second-order questions about coherence and intelligibility that are not present in the debate over distributive justice. Accordingly, I shall explore this debate more fully.⁷⁵

On one side is the view that race-conscious remedies should be "victim-specific"—a view explicitly found, e.g., in Justice Scalia's concurrence in *Croson*.⁷⁶ A further element of this view is, of course, that any compensation

74. For discussion and evaluation of such approaches, see ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 166–71 (2003); Thomas R. Conrad, *The Debate About Quota Systems: An Analysis*, 20 AM. J. POL. SCI. 135, 146–47 (1976); D. Marvin Jones, *When "Victory" Masks Retreat: The LSAT, Constitutional Dualism, and the End of Diversity*, 80 ST. JOHN'S L. REV. 15, 20–21, 28 & n.49 (2006); Terrance Sandalow, *Identity and Equality: Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1877, 1913–14 (1999) (reviewing WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998)).

Claude Steele and his colleagues have found evidence that the "stereotype threat"—the threat of being viewed through the prism of a negative stereotype or performing in a way that would confirm that stereotype—may account for much of the underperformance of African American students on standardized tests. Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, 284 ATLANTIC MONTHLY, Aug. 1999, at 44, 46; see generally NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (Christopher Jencks & Meredith Phillips eds., 1999); Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS INSTITUTION, Spring 1998, http://www.brookings.edu/articles/1998/spring_education_jencks.aspx?p=1 (last visited Nov. 28, 2007) (on file with the Washington and Lee Law review).

75. Some legal scholars have proposed an "Atonement Model" as a more attractive alternative to the "Tort Model" discussed here as a basis for reparations—or, as one leading proponent would prefer to say, "redress"—for the harms inflicted by slavery and persisting racial discrimination in this country. For an analysis of the Atonement Model and an argument that it is superior to the Tort Model considered in this Article, see Roy L. Brooks, *Getting Reparations for Slavery Right—A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 272–76, 284–85 (2004). The differences between the two models, while real, should not be exaggerated. Both models incorporate a reparative ideal: Indeed, Professor Brooks succinctly defines "atonement" as "apology plus reparation." *Id.* at 275.

76. *Richmond v. J.A. Croson*, 488 U.S. 469, 520–28 (1989) (Scalia, J., concurring). Oddly, Justice Scalia's example of a properly "victim-specific" race-conscious remedy is a flawed one. He finds:

[T]here is only one circumstance in which the States may act to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a

comes from the offender—a requirement also illustrated in Justice Scalia's *Croson* concurrence.⁷⁷ This understanding of corrective justice seems to rest on the view that "only individuals can have moral obligations and rights"—a view that Eric Posner and Adrian Vermeule have called ethical individualism.⁷⁸

Opposing that view of corrective justice is one that would hold that neither the author of the wrongs to be rectified nor the victims of those wrongs need or even should be identified as particular individuals. Rather, on this view,⁷⁹ there may be liability owed either by one collective group (say, a "people," the members of a "race," or a family) or by an entity that is corporate in character (say, a government, an Indian tribe, or an insurance company) to another collective group or corporate entity. Justice Scalia acidly rejected one form of this theory in his *Adarand* concurrence, when he stated that "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race."⁸⁰ Kim Forde-Mazrui has argued to the contrary that "[i]f American society disrupted the racially just distribution of black people's rights, resources, and opportunities by discriminating on the basis of race, then as a matter of corrective justice, society has a prima facie obligation to redress the harmful effects of that discrimination."⁸¹

discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising salaries of "all black employees" by 20%.

Id. at 524 (Scalia, J., concurring). But, this formulation overlooks the need to compensate black employees through back-pay as well; they are entitled, not only to prospective injunctive relief, but to compensation for the underpayments they were subjected to in the past.

77. See *id.* at 524 (Scalia, J., concurring) ("States may act *by race* . . . where it is necessary to eliminate *their own maintenance* of a system of unlawful racial classification." (second emphasis added)).

78. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 698 (2003).

79. Posner and Vermeule usefully distinguish between two possible positions here:

"[S]oft" ethical individualism, which holds that a corporate body may have certain moral rights or obligations even if the individuals who compose it do not have those rights or obligations, and "ethical collectivism," in which a more loosely defined group such as a nation can have moral obligations or rights.

Id. at 698–99.

80. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

81. Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 708 (2004). Consistent with that view, Forde-Mazrui argues:

[T]o the extent America as a nation is responsible for redressing the effects of past discrimination, the cost of redress is fairly borne by all current members of society. These members include activists in the civil rights movement, descendants of

While the ideas of collective identity, collective wrongdoing, and collective victimhood are considered to be problematic,⁸² they undoubtedly form a significant part of our ordinary religious, moral, and legal discourse. Heinrich Gomperz, a leading historian of philosophy, argued that the idea that only individuals may be held liable was an artifact of Hellenistic thought, as refashioned by the later Christian tradition.⁸³ More recently, the Israeli

abolitionists, recent immigrants, and even blacks whose lives have been negatively impacted by America's discriminatory past.

Id. at 725; *see also* Westley, *supra* note 21, at 472 ("[T]he focus of reparations doctrine needs to be on the role of government.").

82. *See, e.g.*, Posner & Vermeule, *supra* note 78, at 707–08 ("[E]thical collectivism has enjoyed few philosophically sophisticated defenses . . ."). The authors also argue:

Ethical collectivism must overcome two difficulties. First, it is always difficult to determine what the relevant groups are, and what to do when groups overlap The nation, to take just one case, is a notoriously protean and ill-defined concept, and the national affiliations of individuals are blurred by intermarriage and immigration. Second, even if the groups could be identified, it is difficult to know what obligations they owe to each other.

Id. A classic critique of the notion of collective responsibility is found in H.D. Lewis, *Collective Responsibility*, 23 *PHILOSOPHY* 3 (1948). Lewis argues that rather than "revert[ing] to the barbarous notion of collective or group responsibility, [we should] give up altogether the view that we are accountable in any distinctively moral sense." *Id.* at 3. *See also* GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* 89–91 (2002) (noting difficulties of extending collective responsibility over several generations). On the other hand, some analytical philosophers have defended the conceptual and moral coherence of attributions of collective responsibility. *See, e.g.*, D.E. Cooper, *Collective Responsibility*, 43 *PHILOSOPHY* 258, 260–61 (1968) (arguing that contrary to "methodological individualism," statements about collective responsibility are not always reducible to statements about individual responsibility). W.H. Walsh, *Pride, Shame and Responsibility*, 20 *PHIL. Q.* 1, 9 (1970) ("[E]ven in advanced societies it seems clear that collective action . . . is the norm rather than the exception; we act in conjunction with others far more often and far more importantly than we act by ourselves alone."). Similarly, Joel Feinberg argues:

Under certain circumstances, collective liability is a natural and prudent way of organizing the affairs of an organization, which the members might well be expected to undertake themselves, quite voluntarily. This is true only of those organizations where there is already a high degree of *de facto* solidarity. . . . A group has solidarity to the degree that its members have mutual interests, bonds of affection, and a "common lot."

Joel Feinberg, *Collective Responsibility*, 65 *J. PHIL.* 674, 677 (1968).

83. *See* H. Gomperz, *Individual, Collective, and Social Responsibility*, 49 *ETHICS* 329, 336 (1939) ("It was only in the Hellenistic age that individualism began to outgrow collectivism or, as we might perhaps say, civism. It culminated in Christianity when the redemption and salvation of the individual soul came to be recognized as man's highest goal."). *But see* YEHEZKEL KAUFMAN, *THE RELIGION OF ISRAEL: FROM ITS BEGINNINGS TO THE BABYLONIAN EXILE* 329–31 (Moshe Greenberg trans., 1960) (specifying evidence of "the doctrine of individual retribution" in the Hebrew Bible, while acknowledging that the Bible also expresses "a belief in collective retribution and in collective responsibility"); Saul Levmore, *Rethinking Group Responsibility and Strategic Threats in Biblical Texts and Modern Law*, 71 *CHI.-KENT L.*

philosopher, Avishai Margalit, has described what he calls "[n]atural communities of memory," such as "families, clans, tribes, religious communities, and nations"—groups that have shared memories of common nightmares or triumphs, benefactions or misdeeds.⁸⁴ Margalit argues that such "communities of memory" may be morally entitled in some circumstances to "impose" their memories on other groups, or to expect other groups to recognize and honor them in their shared memories.⁸⁵ As Margalit notes, religions are natural "communities of memory" and, therefore, are likely to sustain robust conceptions of collective agency, liability, and redemption.⁸⁶ We see such conceptions at work in Jewish scriptures, faith, and rituals (such as the Passover seder)⁸⁷ and in Christian doctrines such as the Atonement.⁸⁸

Secular law also recognizes related conceptions.⁸⁹ Our own Constitution takes steps to preclude the imposition of collective liability in some instances,

REV. 85, 119 (1995) (arguing that individual responsibility is not a modern construct but can often be found in the Hebrew Bible).

84. AVISHAI MARGALIT, *THE ETHICS OF MEMORY* 69 (2002).

85. *Id.* at 47, 80–83.

86. *See id.* at 72 (discussing how the Jews, for example, "base their obligation on a debt of gratitude that should be kept in memory").

87. So, for example, in the Book of Daniel, Daniel prays in the collective name "We," "confess[es] [his] sin and the sin of [his] people Israel," and implores God to grant Israel His mercy. *Daniel* 9:3–20 (Revised Standard Version).

88. Christian thought has traditionally applied the description of the "Suffering Servant" in (*Deutero-*)*Isaiah* to the Atonement, finding in it a prophetic account of collective redemption purchased through the sufferings and death of a unique individual, Jesus Christ: "But he was wounded for our transgressions, he was bruised for our iniquities; upon him was the chastisement that made us whole, and with his stripes we are healed." *Isaiah* 53:5 (Revised Standard Version); *see also* 1 *Peter* 2:24 (Revised Standard Version) ("By his wounds you have been healed."); *Romans* 5:6–11 (Revised Standard Version) (depicting the notion of the Suffering Servant).

89. Daryl J. Levinson, *Collective Sanctions*, 56 *STAN. L. REV.* 345, 361 (2003) ("[C]ollective sanctions regimes—or at least close functional analogues—are a central feature of modern legal systems."). Levinson further argues:

[L]iberal individualism aside, legal doctrine and jurisprudence routinely personify certain collectivities, treating them as if they were individuals for purposes of legal liability and moral responsibility. Corporations, for example, are granted the status of legal persons who, when they commit a tort or crime, should naturally pay compensation or receive punishment just like any other individual tortfeasor or wrongdoer. Groups of citizens, likewise, are reified into states or governments that can be held responsible for wrongdoing and punished as if they were individual agents.

Id. at 425.

Some analysts have distinguished between the idea of "shared responsibility"—a condition in which every member of a group is individually responsible, albeit perhaps unequally, for a given outcome—and "collective responsibility" narrowly considered—in which a group is held

thus implicitly acknowledging the force of the idea: For example, under Article III, Section 3, Clause 2, although Congress may "declare the Punishment of Treason,"⁹⁰ "no Attainder of Treason shall work Corruption of Blood."⁹¹ And Article VI, Clause 1, by providing that "[a]ll Debts contracted . . . before the Adoption of this Constitution, shall be . . . valid against the United States under this Constitution,"⁹² confirms the liability of those born after the generation of the Revolution (and of the successor U.S. government created by the Constitution) for the debts incurred to fight the War of Independence. Our law elsewhere holds individuals criminally liable for the actions of other individuals by means of such doctrines as "conspiracy" and "aiding and abetting,"⁹³ or as a matter of "public policy."⁹⁴ Vicarious civil liability is still more entrenched in our law.⁹⁵ Thus, our legal system attributes civil liability to parties who are, or

responsible for a state of affairs even if some of its members were not personally responsible, and in which nonetheless some or all of those members, because of their relationship to the group, are nonetheless held responsible (at least to some degree) for the outcome. GREGORY F. MELLEMA, COLLECTIVE RESPONSIBILITY 3–5 (1997). Our legal system exemplifies both kinds of responsibility.

90. U.S. CONST. art. III, § 3, cl. 2.

91. *Id.* For the legal background to this provision, see *United States v. Brown*, 381 U.S. 437, 441, 453 (1965); Max E. Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992).

92. U.S. CONST. art. VI, cl. 1.

93. See *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946) (concluding that acts committed by criminal co-conspirators are attributable to one another); MODEL PENAL CODE § 2.06 (1962) (giving the conditions for vicarious criminal liability).

94. See *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494–95 (1909) (elucidating on the public policy reasons of finding corporate criminal liability). To be sure, the "public policy" doctrine, however well-entrenched, has forceful critics. See Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 311 (1991) (criticizing the Supreme Court's decision in 1909 to impose criminal responsibility on a corporation because of public policy).

95. Civil liability predicated on the *respondet superior* doctrine (a form of vicarious liability) is long-standing in this country. See *Gleason v. Seaboard Air Line Ry. Co.*, 278 U.S. 349, 356 (1929) (commenting on the law of vicarious liability). Justice Stone stated:

Undoubtedly formal logic may find something to criticize in a rule which fastens on the principal liability for acts of his agent, done without the principal's knowledge or consent and to which his own negligence has not contributed. But few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own.

Id.; see also *Guy v. Donald*, 203 U.S. 399, 406 (1906) ("Whether the ground be policy or tradition, such a liability is imposed, as we all know, in many cases. When a man is carrying on business in his private interest and entrusts a part of the work to another, the world has agreed to make him answer for that other as if he had done the work himself."); *Phila. & Reading R.R. Co. v. Derby*, 55 U.S. (14 How.) 468, 486 (1852) ("The rule of *respondet superior*, or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or

might be, innocent of any wrongdoing, on the grounds, e.g., that those parties are well situated to spread or reduce the costs of accidents.⁹⁶ Vicarious liability may also be imposed so that those in a position to influence potential wrongdoers might be induced to deter them. For example, the Supreme Court held not long ago and without dissent that local public housing authorities could "terminate the lease of a tenant when a member of the household or guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity."⁹⁷ Most illuminating of all, perhaps, the international law of armed conflict—and even more state practice—are heavily influenced by notions of collective responsibility.⁹⁸ Conceptions of collective responsibility drawn from these international sources would seem to be relevant insofar as the violence and predation that have marked racial relations in this country over most of the past four centuries can

deceitful."); RESTATEMENT (SECOND) OF TORTS § 876 (1979) (discussing liability for harm caused to a third person from the tortious conduct of another in concerted acts). Even punitive damages may constitutionally be awarded against an employer held to be variously liable for an employee's tortious conduct. See *Pac. Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991) ("[A] corporation is liable for both compensatory and punitive damages for the fraud of its employee effected within the scope of his employment."); *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 115 (1927) ("[T]he rule of liability of corporations for the willful torts of their employees . . . to liability for punitive damages are recognitions by the common law that the imposition of liability without personal fault, having its foundation in . . . public policy, is not repugnant to . . . due process of law.") (citations omitted).

96. See *Konradi v. United States*, 919 F.2d 1207, 1210–11 (7th Cir. 1990) (noting that *respondeat superior* focuses on the employer's ability to reduce risk by altering activity); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1236 (1984) ("Finally, to the extent that the risks of civil liability are insurable, a principal often can obtain insurance more cheaply than his agents."); Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 455–58 (1923) (arguing for the risk-spreading rationale for *respondeat superior* doctrine). To be sure, vicarious civil liability is not here grounded on the ideal of corrective justice. Although the plaintiff's injury is corrected, it is not necessarily corrected by the party who caused the wrong.

97. *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002).

98. See Levmore, *supra* note 83, at 99–100 (using the biblical stories of Gibeah and Sodom to illustrate the international law concept of group responsibility in armed conflicts). For example, after the end of the Versailles Peace Conference, Woodrow Wilson expressed the view that the German *people*—not just their political and military leaders—were responsible for the First World War, and therefore could justly be made to suffer the consequences of what he acknowledged was a "hard" treaty. Manfred F. Boemeke, *Woodrow Wilson's Image of Germany, the War-Guilt Question, and the Treaty of Versailles*, in THE TREATY OF VERSAILLES: A REASSESSMENT AFTER 75 YEARS 603, 612–14 (Manfred F. Boemeke, Gerald D. Feldman & Elisabeth Glaser eds., 1998). Although some American leaders expressed similar views about the German people during the Second World War and proposed to punish them collectively, the victorious Allies chose to punish only individual Nazi leaders instead. JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 93–94 (2004).

fairly be analogized to a long-continuing and unequal war between two nations or two peoples.

Furthermore, whether rationally or irrationally, people take pride in the deeds of their ancestors, descendants, sports teams, ethnic groups, co-religionists, or nations, or are ashamed on their account.⁹⁹ The common practice of profiling, whether on a racial or nonracial basis, and whether engaged in by government investigators, insurance companies, or taxi drivers, involves a form of collective liability: It presumptively attributes to an individual some trait, often damaging, that is thought to characterize many or most members of a group to which the individual is believed to belong. Abraham Lincoln's Second Inaugural Address sounded the theme of collective liability when he said:

Yet, if God wills that [the War] continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."¹⁰⁰

It simply cannot be said, therefore, that the idea of collective liability (and still less, corporate liability) is alien to thinking about corrective justice.

Furthermore, corporate actors (and collective groups, to the extent that some corporate actors can be said to represent them) have in recent years accepted liability for their past historic injustices to collective groups, and have sought in some measure to provide corrective justice to the injured groups, their current members, or their representatives. Some writers argue that the post-War, West German government's attempts to redress the Nazi Holocaust, both morally and through reparations paid to the state of Israel, mark the beginning of this development.¹⁰¹ The precise starting point may have been Chancellor

99. Meir Dan-Cohen argues:

[W]hether or not recognized by law, instances of collective responsibility abound. From the relatively simple case of the baseball player who reports in the first person plural about an inning or a victory ("we scored," "we won") in a game in which she did not even participate, to the more complicated situation of the American for whom space missions or the Vietnam War are matters of personal pride or shame, we witness all around us collective affiliation leading people to treat the actions of others as their own.

Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1237 (1994).

100. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=38> (last visited Feb. 3, 2008) (on file with the Washington and Lee Law Review).

101. ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK

Konrad Adenauer's speech to the Bundestag in September 1951, in which he acknowledged that "unspeakable crimes were perpetrated in the name of the German people which impose upon them the obligation to make moral and material amends, both with regard to the individual damage which Jews have suffered and with regard to Jewish property for which there are no longer individual claimants."¹⁰² Pursuant to its reparations program, the West German government negotiated agreements with the Israeli government under which it first paid 3 billion deutsche marks to assist in the integration of Jewish refugees from Europe into Israeli society and then 450 million deutsche marks "to be used for the relief, rehabilitation and resettlement of Jewish victims of the Nazis."¹⁰³

The German government is by no means alone in having adopted such measures. In the shadow of Nazi atrocities, the United States government in 1946 also acknowledged an obligation to rectify past injustices towards Indian tribes by the passage of the Indian Claims Commission Act,¹⁰⁴ which authorized redress for tribal claims for treaty violations that were no longer legally actionable.¹⁰⁵ Somewhat similar legislation was enacted in the 1971 Alaska Native Claims Settlement Act,¹⁰⁶ under which the United States agreed to pay \$1 billion and restore 44 million acres as reparations for the wrongful seizure of lands of Alaska native peoples.¹⁰⁷ And in 1988, Congress appropriated \$1.6 billion to provide \$20,000 in compensation to each Japanese-American survivor of the country's World War II internment camps.¹⁰⁸ Such

REPARATIONS, at xv (2004).

102. Kurt Schwerin, *German Compensation for Victims of Nazi Persecution*, 67 NW. U.L. REV. 479, 492-93 (1972) (quoting Chancellor Konrad Adenauer in his speech to the Bundestag in September of 1951). See generally NICHOLAS BALABKINS, *WEST GERMAN REPARATIONS TO ISRAEL* (1971); ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 3-29 (2000).

103. Schwerin, *supra* note 102, at 493-94.

104. Act of Aug. 13, 1946, Pub. L. No. 79-726, ch. 959, § 2, 60 Stat. 1049, 1050 (repealed 1978). See *United States v. Dann*, 470 U.S. 39, 45-46 (1985) (describing the Act's purposes).

105. This is not to suggest that the Indian Claims Commission Act is the earliest American example of a statutory reparations scheme. For earlier instances, see Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 817-19 (2006).

106. 43 U.S.C. §§ 1601-1629 (2000).

107. John F. Walsh, *Settling the Alaska Native Claims Settlement Act*, 38 STAN. L. REV. 227, 227 (1985).

108. See Civil Liberties Act of 1988, Pub. L. No. 100-383, tit. I, 102 Stat. 903, 904-05 (codified at 50 U.S.C. app. § 1989 (2003)) (awarding reparations to Japanese Americans); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 515 (1998) (detailing the payments made to Japanese American internee survivors). As Martha Minow observes, the cash payment was not intended to, and did not, compensate for the suffering and indignity that the recipients and their families had experienced.

actions support the claim that governments and other corporate persons may coherently be held accountable in corrective justice to a group for wrongs that those actors (or the groups or society they represented) inflicted on that group in the past.¹⁰⁹ In the American case, it is plausible to argue that the claims of African Americans, and perhaps also of Native Americans, to corrective justice for past injuries stand on a higher footing, morally, and constitutionally, than those of any other groups.¹¹⁰

My central point in this attempt to structure the affirmative action debate is to highlight that, just as in the antebellum debate over slavery, both sides to the controversy here can plausibly lay claim to "justice" for their positions. Moreover, to the extent that the debates sound in constitutional law in a narrow sense, each side can proffer interpretations of the Constitution under which their positions can be seen as "constitutionally just." For example, those who favor an individualistic conception of corrective justice place weight on the Fourteenth Amendment's language that no state shall deny to "any person" within its jurisdiction the equal protection of the law. Against this, proponents of corporate or collective liability can argue that a government's continuing failure to correct the past racial injustices in which it was implicated perpetuates those injustices and thus inflicts harms on the individual living descendants of those who suffered the original wrongs.¹¹¹ Both sides, in short,

Rather, "the explicit aim, and the actual effects of the reparations law, illustrate the symbolic significance of official acknowledgement of wrongdoing, paying respect to living survivors and to a community of memory." MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 100 (1998).

109. A much earlier example (albeit one highly relevant here) is the unsuccessful "Mason Bill," which was introduced several times in Congress in the late nineteenth century, see S. 4718, 55th Cong. (1898). The Mason Bill would have paid surviving former slaves over the age of seventy a lump sum of \$500 and provided them with a \$15 monthly pension for the remainder of their lives.

110. See Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 432-34, 438 (1978) (suggesting that affirmative action should be limited to those groups that have suffered special ill treatment and that were made the objects of a special constitutional status).

111. See Forde-Mazrui, *supra* note 81, at 709 ("Society's persistent failures to redress adequately conditions that predictably perpetuate, and often worsen, the effects of such past racial injustices, are recurring wrongs that create new remedial obligations."); see also BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 19 (Beacon Press 2003) (1973). Bittker states:

[O]ne thing is clear: the legacy of the Jim Crow system is still with us. The status of American blacks today stems unmistakably from the years when segregation enjoyed the *nihil obstat* of *Plessy v. Ferguson*, and no one who is sensitive to the persistent effects of deep-seated social customs, especially when reinforced or stimulated by the legal system, can doubt that the life of blacks in America will bear for decades the scars of a century of discrimination.

Id. Recent work coming almost a generation after Bittker's has confirmed the persistence of the effects of slavery, Jim Crow, and de jure segregation. See generally SHERYLL CASHIN, *THE*

can frame legal arguments that accommodate the "individualistic" phrasing of the Fourteenth Amendment to their advantage.¹¹²

The deep disagreement over conceptions of corrective and distributive justice in the contemporary debate over race-conscious governmental action, like the earlier disagreement between conceptions of justice in the debate over slavery, has the potential to produce a dangerously high level of social conflict and polarization, indeed even of mass violence. Of course, it seems most unlikely that the national debate over affirmative action, or even over racial reparations, could issue in a civil war, as the debate over slavery did. The situation that led to the Civil War was marked by three salient features, only one of which is present here: first, a wrenching, decades-long disagreement over a fundamental moral and constitutional issue of great moment to the lives, prosperity, and good consciences of millions of Americans; second, a division of opinion on that question that largely corresponded to sectional lines; and third, a readiness on the part of the political leadership of the state governments within one of those sections to risk a violent confrontation over the issue. Thankfully, the last two characteristics do not mark the contemporary debate over constitutional justice in matters of race.

Nonetheless, the potential of that debate to cause deep and divisive rifts within American society—to shatter our "constitutional peace"—should not be underestimated. Drawing on the experience of the successful quest for reparations for Japanese American internees, Eric Yamamoto pointed to "the risks of reparations efforts—the hidden dangers of entrenched victim status, image distortion, mainstream backlash, interminority friction, and status quo enhancement."¹¹³ A demand for corrective justice in a form that would entail the transfer of substantial amounts of wealth, possibly over the course of several decades, from one group of American citizens to another, could well inflame racial hostility, generate bitter resentments on all sides, open wounds that have barely, if at all, begun to heal, and trigger a backlash that could reverse a half-century's effort in this country to achieve racial reconciliation,

FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004); HACKER, *supra* note 74, at 3–4.

112. Alternatively, proponents of corrective justice might challenge the dominant "individualistic" reading of the Fourteenth Amendment. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (differentiating between the Equal Protection Clause and the "antidiscrimination principle" and stating that the antidiscrimination principle embodies a limited conception of equality that is highly individualistic); see also Westley, *supra* note 21, at 468–69 (observing that racism is a group practice and therefore individual reparations to blacks should be opposed because blacks were harmed as a group).

113. Yamamoto, *supra* note 108, at 482.

understanding, forbearance, and good will. Many recent writers and scholars—Amy Chua, for one—have forcefully reminded us how dangerous politicized racial and ethnic conflicts can be, especially in societies with market systems in which racial and ethnic differences tend to coincide with distinctions in class and wealth.¹¹⁴ Against the backdrop of centuries of racial hierarchy, violence, and oppression in this country, it is not imprudent to fear that severe and destabilizing racial conflict could ensue if the legal system were definitively to settle on one or the other of the opposing conceptions of "constitutional justice" outlined above.¹¹⁵

In those circumstances, a naturally cautious and conservative institution like the Supreme Court will be prone to seek a formula that enables it to avoid choosing between rival conceptions of "constitutional justice" and will instead look for one that will permit it to provide the nation with a durable "constitutional peace."¹¹⁶ As I read the affirmative action cases, that is exactly what, over time, the Court has effectively done. Indeed, in its decisions in *Grutter* and *Gratz*, the Court seemed to bypass the debate over justice altogether, focusing instead on the instrumentalist question how affirmative action policies, designed as a method of elite formation, could best serve the interests of the nation.

C. *Affirmative Action As a Conservative Strategy*

Interpreting the Court's "affirmative action" case law as developing a strategy that purchases constitutional peace at the cost of constitutional justice reflects the origins of affirmative action in the conservative policy thinking of the Nixon Administration.¹¹⁷ Taking power after the enormous and wrenching

114. See AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 19–21 (2003) (observing that free markets, outside the West, typically fuel ethnic envy and hatred by intensifying economic dominance of certain nonindigenous minorities over impoverished majorities).

115. See Amar & Katyal, *supra* note 21, at 1776 ("[A]ny form of affirmative action for nonwhites risks backlash from whites. But failure to do anything to integrate disadvantaged minorities into mainstream America risks minority backlash—race riots tomorrow, perhaps, and potential democratic breakdown in a generation or two.").

116. Justice Powell, who was to play a crucial role in the evolution of the Court's doctrine of racial preferences, seems to have been particularly sensitive to this point. Thus, he observed in his *Fullilove* concurrence that "[i]n the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination." *Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concurring).

117. See DEAN J. KOTLOWSKI, *NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY* 124 (2001) ("Nixon . . . must be acknowledged as the sire of affirmative action."). The Johnson

social changes that had occurred in American race relations during the Kennedy and Johnson Administrations and the racial violence in major American cities that marked the mid- to late-1960s, the Nixon Administration concluded that global solutions to persisting racial inequalities were simply impracticable and that race relations needed to be more carefully "managed."¹¹⁸ Nixon and his advisers believed that the prevailing post-Vietnam War policy environment had changed in a fundamental respect: They perceived themselves to be governing in a period in which continuous economic growth was no longer attainable, so that the steady, perceptible improvements in the standard of living for most Americans could not be counted on to mute racial antagonisms.¹¹⁹ Furthermore, they believed that the Kennedy and Johnson Administrations' ambitious project of attempting to integrate African Americans into the

Administration, largely under the influence of then-Assistant Secretary of Labor (and later Nixon adviser) Daniel Patrick Moynihan, had begun contemplating breaking with the previously dominant doctrine of color-blindness and initiating race-conscious programs. President Lyndon Johnson gave voice to this change in strategy in his celebrated Howard University speech of June 1, 1965. Unlike later affirmative action programs, however, these initiatives were intended to address the problem of (specifically) African American poverty. GARETH DAVIES, *FROM OPPORTUNITY TO ENTITLEMENT: THE TRANSFORMATION AND DECLINE OF GREAT SOCIETY LIBERALISM* 65–74 (1996). A critical (but neglected) turning-point came in the 1966 White House Conference on Civil Rights and the November 1965 Planning Conference that preceded it. At the planning conference, "assembled black leaders, antipoverty activists, and academics subjected the philosophy as well as the politics of [Johnson's] Great Society liberalism to all but continuous attack." *Id.* at 95–96. The discussions at a later plenary Conference demonstrated how far many influential leaders and analysts had drifted from the optimistic belief that racial integration within a color-blind society was a desirable and realistic goal.

At the base of the confusion, antagonisms and the air of uncertainty running throughout the conference lay a question creating anxiety deep within the psyche of both black and white delegates: the question of whether America should continue to attempt to resolve the problem of racial discrimination and antagonism or whether it should take more temporary and limited measures that acknowledged the divisions between black and white Americans. This tension between "color-blindness," the purported aim of federal policy since Truman, and compensatory measures specific to blacks (later known as "affirmative action") emerged as the underlying problem of the conference.

Kevin L. Yuill, *The 1966 White House Conference on Civil Rights*, 41 *HIST. J.* 259, 273 (1998).

118. See KEVIN L. YUILL, *RICHARD NIXON AND THE RISE OF AFFIRMATIVE ACTION: THE PURSUIT OF RACIAL EQUALITY IN AN ERA OF LIMITS* 98 (2006) ("No longer were problems . . . to be resolved, they were simply to be more *manageable*.").

119. See *id.* at 210 (discussing Nixon's difficulty in governing during a period without national growth). In this respect, of course, the Nixon Administration reflected the mood of many analysts in the 1970s. See, e.g., William D. Nordhaus & James Tobin, *Is Growth Obsolete?*, in *THE MEASUREMENT OF ECONOMIC AND SOCIAL PERFORMANCE, STUDIES IN INCOME AND WEALTH* 509 (Milton Moss ed., 1973) (surveying then-current objections to desirability or feasibility of economic growth).

"mainstream" of American society had conspicuously failed.¹²⁰ Finally, in part for political reasons, they sought to refocus race-linked governmental programs away from poverty relief and towards the advancement of middle class minorities.¹²¹

Affirmative action was a key element in the Nixon Administration's policy of attempting to "manage" potentially violent racial confrontation bureaucratically. For Nixon, affirmative action

represented the most conservative civil rights option at a time when campaigns to integrate schools and neighborhoods continued to attract the support of many. Affirmative action covered a retreat; it allowed Nixon to back away from the grand promises of the 1960s, to break up the big problems into little pieces, to manage rather than reform race relations. Affirmative action could be implemented quietly, rewarding those with more of a stake in the system—the black middle class—rather than those shouting from the ghettos [Affirmative action] was controlled not from the streets or by the civil rights activists but from the boardrooms and by upper echelon personnel managers [It attempted] to restore equality of opportunity at a time when it does not appear to be automatically guaranteed by American capitalism.¹²²

120. To illustrate, in early 1970, Nixon received a memo from his adviser Pat Buchanan in which Buchanan declared that the "ship of integration is going down." Nixon apparently agreed. Some days later, Nixon adviser H.R. Haldeman recorded in his diary, "Obviously, [the President is] deeply concerned [about racial issues]. Later kept saying to me there's no adequate solution and nothing we can do in the short haul to settle this, it will have to take one hundred years, but people don't want to wait." YUILL, *supra* note 118, at 174. Nixon adviser Daniel Patrick Moynihan also counseled the President that "[t]he era of equal opportunity, nondiscrimination, integration and such . . . is coming to an end." HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* 311 (1990); *see also* KOTLOWSKI, *supra* note 117, at 156 (discussing the Nixon Administration's plans).

The most radical aspect of Nixon's program was the President's willingness to move beyond the melting pot. As Republican moderates committed to individual choice, local authority, and voluntary solutions, Nixonians hated federal programs to force the races together outside the workplace. When a fair number of blacks expressed a desire for separatism and greater economic power, the administration acted. In this respect, Nixonians and Black Power advocates made strange bedfellows indeed.

Id.

121. *See* KOTLOWSKI, *supra* note 117, at 128 (describing how Nixon adviser Alan Greenspan argued in a memorandum for the President that federal anti-poverty programs were ineffective in raising minority incomes or in reducing the crime rate). "Greenspan proposed shifting federal policy from 'reparations for past exploitation' to measures that 'help Negroes help themselves.'" *Id.*

122. YUILL, *supra* note 118, at 236, 238.

Judged by the standards that it set for itself, Nixon's affirmative action policy has been a stunning success—in great measure, because its origins and purposes have been so poorly understood. As Kevin Yuill sees it, the massive expansion of affirmative action both inside and outside government since the Nixon years has reflected the growing "clientization" of the relationships between ordinary Americans on the one side and their government and their elites on the other side.¹²³ As affirmative action programs have taken hold, even opponents of those programs have come to argue, not so much for their elimination, as for their extension to nonminorities, based on economic class or some other nonracial criterion.¹²⁴ Furthermore, "the beneficiaries of th[ese] client relationships are not the clients but those who legitimate themselves by adopting the 'enabler' role. This is not restricted to the state. Hence, affirmative action appears on the 'mission statements' of just about all large corporations and public institutions."¹²⁵ As Yuill contends, the legitimizing and stabilizing effects of permitting major corporations and public institutions to play "enabler" roles help to explain the resistance of large corporations to the Reagan Administration's attacks on affirmative action and the enthusiastic support that elite academic institutions gave to affirmative action programs like that at issue in *Grutter*.¹²⁶

Fittingly, it was one of Nixon's appointments to the Supreme Court—Justice Louis Powell—who placed the judicial *nihil obstat* on affirmative action.¹²⁷ And it was another "moderate" conservative Justice—Sandra Day O'Connor—who, over the course of her tenure, succeeded in writing Powell's vision deeply into the Court's constitutional case law.¹²⁸ Although the Court did occasionally deviate from the path chalked out by Powell and O'Connor, it came in the end to hew closely to it.¹²⁹ In the Part that follows, I shall attempt

123. See *id.* at 237 ("The deciding tendency that underwrote the massive expansion of affirmative action beginning in the Nixon years has been the shift in the relationship between Americans and their government, the 'clientization' . . . of the citizen's role.").

124. *Id.*

125. *Id.* at 238.

126. See *id.* at 238–39 ("This explains the resistance of large corporations to Ronald Reagan's attack on affirmative action.").

127. See PETER WOOD, DIVERSITY: THE INVENTION OF A CONCEPT 103 (2003) ("Justice Powell . . . breathed life into a tentative new rationalization for affirmative action, the *diversity* defense.").

128. See *id.* at 125–26 (referring to Justice O'Connor's role in later affirmative action cases).

129. See *id.* (discussing how later Supreme Court cases, though narrowing the conditions necessary for racial preference programs, "strengthened the principle that affirmative action programs could be squared with the [F]ourteenth Amendment").

to make good on the claim that the Court's major affirmative action cases are best understood as an attempt to find "constitutional peace" even at the cost of "constitutional justice." I shall focus on three main cases: *Bakke*, *Adarand*, and *Grutter*.

IV. Constitutional Peace and Affirmative Action: Three Cases

A. Bakke

In the beginning, there was Justice Powell's opinion in *Bakke*. Powell's reliance on the idea of "diversity" was surprising and unexpected, as is evidenced by the fact that none of the other eight Justices sounded that theme.¹³⁰ Nor was the "diversity" argument more than incidental in the petition for certiorari and in the brief of the defendant University of California Davis Medical School.¹³¹ The medical school's counsel, former Solicitor General Archibald Cox, mentioned "diversity" only once in a forty-four minute oral argument defending the medical school's admissions policy—and then, only in response to a question from one of the Justices.¹³²

The arguments that [the medical school] put first were that it needed to make up its past deficit of black students; that it needed to serve the larger cause of societal equity toward blacks; and that it needed to assist in supplying more physicians to black neighborhoods. *Diversity* was present more in the form of a rhetorical gesture than a serious argument—and almost like an afterthought.¹³³

What work did the idea of "diversity" do, then, in Powell's opinion, and why did it have so much resonance in the culture and, later, in the Court's opinions? In terms of the analytical structure suggested above, the idea of "diversity" provided an answer to the question of distributive justice.¹³⁴ Allan

130. See Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 861 (2000) (explaining that before Justice Powell inscribed it deeply into American constitutional law, the idea of "diversity" "carried no particular weight and had, at most, a modestly benign connotation").

131. See WOOD, *supra* note 127, at 104–07 ("*Diversity* . . . appears as a minor theme in the University of California's petition to the Supreme Court.").

132. See *id.* at 108 (stating that Cox did not advance the argument that diversity was best for all involved).

133. *Id.*

134. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978) (describing racial classification in admissions). The Court stated:

Racial classifications in admissions conceivably could serve . . . [the] purpose [of a] . . . fair appraisal of each individual's academic promise in the light of some

Bakke, who was challenging the medical school's admissions program, argued that he was entitled to have been admitted on his merits. He pointed to the significant differences between his results and the average results of the program's minority "special admittees" in the relevant quantifiable dimensions, including undergraduate grade point average (GPA) in science courses, overall GPA, and scores in the verbal, quantitative, science, and general information sections of the Medical College Admissions Test.¹³⁵ That was, in effect, an argument that the school had denied equal protection by allocating places other than on the basis of the "merit" criterion of distributive justice.¹³⁶ Powell's "diversity" argument can be read as, in part, an answer to this claim: Bakke, according to Powell, simply had too narrow and mechanical a notion of what constitutes "merit."¹³⁷ Nonquantitative considerations could justifiably be considered in assessing an applicant's "merit," along with objective, numerical data reflecting performance on standardized tests or in academic course work.¹³⁸ Qualities relevant to an assessment of merit, Powell argued, could include "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of

cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all.

135. See WOOD, *supra* note 127, at 105 (showing a comparison of Bakke's scores to those of admitted students). Bakke's scores were also better than those of the average white student who was admitted by the medical school—thus raising the question whether there were nonracial factors (such as his age—he was thirty-three at the time of his second rejected application) that accounted for the school's decisions against him. See CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 153 (2004) ("The committee believes that an older applicant must be unusually highly qualified if he is to be seriously considered [Bakke] is a well-qualified candidate for admission whose main handicap is the unavoidable fact that he is now 33 years of age.").

136. See WOOD, *supra* note 127, at 105 ("Bakke had applied for admission in 1973 and again in 1974, and both times was rated by the school as 'qualified' for admission.").

137. See *Frontline: Secrets of the SAT: Interview with Nicholas Lemann*, <http://www.pbs.org/wgbh/pages/frontline/shows/sats/interviews/lemann.html> (last visited Nov. 28, 2007) (arguing that selection for places at elite colleges and universities based solely on scores on standardized tests "is not the only possible meritocracy. It's a highly particularized kind of meritocracy") (on file with the Washington and Lee Law Review). Lemann continued by stating that "[a]ffirmative action . . . is not a threat to this system of meritocracy [Affirmative action is] a part of this kind of strange meritocratic apparatus we have. It's a patch on the meritocracy to make it run better." *Id.*

138. See generally Norman Daniels, *Merit and Meritocracy*, 7 PHIL. & PUB. AFF. 206 (1978) (arguing that if job selection is governed by "macro-productivity" considerations rather than "micro-productivity" ones, then higher objective test scores can no longer be taken as sole criterion of "merit").

overcoming disadvantage, ability to communicate with the poor, and other qualifications"¹³⁹—including race. So regarded, the significance of race in allocating governmental benefits and burdens could be minimized:

[It was merely] a "plus" in a particular applicant's file The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.¹⁴⁰

At the same time, the "diversity" idea performed another function in Powell's opinion: It provided a rationale for affirmative action untethered to the normative demands of corrective justice, and thus softened the harshness of Powell's insistence that such demands were not relevant.¹⁴¹ Powell was plainly hostile to justifications of race-conscious governmental action framed in such remedial terms, except in circumstances that he sought to restrict quite carefully.¹⁴² Powell's broad argument was that the invocation of racial corrective justice as a governmental purpose should usually require: (1) the identification of particular victims or victim classes (i.e., a kind of victim-specificity); (2) the ascription of liability only to an identified wrongdoer or beneficiary of a wrongdoing (i.e., a kind of offender-specificity); and (3) the proof of a causal relationship between an offender's action and the existing condition of the victim or victim class.¹⁴³ He argued that, at least in general, none of these conditions could readily be established when a governmental unit sought to justify a racial preference as an attempt to remediate "societal

139. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978).

140. *Id.* at 317.

141. See Issacharoff, *supra* note 25, at 36 ("[D]iversity is untethered to any concept of a wrong, either societal or institutional."); see also Colin S. Diver, *From Equality to Diversity: The Detour from Brown to Grutter*, 2004 U. ILL. L. REV. 691, 694–95 (2004) ("The history of affirmative action in higher education demonstrates the tension between the remedial and diversity rationales for race-conscious admissions programs.").

142. See *Bakke*, 438 U.S. at 295 n.34 (criticizing the dissent). He stated:

[The dissenting justices] offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere *post hoc* declarations by an isolated state entity—a medical school faculty—unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

Id.

143. See *id.* at 309 ("Before relying upon . . . findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination.").

discrimination" against African Americans.¹⁴⁴ Thus, he seemed to assimilate the historic grievances of African Americans to those of other racial and ethnic groups, in effect denying that their claims to remedial action took priority over those of other claimants: The "white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not."¹⁴⁵ Further, he argued that any attempt to work corrective justice would itself likely involve injustice, because there would be "a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."¹⁴⁶ Finally, he expressed doubt that the disparate outcomes between minorities and whites that would arise in a race-neutral admissions scheme could be attributed causally to past racial discrimination by American society: This causal hypothesis was merely "a speculative leap . . . [unsupported by] one word in the record."¹⁴⁷ By contrast, the Brennan-led plurality found:

Davis clearly could conclude that the serious and persistent underrepresentation of minorities in medicine . . . is the result of handicaps under which minority applicants labor as a consequence of a background of deliberate, purposeful discrimination against minorities in education and in society generally. . . . The conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance to *Brown I*, or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination, . . . and yet come to the starting line with an education equal to [whites']¹⁴⁸.

144. *See id.* at 310 ("[T]he purpose of helping certain groups whom the faculty . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.").

145. *Id.* at 295.

146. *Id.* at 298. Powell's concern with offender-specificity was also manifested in his plurality opinion in *Wygant*, where he wrote that "the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (emphasis added); *see also id.* at 278 (remedial action would have required showing "prior discrimination by the Board" (emphasis added)). Powell also insisted that a *concession* by a public employer that it had engaged in past discrimination would also be insufficient to justify race-conscious affirmative action. *Id.* at 278 n.5.

147. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 297 (1978).

148. *Id.* at 370–72 (1978) (Brennan, J., concurring). Remediation was also the theme of the argument for the United States, an amicus on the medical school's behalf. *See OGLETREE, supra* note 135, at 158 ("[The medical college's] oral argument corresponded to the Justice Department

Accordingly, Powell rejected governmental efforts addressed to "the remedying of the effects of 'societal discrimination,'" which he castigated as "an amorphous concept of injury that may be ageless in its reach into the past."¹⁴⁹ He contrasted such efforts to achieve corrective justice with the Court's own much narrower efforts in the "school desegregation cases," where judicial orders were intended to abate or eliminate "the disabling effects of identified discrimination."¹⁵⁰ It appeared to follow that administrative and (it would seem) even legislative¹⁵¹ efforts to achieve corrective justice would have to be modeled on the reasoning, practices and methods of courts of equity deciding cases one at a time.¹⁵² In particular, the governmental actor would have to make or rely upon "judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such findings . . . it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another."¹⁵³ For that reason alone, therefore, the medical school's admissions policy could not be founded on corrective justice norms: It simply lacked the institutional competence to make such findings, "at least in the absence of legislative mandates and legislatively determined criteria."¹⁵⁴

brief but went further, stressing that discrimination was so pervasive in American life that it made remedial programs necessary.").

149. *Bakke*, 438 U.S. at 307.

150. *Id.*

151. In his concurring opinion in *Fullilove*, Justice Powell opined that before even Congress could enact race-conscious remedial legislation, it would have to "make findings that demonstrate the existence of illegal discrimination." *Fullilove v. Klutznick*, 448 U.S. 448, 498 (1980) (Powell, J., concurring). He did, however, also say:

Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is . . . make policy rather than to apply settled principles of law. The petitioners' contention . . . is essentially a plea that we treat Congress as if it were a lower federal court. But Congress is not expected to act as though it were duty bound to find facts and make conclusions of law.

Id. at 502 (Powell, J., concurring).

152. *See Bakke*, 438 U.S. at 308–09 (stating that without findings of statutory or constitutional harm to a defined group, the government has no basis for preferring that group over others).

153. *Id.*

154. *Id.* at 309. One might argue that Powell's critique of the medical school's proposed remedial justification was essentially sound. After all, the medical school itself had not engaged in any prior racial discrimination: It was simply too new to have done so. *See id.* at 272–76 (stating that "[t]he Medical School of the University of California at Davis opened in 1968" while Allan Bakke first applied to the school in 1973). Hence, the usual requirement of corrective justice that the remediator be the original wrongdoer was not met. Moreover, the beneficiaries of the school's race-sensitive admissions policy were not themselves the victims (original or other) of any racial wrongdoing in which the school had been actively complicit. *Id.* at 310. Further, it could be argued, the task of remedying past *societal* injustices should not be undertaken by institutions at the level of the medical school: Any such remediation should be

Powell's *Bakke* opinion, a masterpiece of subtlety, indirection, and ambiguity, represented a decision for "constitutional peace" over "constitutional justice." And despite reflecting the views of only a single member of the Court, Powell's "diversity" rationale enjoyed immediate, widespread, and enthusiastic acclaim.¹⁵⁵ Further, despite what may be growing popular,¹⁵⁶

undertaken, or at least sanctioned, at a higher level of government—Congress or the state legislatures—that could claim to represent (as the medical school could not) society at large. But these arguments rest on assumptions that are inconsistent with many theories of collective agency and collective liability. If a governmental unit at whatever level fails to take measures that lie within its power to correct the persisting effects of societal discrimination, it can be argued that that unit is perpetuating those effects, and hence becomes a party to the wrong. Moreover, the "victims" of a wrong need not be the original ones, but may also be those standing in particular relationships with them, if the effects of the wrong work a continuing injury to the latter class. Finally, there is nothing absurd in the effort by a political or administrative unit at a level below that of the federal or state legislature to address the effects of "societal" discrimination, even if that lower-level unit by itself could plainly not repair the whole of the society's wrong. Imagine that the city of Muenster in West Germany had decided in 1950 to establish a scholarship program for the surviving children of Jewish victims of Nazi persecution throughout Europe. Plainly the city, by itself, could do extremely little to remedy all the atrocities that Germany had inflicted between 1933 and 1945 on the Jews of Europe. Yet, that would not make it incoherent or unreasonable for the city, as the political representative of a part of German society, to attempt to do such remediation as it could.

155. See WOOD, *supra* note 127, at 113 ("Powell's *Bakke* opinion . . . lifted *diversity* out of obscurity and gave it the respectability of seeming law.").

156. When some affirmative action policies have been put to the voters, they have been resoundingly *rejected*. The Supreme Court's decision in *Grutter* to uphold the University of Michigan Law School's affirmative action triggered a state-wide referendum in November 2006, in which Michigan voters adopted by a lopsided 58%–42% count a proposal to amend the state constitution to forbid such preferences in public education, employment, or contracting. The amendment was self-executing and, among other effects, rolled by the law school's "diversity"-based admissions program. The Sixth Circuit has upheld the outcome of the referendum against a variety of constitutional challenges, including an equal protection claim. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 239–40 (6th Cir. 2006).

Further, opinion poll results from the 1980s through the mid-1990s showed a fairly stable pattern of only 15% to 25% of respondent support for racial preferences, with white support generally staying below 20% and black support nearly always exceeding 40%. Charlotte Steeh & Maria Krysan, *Trends: Affirmative Action and the Public, 1970–1995*, 60 PUB. OPINION Q. 128, 130, 135 (1996). Shortly before the *Grutter* decision, the Pew Research Center found that while "a growing majority of the public support[ed] the general idea of affirmative action," nonetheless "when people are questioned about programs involving *preferential treatment* for minorities, opinion turns negative." Pew Research Center, *Conflicted Views of Affirmative Action* (May 14, 2003), <http://people-press.org/reports/pdf/184.pdf> (last visited Nov. 28, 2007) (on file with the Washington and Lee Law Review). Likewise, a Century Foundation Paper in March 2003 found that Americans "strongly associate affirmative action with racial preferences and do not view racial preferences favorably. Among white Americans, 52[%] say affirmative action should be abolished, and more than 80[%] oppose preference in hiring and promotions for racial minorities, even when the programs may help compensate for 'past discrimination.'" Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions* 28 (Mar. 2003) (unpublished manuscript, on file with the Washington and

academic,¹⁵⁷ and judicial¹⁵⁸ disaffection with "diversity," Powell's rationale has stood the test of time well. As Sanford Levinson has written, "diversity" has become "the favorite catchword—indeed, it would not be an exaggeration to say 'mantra'—of those defending the use of racial or ethnic preferences. . . . 'Diversity' . . . has joined 'family values' and 'good medical care' as something that everyone is for."¹⁵⁹

Some part of the appeal of Powell's opinion lay in its adroitness in detaching the question of distributive justice from that of corrective justice by foregrounding the former and sidelining the latter. In effect, Powell played off one form of justice against the other. In describing race and ethnicity as factors that were relevant to the overall assessment of whether a candidate merited admission, Powell invoked a criterion of distributive justice that was not without plausibility and persuasiveness

Lee Law Review), available at http://www.tcf.org/Publications/Education/carnevale__rose.pdf (last visited Feb. 5, 2008).

157. In a recent study, the well-known Harvard political scientist Robert Putnam has found substantial empirical evidence that immigration and ethnic diversity tend, at least in the short to medium run, to undermine social solidarity and deplete social capital. According to Putnam, inhabitants of diverse communities tend to withdraw from collective life, to distrust their neighbors, regardless of the colour of their skin, to withdraw even from close friends, to expect the worst from their community and its leaders, to volunteer less, give less to charity and work on community projects less often, to register to vote less, to agitate for social reform *more*, but to have less faith that they can actually make a difference, and to huddle unhappily in front of the television. Note that this pattern encompasses attitudes and behavior, bridging and bonding social capital, public and private connections. Diversity, at least in the short run, seems to bring out the turtle in all of us.

Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 150–51 (2007), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1467-9477.2007.00176.x> (last visited Feb. 20, 2008). As Putnam observes, however, his reported results concern the apparent effects of diversity on neighborhoods, not on schools. *Id.* at 142. Putnam's findings are consistent with those of other social scientists. See, e.g., Dora L. Costa & Matthew E. Kahn, *Understanding the American Decline in Social Capital*, 56 KYKLOS, 17, 19 (2003) ("Previous empirical work has mainly emphasized the role of racial fragmentation in lowering the level of social capital . . . but there is also evidence of the importance of income inequality and of ethnic fragmentation."). Putnam's controversial findings have already attracted considerable media attention. See, e.g., Christopher Caldwell, *Diversity Is Not Black and White*, FIN. TIMES, Aug. 11, 2007, at 9 (reporting that Putnam's study found a correlation between increasing diversity and falling community participation); Michael Jonas, *The Downside of Diversity*, BOSTON GLOBE, Aug. 5, 2007, at 1D (reporting Putnam's findings of the correlation between community diversity and participation).

158. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2758 (2007) (plurality opinion) ("Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'").

159. Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 577 (2000).

even for those who advocated strict race-neutrality in admissions.¹⁶⁰ Viewed in a certain light, Powell's account of "merit" could even be seen as race-neutral itself: In particular circumstances, any candidate's race or ethnicity might contribute to the "diversity" of the group for which members were being selected.¹⁶¹ At the same time, racial disadvantage could not usually, for Powell, be made the basis for corrective justice, which required showings of victim-specificity, offender-specificity and causation that he would have made extraordinarily difficult to provide. Much of the power of Powell's formulation, then, was that it brought about constitutional "peace" even while seeming to account for constitutional "justice."

Other considerations, too, may explain the resonance of Powell's "diversity" concept in the larger culture—even though it is open to question how far racial "diversity" actually promotes diversity of ideas and perspectives¹⁶² or other values internal to the educational

160. See Kronman, *supra* note 130, at 865 (questioning which groups benefit from diversity). Kronman states:

[O]nce affirmative action is seen . . . as a device for promoting the internal goals of higher education itself . . . the claims of disappointed non-minority applicants are bound to seem less pressing, for no applicant has the right to be admitted to the school of his or her choice so long as the applicant's rejection can be explained as a consequence of the school's effort to maintain an optimal environment for teaching and learning.

Id. (emphasis omitted).

161. George Sher states:

[I]f diversity yields every one of the intellectual benefits that are claimed for it, why should we benefit most when the scholarly community contains substantial numbers of blacks, women, Hispanics, (American) Indians, Aleuts, and Chinese-Americans? Why not focus instead, or in addition, on Americans of Eastern European, Arabic, or (Asian) Indian extraction? For that matter, can't we achieve even greater benefit by extending preference to *native* Africans, Asians, Arabs, and Europeans?

George Sher, *Diversity*, 28 PHIL. & PUB. AFF. 85, 99 (1999).

162. The political scientist Andrew Hacker suggests that American culture generally "makes a point of exaggerating differences and exacerbating frictions. This appears most vividly in the stress placed on race." HACKER, *supra* note 74, at 79. It may be, therefore, that the significance of racial and ethnic diversity as a proxy for diversity of ideas and perspectives has been exaggerated. Some legal scholars appear to think so. For example, Anthony Kronman has recently argued that when students "see themselves as representatives of these [racial or gender] groups and [] define their task as that of being responsible advocates for them[,] they tend to speak,

not on behalf of themselves but of the groups to which they belong. It is to the group, not to their interlocutor or to the conversation, . . . that their loyalty is owed. . . . The individuals exchanging views cease to be individuals, and their exchange ceases to be a conversation. Its personal significance for them declines

process,¹⁶³ or why only race and ethnicity seem to matter in the pursuit of the educational benefits "diversity" is said to yield.¹⁶⁴ (The social science evidence

and its political importance as a negotiation increases.

ANTHONY J. KRONMAN, *EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE* 150–51 (2007); *see also* Sandalow, *supra* note 74, at 1906. Sandalow states:

[T]he central educational objective of colleges and universities is the intellectual development of their students. Racial diversity can contribute to that end, but only to a limited extent My own experience, and that of colleagues with whom I have discussed the question, . . . is that racial diversity is not responsible for generating ideas unfamiliar to some members of the class.

Id.; *see also* Diver, *supra* note 141, at 701–02 (questioning whether *Bakke's* "multidimensional" account of diversity produces better educational outcomes than diversity measured in fewer, race-neutral dimensions); George, *supra* note 27, at 1635–36 (questioning whether instilling racial and ethnic diversity at a law school constitutes a compelling governmental interest); James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 *YALE L. & POL'Y REV.* 5, 5 (2005) (quoting Professor Randall Kennedy as saying: "No one really believes in diversity"); Paulsen, *supra* note 21, at 1000–02 (discussing the problems of using race or gender as a proxy for intellectual diversity). Other legal scholars, however, disagree, arguing that the persisting segregation of (in particular) African Americans tends to inculcate a perspective that differs from the majority's. *See* Kronman, *supra* note 130, at 884 (observing a selection of a student body for racial and ethnic diversity can serve educational good by promoting an especially important form of value diversity); Charles R. Lawrence, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 *COLUM. L. REV.* 928, 928–29 (2001) (finding educational benefits in diversity). In any case, the relationship between race and outlook is only a rough and approximate one. Even Justice O'Connor—who in *Grutter* would endorse a form of the diversity rationale—elsewhere condemned as an "impermissible racial stereotype[]" the "perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike." *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

To be sure, there may well be empirical differences, not so much in the ways they think, but in *what they think about*, that distinguish different racial and ethnic groups. Sanford Levinson has said:

Race and ethnicity . . . at least on occasion, may act as proxies, not so much for holding specific views, but for the probability of being deeply interested (and at least somewhat knowledgeable) at all in certain issues, i.e., those issues most germane to the group in question. . . . I think it simply undeniable that African-Americans are more likely to be concerned with the problems facing African-Americans—and, for that matter, more aware of the complexities and divisions within the group of those comprising the community of African-Americans—than are non-African-Americans.

Levinson, *supra* note 159, at 597. But is this argument for diversity not something of a two-edged sword? If two distinct racial groups find different issues of absorbing concern, might they not be *less* likely to discuss them with the *other* group (which may be uninterested in them), and *more* likely to discuss them *within* the group (where they are sure to hold an interest)?

163. *See* Issacharoff, *supra* note 25, at 38 ("The empirical claim about the benefits of diversity [are] almost as difficult to explain coherently as to demonstrate."). *But see* WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 228 (1998) (reporting studies showing that racially diverse colleges can help improve race relations); Sandalow, *supra* note 74, at 1907 (contending that while diversity in a student body yields some benefits, such diversity is not indispensable to a college education).

164. *See* Lindgren, *supra* note 162, at 10 ("If it's viewpoint diversity that counts most . . . then . . . political diversity is the cleavage that divides Americans the most, followed by race.");

on the supposed benefits, educational or other, of diversity is "thin.")¹⁶⁵ From the viewpoint of the white majority, Powell's "diversity" was attractive because it required no acknowledgement of collective liability for the discrimination of the (even recent) past. As Eugene Volokh has said, the diversity rationale "ascribes no guilt, calls for no arguments about compensation, [and] seems to ask simply for rational, unbigoted judgment."¹⁶⁶ Or as Marvin Jones puts it, the diversity concept was "received as a kind of big tent under which both conservatives and liberals, as well as minority advocates and advocates of merit, could meet and find consensus on inclusion."¹⁶⁷ Furthermore, diversity was supposed to benefit whites no less than nonwhites: Not only were whites not to be charged with liability for the racism of the past, but whites and nonwhites were alike expected to profit from being mingled inside (and outside) the classroom.¹⁶⁸ Who could reasonably object to a transaction that

John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1198–1203 (2005) (noting a lack of political diversity at elite law schools and suggesting such a lack of ideological diversity may have an effect on those schools' attempts to gain "viewpoint diversity").

165. See Justin Pidot, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761, 763 (2006) ("[I]t appears curious that the courts relied on this often thin social science to sustain an admissions policy under strict scrutiny."). Pidot usefully distinguished between (1) "numeric diversity" (the percentage of enrollment of students of color) and (2) "heterogeneity," or an index of the ethnic and racial groups within a student body. *Id.* at 765–66. He further argued that numeric diversity was not in itself sufficient to produce positive outcomes; rather, "diversity experiences" counted as the relevant causal factor. *Id.* at 768–69. Thus, cross-racial interactions produced by numeric diversity, rather than bare numeric diversity in itself, might be supposed to yield the benefit of reduced negative racial stereotyping. *Id.* Summarizing his analysis of the social science studies presented to the courts in the *Grutter* and *Gratz* cases, Pidot concluded that those studies, whether taken singly or in the aggregate, had not "conclusively demonstrate[d] each link in the staged story that affirmative action advocates tell—that numeric diversity is an essential ingredient to diversity experiences, which can in turn bring about a panoply of benefits to students." *Id.* at 807.

166. Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2060 (1996); see also Cynthia Estlund, *Taking Grutter to Work*, 7 GREEN BAG 2d 215, 216 (2004) ("[T]he diversity rationale . . . is decidedly not a remedial argument; it is instrumental and forward-looking. It is not about making up for the sins of the past, but about making a better future." (emphasis omitted)).

167. Jones, *supra* note 74, at 27.

168. See Amar & Katyal, *supra* note 21, at 1750 (describing "[t]his vision of university diversity" as "the heart and soul" of Justice Powell's opinion); see also Jack Greenberg, *Diversity, The University, and the World Outside*, 103 COLUM. L. REV. 1610, 1616 (2003) ("[T]o rest the case for affirmative action on diversity because it contributes to learning incorporates an irony. It argues that admitting blacks is good because it helps whites. Otherwise they would suffer from being alone with only white classmates."). Although the Supreme Court had alluded to the benefits of (what came to be called) "diversity" in higher education before *Bakke*, see, e.g., *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), it had apparently

left all sides better off? Indeed, given that white students are more likely to live in segregated environments before college than African Americans, Latinos, or Native Americans, could they reasonably object to race-conscious selection programs that arguably made them the primary beneficiaries of a multiracial educational experience?¹⁶⁹ Moreover, not only was "diversity" guilt-free and feel-good for whites, it was also low-cost: It certainly did not involve the significant transfers of wealth and positional goods that programs of corrective justice would likely have entailed. Adding to the appeal of "diversity" to elite whites (like Justice Powell himself), most of the burden of affirmative action premised on "diversity" would fall on those whites who, like Allan Bakke, were only middle-of-the-pack applicants in any case and who, again like Bakke, had alternative, if less rewarding, educational and career opportunities.¹⁷⁰ Indeed, as the four members of the Brennan plurality candidly acknowledged, it was quite possible that the "immediate, direct costs" of affirmative action would be borne by whites who themselves might be considered a "discrete and insular" minority.¹⁷¹ Yet, the very political isolation of such whites would tend to leave the constitutional peace undisturbed. Also serving to palliate (at least some) whites, the opinion's "diversity" rationale could be interpreted to limit the numbers of minority group members who displaced whites in the selection

regarded the benefits as flowing to African Americans from whites, rather than the reverse. See Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 35 n.164 (2002) (explaining the Court's early position that diversity in higher education benefits blacks by being with whites). But see Levinson, *supra* note 159, at 575 (contending that white law students are also harmed by a lack of diversity in school).

169. See Diver, *supra* note 141, at 707 (noting that this "troubling" consequence of the diversity rationale "says, in effect, that minorities are being recruited . . . for the educational benefit of whites"). Likewise, Pidot found that some of the social science evidence indicated that "diversity for students of color may be a mixed blessing. If this is indeed the case, affirmative action stands on an odd footing: racial preferences for underrepresented minorities are justified, not for their direct educational benefits to those underrepresented minorities, but because of the benefits that primarily accrue to white students." Pidot, *supra* note 165, at 795; see also *id.* at 794 ("[L]ittle data demonstrate a link between diversity and positive outcomes for students of color.").

170. The latter point was noted by Justice Powell in his plurality opinion in *Wygant*. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 & n.11 (1986) (plurality opinion). Both in *Wygant*, and in other cases, Powell was careful to guard against forms of racial preferences that appeared to work particularly severe or disruptive harms (such as being laid off) on whites. See, e.g., *United States v. Paradise*, 480 U.S. 149, 188–89 (1987) (Powell, J., concurring) (noting that promotion delays for white police troopers under court-ordered affirmative action plan created only a "relatively diffuse" burden, did not cause serious disruption in their lives, and were only temporary).

171. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 268, 361 (1978) (Brennan, J., concurring).

process.¹⁷² A medical school could plausibly use the "diversity" rationale to justify the selection of (say) sixteen "special admittees" who, but for their race, would not have been chosen for any of the school's 100 places; however, it would be less plausible to justify the selection of thirty-five "special admittees" on the same basis. Finally, the opinion's purported distinction between the legitimate use of race as a "goal" under the Harvard College admissions system and its illegitimate use as a "quota" by the Davis Medical School, although "an intellectual failure," was "a public relations triumph."¹⁷³

From the point of view of nonwhite minorities, Powell's formulation also appeared to offer significant advantages. First of all, it dispelled the threat to affirmative action that had been mounting in the late 1970s and left open an avenue for race-conscious governmental programs that could benefit them. Moreover, the avenue for advancement that Powell's opinion left open was one that was particularly alluring to minority members with greatest talents and accomplishments. Charles Ogletree notes that while his initial reaction on hearing of the *Bakke* decision was to think that it was "good news all around,"¹⁷⁴ on second thought he wondered whether "the victory was largely symbolic, benefiting only the Talented Tenth."¹⁷⁵ Likewise, Charles Lawrence has argued that "the 'diversity defense' of affirmative action is, in effect,

172. See OGLETREE, *supra* note 135, at 164 ("[T]he diversity rationale . . . becomes less persuasive as the percentage of minority students grows—there are diminishing marginal returns in terms of racial diversity once the number reaches a certain point.").

173. JOHN C. JEFFRIES, JR., JUSTICE LOUIS F. POWELL, JR., A BIOGRAPHY 485 (2001). Professor Jeffries dismisses Powell's purported distinction between the Harvard and Davis admissions schemes as "pure sophistry" that "penalized [Davis'] candor." *Id.* at 484.

174. OGLETREE, *supra* note 135, at 161.

175. *Id.* The phrase, "The Talented Tenth" originated in a 1903 address by W.E.B. Du Bois. W.E.B. Du Bois, *The Talented Tenth* (Sept. 1903), <http://condor.depaul.edu/~history/webresources/usprimary/WDubois3.htm> (last visited Feb. 20, 2008) (on file with the Washington and Lee Law Review). Du Bois originally entertained the hope that the Talented Tenth would use their wealth and position selflessly to advance the condition of other African Americans. *Id.* In later reflection on this early work, however, Du Bois wrote that the Talented Tenth might in fact prove to be "a group of selfish, self-indulgent, well-to-do men, whose basic interest in solving the Negro problem was personal; . . . without any real care, or certainly no arousing care, as to what became of the mass of American Negroes, or of the mass of any people." W.E.B. Du Bois, *The Talented Tenth: Memorial Address*, 15 *BOULÉ J.* 3–13 (Oct. 1948), *reprinted in* W.E.B. DU BOIS: A READER 347, 349 (David Levering Lewis ed., 1995).

In citing Du Bois, I do not, of course, mean to imply that African American leaders are unconcerned with the fate of those who are poorer, and, indeed, there is substantial evidence that they *are* so concerned. But as with elites of any kind, privilege may militate against an "arousing care" for the truly disadvantaged. For a brief summation and review of the evidence whether African Americans who have benefited from race-conscious programs in higher education are giving back to the broader African American community, see Sandalow, *supra* note 74, at 1910.

conservative The case for diversity is a case for the integration of a privileged class."¹⁷⁶ Absorbing the potential leadership of a disaffected class into positions within a dominant elite is, of course, a traditional means that such elites have used to avert social conflict. Indeed, one might cynically view the consensus that has formed around Powell's "diversity" rationale as a corrupt bargain between white elites and the talented minorities seeking to enter their ranks,¹⁷⁷ to the detriment of the general population of both whites and nonwhites. Further, Powell's "diversity" rationale permitted race and ethnicity to be taken favorably into account, not just for a single, disadvantaged minority group, but for a variety of such groups—Hispanic Americans as well as African Americans, Asian Americans as well as Native Americans. "Diversity" would thus make it possible to fuse such racial and ethnic groups together into coalitions that might be strong enough to sustain such programs politically, but not so numerous as to deny meaningful benefits to each of the coalition's constituencies.¹⁷⁸ Finally, even if the "diversity" rationale could theoretically work in some circumstances to the advantage of underrepresented segments of the white majority, there was little doubt that in fact African Americans and other nonwhites would prove to be its principal beneficiaries: Despite purporting to treat race and ethnicity as "plus factors" that were no more contentious than athletic ability or leadership potential, the encrypted message in Powell's opinion was a willingness to afford a measure, however modest and incomplete, of corrective justice.¹⁷⁹

176. Lawrence, *supra* note 162, at 940–41.

177. Bowen and Bok's study, *The Shape of the River*, argued that African American graduates of top-ranked selective colleges, who went on to earn advanced degrees, formed "the backbone of the emergent black . . . middle class." BOWEN & BOK, *supra* note 163, at 116; see also Sandalow, *supra* note 74, at 1899 (detailing evidence supporting the view that race-sensitive admissions policies in top-ranked colleges "augment[] the representation of blacks in the upper reaches of the middle class").

178. On the other hand, Kevin Yuill argues that Richard Nixon, whom he describes as the "Father of Identity Politics," YUILL, *supra* note 118, at 209, deliberately sought to create preferences for nonblack minority groups in order to "steer [African Americans] into a competition with other groups, ensuring that black civil rights groups became supplicants within the 'system' rather than the vanguard of opposition to it." *Id.* at 213. Consistent with Yuill's hypothesis, the historical evidence shows that Latinos, Asian Americans and American Indians had been low-profile players in the Civil Rights Revolution that preceded the Nixon Administration. Moreover, Nixon actively sought to use affirmative action in government hiring and grant-making to persuade Latino voters to join his coalition. See JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION 150–64* (2002) (identifying Nixon's attempt to win the Latino vote as a political benefit of the "minority-capitalism" program).

179. See Levinson, *supra* note 159, at 601 (quoting views of Professor Jack Balkin that "[i]n the context of educational affirmative action, . . . 'diversity' [is] a code word for representation in enjoyment of social goods by major ethnic groups *who have some claim to past mistreatment.*" (emphasis added)); Sher, *supra* note 161, at 96 (arguing that every

Whatever the explanation, there can be little doubt of the success of Justice Powell's formula for promoting "constitutional peace." And there can also be little doubt that securing "constitutional peace," in a very literal and urgent sense, was a matter of compelling personal concern to Justice Powell, as it was to other jittery conservatives in the late 1960s and 1970s. Powell's authoritative biographer, Professor John C. Jeffries, Jr., sees Powell's *Bakke* opinion as a "defining moment"¹⁸⁰ in which Powell revealed "his essential character as a pragmatic conservative."¹⁸¹ Jeffries's analysis of Powell's *Bakke* opinion lends strong support to the thesis that that Powell was seeking to secure "constitutional peace" in the face of what seemed to him to be a significant risk of rending racial conflict. Jeffries stated:

[Powell] accepted affirmative action for the same reason that, twenty years earlier, he had accepted *Brown v. Board of Education*—because it was necessary. . . . Preferential admissions were distasteful, unseemly, perhaps even unfair, but they were also vital to an integrated society. This pragmatism was reinforced by Powell's innate conservatism. His was not the zealous conservatism of a right-wing reformer but the instinctive caution of a born pessimist. He dreaded chaos and upheaval. Law should serve the cause of social stability, and by the time of *Bakke*, social stability required affirmative action.¹⁸²

In the mid-to-late 1960s, not long before his appointment to the Court, Powell had written several articles expressing his deep fear that the Civil Rights Movements' methods and tactics could easily lead to extreme, even revolutionary, violence. In a 1965 article entitled *Respect for Law and Due Process—The Foundation of a Free Society*,¹⁸³ Powell warned gravely:

We live in a time of unprecedented unrest and discord throughout the world. . . . Although America is still a place of relative order and tranquility, there are deeply disquieting signs even in our country of a rising tide of lawlessness—ranging from serious crime to various forms of disrespect for law and order.¹⁸⁴

Powell went to some lengths in this article to argue that Dr. Martin Luther King's invocation of Mahatma Gandhi as a model for nonviolent civil disobedience was inapposite in an American context: "Gandhi's alternatives

ostensibly forward-looking defense of diversity has a backward-looking core).

180. JEFFRIES, *supra* note 173, at 470.

181. *Id.*

182. *Id.*

183. Louis F. Powell, Jr., *Respect for Law and Due Process—The Foundation of a Free Society*, 18 U. FLA. L. REV. 1 (1965).

184. *Id.* at 1.

were civil disobedience or bloodshed. There is no parallel in America where wrongs may be redressed in the courts and through established political institutions."¹⁸⁵ Worse, Powell saw the widespread practice of civil disobedience as tending to "anarchy": "The frightening aspect of civil disobedience is that it tends to escalate in various ways. It spreads geographically; the worthiness of causes becomes increasingly marginal; and the lines between peaceful demonstrations, disorderly conduct and mob violence are often difficult to draw. . . . Tyranny is the inevitable result of this anarchy."¹⁸⁶ Powell returned to these dangers in *A Lawyer Looks at Civil Disobedience*, an article he published in 1966.¹⁸⁷ There, he developed the argument linking civil disobedience to the breakdown of law and order and even to the possibility of regime change:

No one knows the extent to which the doctrine of [civil] disobedience, and especially the widespread resort to the streets, has contributed to the general deterioration of respect for law and order and specifically to major outbreaks—such as riots in Harlem, Rochester, Philadelphia, Chicago, and Watts. Yet few objective observers would deny that the contribution has been significant.

. . . .

If sit-ins and massive demonstrations are justified for the "worthy" they are equally justified for the "unworthy," as under this doctrine each man may determine which laws are unjust, and each has the "moral duty" to disobey them. The fortunate fact that the Ku Klux Klan has not yet engaged in massive disobedience against civil rights legislation suggests no unique respect for law by Klansmen but rather a lack of numerical strength and organization, elements which it could acquire.

In simplest terms, we are talking about the foundations of an ordered society. . . .

The logical and inescapable end of civil disobedience is the destruction of public order, and in the anarchy which follows, all liberty would be lost.

. . . .

185. *Id.* at 5.

186. *Id.* (citations omitted).

187. Louis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205 (1966).

We may already have reached the point where the long-range success of the civil rights movement is endangered, especially the hope that racial minorities will be genuinely accepted and respected by their fellow citizens.¹⁸⁸

Powell raised the danger of a violent revolution when discussing a proposal by Professor Charles Black of the Yale Law School for "a massive and general campaign of civil disobedience . . . against the power structure of some state with the aim of producing a total change."¹⁸⁹ Powell noted that Black thought that such an attempt "to overthrow a state government by civil disobedience"¹⁹⁰ was "a definite possibility and should be 'welcomed,'"¹⁹¹ and invited his readers to recall that "there was a written plan, considered but not used, to paralyze Montgomery [Alabama] and create a major crisis."¹⁹²

The most impassioned of Powell's writings on the subject was a speech he delivered at Point Clear, Alabama, on October 5, 1967, later published in full in *U.S. News & World Report*.¹⁹³ Powell described the situation as a "crisis in which the symptoms of incipient revolution are all too evident."¹⁹⁴ The "crisis," in his view, had originated in the teaching and practice of "civil disobedience" in Dr. Martin Luther King's campaign for civil rights.¹⁹⁵ Powell argued that later "[p]olitical activists and extremists of all kinds were quick to recognize the potential of this doctrine as an extralegal means of attaining goals—and even of promoting revolution."¹⁹⁶ In addition, Powell identified two other dangerous movements:

(1) a militant Negro nationalist movement, summed up in the slogan "black power," and (2) a radical political movement called the New Left or New

188. *Id.* at 225–26, 230.

189. *Id.* at 227 (quoting Charles L. Black, Jr., *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEX. L. REV. 492, 500 (1965)).

190. *Id.*

191. *Id.*

192. *Id.* What Powell did not bring out was that Professor Black was imagining a situation in which (1) a state was committing, sanctioning, or leaving unpunished murderous violence against its African American citizens on a massive scale ("People are shot in the back, churches are bombed, and nothing much happens"), and (2) "the Negroes in the state . . . try some form of peaceful resistance with the aim of attaining recognition of their federal legal rights." Charles L. Black, Jr., *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEX. L. REV. 492, 503 (1965) (emphasis added).

193. Lewis F. Powell, Jr., *Civil Disobedience: Prelude to Revolution?*, U.S. NEWS & WORLD REP., Oct. 30, 1967, at 66.

194. *Id.*

195. *See id.* ("[Civil Disobedience] was dramatically associated with the civil-rights movement by the famous letter of [the Rev. Dr.] Martin Luther King from a Birmingham jail.")

196. *Id.*

Politics, which hopes to change our form of government. The two movements have been converging, and now pursue the common causes of "black power" and frustration of America's attempt to contain Communism in Vietnam.¹⁹⁷

Powell named several prominent figures (most of them African Americans, including Dr. King, Stokeley Carmichael, and H. Rap Brown) as "men determined to remake America—not by the democratic processes of our institutions but by varying forms and degrees of coercion. The more radical of these leaders, like Mr. Carmichael and Mr. Brown, are openly advocating revolution."¹⁹⁸ Powell attributed "the violent eruptions in our cities—where civil disobedience has reached its ultimate form"¹⁹⁹ largely to such advocacy: Citing J. Edgar Hoover for support, Powell argued that "few can doubt that the cumulative effect of the black-nationalist movement, and of the incitements to hatred and disobedience were major contributing factors."²⁰⁰ Contending that "America faces a crisis of lawlessness with the gravest potential for disaster,"²⁰¹ Powell urged a variety of sternly repressive measures. Among other steps,²⁰² he argued that "[t]hose who incite riots and rebellion should be treated as the most dangerous of criminals and relentlessly prosecuted. The irresolution of our society is attested by the fact that we hasten to put petty criminals in prison and yet permit the Carmichaels and Browns to remain free."²⁰³ "America," Powell said, "needs to awaken to its peril; it needs to understand that our society and system can be destroyed."²⁰⁴

It is essential to read Powell's *Bakke* opinion against the backdrop of his anxious forebodings of little more than a decade before. Like other Nixon appointees, Powell feared that the crisis of the 1960s and 1970s had called into question the legitimacy and survival of the American scheme of government. The threat that violent racial conflict posed to the "constitutional peace" was both imminent and real.²⁰⁵ Although by the time *Bakke* was being litigated, that threat had somewhat subsided, that peace was fragile: Indeed, misunderstanding the *Bakke* decision at first, the Reverend Jesse Jackson

197. *Id.* at 66–67.

198. *Id.* at 67.

199. *Id.* at 68.

200. *Id.*

201. *Id.* at 69.

202. For a complete list of Justice Powell's proposed measures, see *id.* (listing seven steps that could be taken to reduce the problems of civil disobedience and lawlessness).

203. *Id.*

204. *Id.*

205. *Supra* notes 189–93 and accompanying text.

"called for massive demonstrations to protest a decision he compared to the Nazi march on Skokie."²⁰⁶ Affirmative action of the kind upheld in *Bakke* must have seemed, to Powell, a small price to pay for entrenching the peace.

B. Adarand

After Justice Powell's departure from the Court, Justice O'Connor became the most influential single Justice in shaping the nation's affirmative action jurisprudence. And, by and large, Justice O'Connor ploughed Justice Powell's views on both corrective and distributive justice ever more deeply into this area of constitutional law. Let us consider here her position on corrective racial justice; her views on distributive justice will be examined in Part III.C.

With remarkable consistency and perseverance, Justice O'Connor worked, in a series of decisions for the Court, plurality opinions, concurrences, and dissents, to establish that (1) "societal discrimination" would not be accepted as a basis for corrective governmental action;²⁰⁷ (2) remedial action would be permissible only if addressed to discrimination that had been "identifie[d] . . . with some specificity;"²⁰⁸ (3) remedial action had to be addressed to the governmental actor's own past wrongs;²⁰⁹ (4) even then such remedial efforts would deny equal protection if the burden they imposed on whites became too severe or too concentrated;²¹⁰ (5) "benign" racial classifications were subject to the same level of judicial review—strict scrutiny—as "malign" ones;²¹¹ (6) the

206. JEFFRIES, *supra* note 173, at 496.

207. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986) (plurality opinion) (requiring a narrowly tailored, compelling government interest to justify race-based provisions of a school district's Collective Bargaining Agreement); *id.* at 288 (O'Connor, J., concurring) ("I agree with the plurality that a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.").

208. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989).

209. See *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring) ("I agree with the plurality that a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.").

210. See *id.* at 287 (O'Connor, J., concurring) ("[A] public employer . . . may undertake an affirmative action program . . . by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.").

211. See *Croson*, 488 U.S. at 493 (plurality opinion) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."); *id.* at 490–91 (plurality

same standard of strict scrutiny applied to both federal and state remediation;²¹² (7) even when race-conscious action was allowable, it could only be undertaken if race-neutral measures to achieve the same ends had been carefully considered first;²¹³ (8) "strict scrutiny" had to be given the demanding interpretation that it had carried in earlier cases;²¹⁴ and even (it seemed for a while) (9) no nonremedial justifications for race-conscious governmental action could be given.²¹⁵ Like Justice Powell, then, Justice O'Connor proved to be deeply suspicious of defenses of race-conscious governmental action that sounded in corrective justice.

The most definitive expression of Justice O'Connor's views on the relationship between affirmative action and corrective justice came in her 1995 decision in *Adarand Constructors*. There, she held for the Court that a congressionally authorized federal program that gave a competitive advantage to minority owned subcontracting firms had to be reviewed under the strict scrutiny standard. She wrote boldly: "[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."²¹⁶ Furthermore,

opinion) (discussing the consequences of allowing the state to classify racial classifications as merely benign); *United States v. Paradise*, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting) (stating the two-part test the Court defined in *Wygant*); *Wygant*, 476 U.S. at 285 (O'Connor, J., concurring) ("[Justice Powell's] standard reflects the belief, apparently held by all Members of this Court, that racial classifications of any sort must be subjected to "strict scrutiny," however defined.").

212. See *Metro Broad., Inc. v. FCC*, 476 U.S. 547, 604 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (O'Connor, J., dissenting) ("The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications."); *Paradise*, 480 U.S. at 196 (O'Connor, J., dissenting) (reviewing race-conscious federal district court order under strict scrutiny standard).

213. See *Croson*, 488 U.S. at 507 ("[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting.").

214. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285-86 (1986) (O'Connor, J., concurring) ("The analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable to individual Members of the Court." (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982))).

215. *Supra* note 1 and accompanying text. *But see Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) ("[C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find . . . [other interests] to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies.").

216. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

she explicitly affirmed that that standard was applicable to Congress, no less than to states: "[R]equiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a 'compelling interest' does not contravene any principle of appropriate respect for a co-equal Branch of the Government."²¹⁷

We should pause to consider the lengths to which Justice O'Connor was forced to go in order to reach those conclusions. First, she had to discount Section 5 of the Fourteenth Amendment, which on its face appears to give Congress the preeminent role in enforcing Section 1's equal protection norm.²¹⁸ In terms, Section 1 constrains only the states, not Congress; it is therefore—with all due respect for *Bolling v. Sharpe*²¹⁹—no small leap to apply the equal protection norm in exactly the same form to acts of Congress.²²⁰ Justice O'Connor had herself drawn attention to this very difference in *Croson*, where she said that the fact that "Congress may identify and redress the effects of society-wide discrimination does not mean that . . . the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power."²²¹ Further, Section 5 authorizes Congress to enact "appropriate" enforcement legislation—phrasing that certainly seems no more constraining than the "necessary and proper" language of Article I, Section 8, Clause 18.²²² Moreover, the history of the Fourteenth Amendment encapsulates powerful evidence that Section 5 was intended to give Congress at least a co-equal role with the federal judiciary in defining what the guarantees of Section 1 meant.²²³

217. *Id.* at 230.

218. Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

219. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.").

220. For a defense of *Bolling*, read as a substantive due process case, see generally David E. Bernstein, *Bolling, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253 (2005). There, Bernstein renewed the *Bolling* decision and its failure to cite effective precedent as a product of "Lochnerphobia." *Id.* at 1257.

221. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality opinion).

222. In its first case construing Section 5, the Court gave it such a construction. See *Ex parte Virginia*, 100 U.S. 339, 345–46 (1879) ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain . . . if not prohibited, is brought within the domain of congressional power.").

223. See Steven A. Engel, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 123–30 (1999) (examining the history behind the various drafts of the Fourteenth Amendment); EPPS, *supra* note 59, at 210 ("[I]t seems much more probable Congress intended to grant itself a co-

And the Reconstruction congresses, both before and after the ratification of the Fourteenth Amendment, enacted legislation that allocated specific benefits to African Americans on the basis of race.²²⁴ Taking the history, purposes, and early implementation of the Reconstruction Amendments as a whole, it is highly plausible to say, as Judge Guido Calabresi has, that those amendments "unmistakably had [a] theme . . . of special redress for the special disadvantages of blacks even at significant cost to other groups."²²⁵

Second, in order to arrive at her holding, Justice O'Connor—a firm supporter in other cases of a robust form of constitutional *stare decisis*²²⁶—had to overrule or limit severely two of the Court's precedents, one of which—*Metro Broadcasting*²²⁷—had been decided only five years earlier.²²⁸

equal role with the courts in the clearly political work of defining [the Fourteenth Amendment's substantive provisions.];" *see also* AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 361–63 (2005) (discussing original intent of grant of congressional enforcement power under Section 2 of the Thirteenth Amendment); ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 207 (1992) ("The underlying purpose of this revision [of the original draft of the Fourteenth Amendment] was clearly to anoint the judiciary as the guardian both against states and Congress of the principles won on the battlefields of the Civil War.").

224. Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 430–31 & n.23 (1997) (enumerating laws, which operated on the basis of race that were passed shortly after the adoption of the Fourteenth Amendment); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 *VA. L. REV.* 753, 754–77 (1985) (discussing legislation based upon race that the Reconstruction congresses passed). *See generally* PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 1114–19 (5th ed. 2006) (reviewing scholarly literature). The relevant statutes include the Act of July 28, 1866, ch. 296, 14 Stat. 310, 317, which appropriated funds for "the 'National association for the relief of destitute colored women and children'"; Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20, 20, which appropriated \$15,000 "for the relief of freedmen and destitute colored people in the District of Columbia"; and Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 528, which appropriated \$145,000 for "collection and payment of bounty, prize-money, and other legitimate claims of colored soldiers and sailors" and other related purposes.

225. Calabresi, *supra* note 110, at 433; *see also* Ian F. Haney Lopez, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 *STAN. L. REV.* 985, 1032–33 (2007) (discussing Justice Marshall's dissenting opinion in *Bakke*); Schnapper, *supra* note 224, at 784–88 (discussing the history surrounding the adoption of the Fourteenth Amendment).

226. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46 (1992) (plurality opinion) ("After considering the fundamental questions resolved by *Roe* . . . and the rule of *stare decisis* we are led to conclude . . . the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

227. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

228. The other precedent was *Fullilove*. *See Fullilove v. Klutznick*, 448 U.S. 448, 491–92 (1980) (plurality opinion) (upholding the MBE provision of the Public Works Employment Act of 1977 but refusing to adopt a standard of judicial review for courts to use in examining the constitutionality of such raced congressional based employment programs).

Third, to the extent that the justification for the modern Court's use of strict scrutiny in evaluating racial classifications depends on its role in protecting "discrete and insular minorities"²²⁹ from the potential tyranny (or indifference) of the majority, that justification is far less persuasive when Congress enacts race-conscious programs that benefit minority groups.²³⁰ Justice O'Connor had herself invoked the jurisprudence of "discrete and insular minorities" in *Croson*, where she struck down an affirmative action program instituted by a city, the majority of whose city council members and approximately 50% of the population were African American.²³¹ But the same reasoning would militate for upholding federal programs like the one at issue in *Adarand*. Likewise, the Madisonian argument of *Federalist No. 10*—that the federal government will be less faction-prone, and hence able to legislate more disinterestedly, than the states²³²—which has been so influential in American constitutional thought, would also have favored a more lenient standard of judicial review for Congress than for the states.

Various explanations may be, and have been, offered for the result in *Adarand*—for instance, that affirmative action programs in the contracting industry are particularly vulnerable to fraud or corruption, or do little to convey benefits to the truly disadvantaged members of minority groups. The explanation offered here is different; the Court, and particularly Justice O'Connor, viewed race-conscious programs that were based on conceptions of collective liability that called for corrective justice as, potentially, highly dangerous threats to the stability and peace of our constitutional order. Moreover, this understanding of the destabilizing and disruptive effects of race-conscious corrective justice policies extended to congressional action, as well as to actions by states, localities, or other subordinate governmental units.²³³ On Justice O'Connor's reading of the Fourteenth Amendment, not even

229. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

230. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion) ("If one aspect of the judiciary's role under the Equal Protection Clause is to protect discrete and insular minorities from majoritarian prejudice or indifference . . . some maintain that these concerns are not implicated when the 'white majority' places burdens upon itself." (internal citations omitted)).

231. *Id.*

232. *See generally* THE FEDERALIST NO. 10 (James Madison).

233. Yet, as Robert Westley correctly observes, "historically it has been legislatures, not courts, that have in fact initiated the most comprehensive remedies to racial subordination . . . It is Congress, and perhaps the legislatures of former slave states, that must be persuaded to enact reparations." Westley, *supra* note 21, at 436; *see also* Brophy, *supra* note 105, at 824 (discussing the optimistic view that reparations will occur through legislative means once the national conscience is prepared for the reparations process to begin).

Congress—the governmental actor most capable of remedying broad "societal" discrimination—could attempt to do so, except when subjected to severe judicial constraints.

C. Grutter

Even as *Adarand* seemed all but to close the door on remedial race-conscious programs, *Grutter* seemed to open the door widely to race-conscious action based on "diversity."²³⁴ As Colin Diver has said, "*Grutter* can be viewed as completing the transformation in justificatory practice from remediation to diversity."²³⁵ Taken together, *Adarand* and *Grutter* represent the constitutionalization of the basic framework delineated in Justice Powell's *Bakke* opinion: "No" to the radical, peremptory demand for corrective justice and "Yes" to the pragmatic, instrumentalist view that race-conscious selection has its uses. *Grutter*, as Kenneth Karst put it, "does not look back to . . . slavery and Jim Crow, . . . [but] places us in the Here and Now The nation needs integration of our leading institutions, not to compensate victims

234. The Court's subsequent October 2006 Term decision in *Seattle School District* left uncertain how far the diversity rationale used in *Grutter* can be extended. On the one hand, the five-member majority, speaking through Chief Justice John Roberts, went to some lengths to insist that *Grutter* was based "upon considerations unique to institutions of higher education," and indeed that "the unique context of higher education" was one of two "key limitations on its holding." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2754 (2007); see also *id.* at 2753 ("The specific interest found compelling in *Grutter* was student body diversity 'in the context of higher education.'" (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003))). Justice Kennedy joined Justices Scalia, Thomas and Alito in these statements. Indeed, in a part of his opinion joined by three other Justices but not Justice Kennedy, the Chief Justice even felt obliged to deny the four dissenters' claim that "accus[ed] us of tacitly overruling [*Grutter*]." *Id.* at 2763 (plurality opinion) (citing *id.* at 2834–36 (Breyer, J., dissenting)).

On the other hand, Justice Kennedy, in his separate partial concurrence, did not seem to limit *Grutter*'s diversity rationale to the "unique" setting of higher education. Rather, he maintained that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue," and that "[i]n the administration of public schools by the state and local authorities, it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." *Id.* at 2788, 2792 (Kennedy, J., concurring) (citations omitted). At the same time, however, Justice Kennedy opined that "in the context of college admissions . . . First Amendment interests gave universities particular latitude in defining diversity." *Id.* at 2794 (discussing the fact that the Court's reasoning in *Gratz* does not control the outcome of the *Seattle School District* case) (citations omitted).

The extent to which "diversity" can serve as a compelling state goal outside the context of education (or even higher education) thus seems to be uncertain after *Seattle School District*.

235. Diver, *supra* note 141, at 698.

of past iniquities, but to serve the whole nation's present vital purposes at home and overseas."²³⁶ Alternatively, from Charles Lawrence's angle, *Grutter* enables the proponent of affirmative action "to champion racial justice without confronting the moral question of whether he can define as 'just' a society still significantly separate and unequal."²³⁷

Justice O'Connor's opinion in *Grutter*, however, does not merely recapitulate the major themes of Justice Powell's *Bakke* opinion. It also introduces a new and significant theme of its own. Powell's *Bakke* opinion defended race-conscious selection as a device for promoting the internal goals of higher education itself.²³⁸ "Diversity," in other words, was seen as a method of selecting applicants whose presence within the classroom (and to a lesser extent, on the campus) would create a richer mix of values, perspectives and experiences, and so improve the overall quality of the learning process. "Diversity," so understood, was essentially a pedagogical defense for race-conscious selection. Much of Justice O'Connor's discussion in *Grutter* tracks Powell's reasoning here—albeit with much more empirical data to support it.²³⁹ But in O'Connor's hands, "diversity" became a successful defense because it promoted goals external to the educational process itself.²⁴⁰ Here, as is well

236. Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 69 (2004). Karst's enthusiastic assessment of *Grutter* would be widely shared in corporate boardrooms throughout the country. Karst states:

[T]he remedial argument . . . does not match up with the rhetoric surrounding most workforce diversity programs. Within the corporate world, remedial arguments are *passé*. They have been largely supplanted by the "business case for diversity": The proposition that a diverse workforce is essential to serve a diverse customer base, to gain legitimacy in the eyes of a diverse public, and to generate marketable products and services within a global economy.

Estlund, *supra* note 166, at 216.

237. Lawrence, *supra* note 162, at 941–42.

238. See Kronman, *supra* note 130, at 865 (discussing the claim that educational institutions should have the right make a judgment with regard to affirmative action after weighing its costs and benefits).

239. Thus, Justice O'Connor found:

[T]he educational benefits that diversity is designed to produce were substantial. . . . [T]he Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

Grutter v. Bollinger, 539 U.S. 306, 330 (2000) (citations omitted).

240. The distinction between "internal" and "external" goals is owed to Dean Kronman. As Kronman explains:

Most, perhaps all, activities have distinctive internal goals of their own. These are

known, she relied on amicus briefs filed on behalf of retired military officers and corporate executives—groups hardly known for their radical politics.

What were these external, noneducational goals served by "diversity"? Justice O'Connor's opinion kept an observant eye on the world outside the university classroom—indeed, on the world outside the United States' borders. It is not too much to say that her opinion reflected a rather cool, analytic appraisal of the post-Cold War strategic environment in which the United States had to act.²⁴¹ First, major United States-based corporations like amici 3M and General Motors had to compete in a globalizing economy, and Justice O'Connor adopted their contention that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."²⁴² Second, the retired military officials argued that a racially diverse officer corps was essential to the national security and, again, Justice O'Connor found that contention persuasive.²⁴³ Finally, the persisting racial stratification and segregation of

the specific ends toward which the activities in question are directed. The activity of policing, for instance, aims to provide physical security for those living in a certain community. The activity of firefighting is directed toward the prevention and control of fires. These are the internal goals of policing and firefighting, respectively. They are what the activities are for. If a police or fire department is required to set aside a certain number of positions for minority applicants, who before have been the victims of prejudice and discrimination in hiring, the resources of the department are being used not in pursuit of its internal goal, but to help achieve a fairer distribution of wealth and opportunities in society generally, a goal external to the work of the department.

Kronman, *supra* note 130, at 865–66. As Kronman notes, the distinction between internal and external goals is not an exclusive one; both goals might be served by a police force's policy of hiring minority recruits, on the reasonable assumption that a racially-mixed police force would be more effective in controlling crime or keeping peace in particular neighborhoods. *Id.* at 866.

241. See Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court's Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 698–99, 701–02 (2005) (interpreting the *Grutter* decision as ratifying the opinion of economic, political, and military elites who sought to prevent inequality from serving as a source of conflict that could harm the United States' status in the international arena).

242. *Grutter*, 539 U.S. at 330.

243. *Id.* at 331. For some well-taken doubts about the "business case" for diversity, see generally Levinson, *supra* note 159, at 585–92. In general, the "business case" for diversity appears to come down to defending the marketing technique of giving consumers and clients something that they want—the satisfaction of being served by someone "like them." See *id.* at 587–88. As Levinson points out, the "customer satisfaction" rationale harbors obvious dangers within itself. *Id.* at 588. It would, for example, normally be considered a civil rights violation for an airline to hire only attractive, young female stewardesses because their male passengers preferred being served by them. Indeed, it was not long ago (before Michael Jordan transformed advertising) that outstanding African American athletes were routinely "denied endorsement contracts" because corporate America believed that whites would not purchase the

American society create a strategic and political vulnerability for the United States, and "diversity" provided some remedy for that: As Justice O'Connor put it, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."²⁴⁴ Like President Eisenhower's Defense Secretary, Charles E. Wilson, Justice O'Connor appeared to believe that "[w]hat's good for the country is good for General Motors, and vice versa."²⁴⁵

What linked all three arguments together in Justice O'Connor's opinion was the crucial role of elite universities and professional schools as gateways into the leadership cadres of American law and politics, business, and the military. *Grutter* is about elite-recruitment and elite-formation—the selection of the "best and the brightest" for leadership positions in American society. Justice O'Connor was utterly candid about this focus:

[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for [twenty-five] of the 100 United States Senators, [seventy-four] United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.²⁴⁶

This form of the "diversity rationale" goes far beyond Justice Powell's limited concern with the quality of discourse in the classroom. Here the "diversity rationale" is decoupled, not only from the normative concerns with corrective justice that Powell rejected in *Bakke*, but even from Powell's description of an enriched conception of individualized "merit" that anchored his argument in a form of distributive justice. Although parts of Justice O'Connor's opinion do indeed echo Powell in referring to the need for a "truly individualized consideration" of each candidate that factors in race,²⁴⁷ O'Connor seems more concerned with the selection of individuals to serve as

products they had endorsed. THOMAS C. HOLT, THE PROBLEM OF RACE IN THE TWENTY-FIRST CENTURY 111(2000) (emphasis added).

244. *Grutter*, 539 U.S. at 332.

245. THE NEW DICTIONARY OF CULTURAL LITERACY 472 (E.D. Hirsch, Jr., Joseph F. Kett & James Trefil eds., 3d ed. 2002).

246. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2000) (citations omitted).

247. *Id.* at 334.

visible representatives of racial categories in leadership positions, as if they were to be models in a United Colors of Benetton advertisement.²⁴⁸

Moreover, although Justice O'Connor indicated an ostensible preference for race-neutral admissions policies, she failed even to consider whether socio-economic status could be used, without sacrificing the aim of racial diversity, as an alternative to reliance on race.²⁴⁹ Affirmative action as currently practiced by elite educational institutions strongly favors students—whether white or nonwhite—from upper middle or middle class families. Carnevale and Rose found that 74% of students at the most selective 146 colleges they examined came from the top economic quartile (as compared with 10% from the bottom half and just 3% from the bottom quartile),²⁵⁰ and Bowen and Bok classified 86% of the African Americans enrolled in the twenty-eight selective universities they studied to be middle or upper middle class.²⁵¹ If such selective institutions function as the gateways for entry into the American elite, they seem also to be restricting entry to a relatively affluent recruitment base. Yet, Carnevale and Rose also found that if universities used an admissions policy based on grades and test scores coupled with economic affirmative action, the representation of those from the bottom socio-economic half would rise from 10% to 38% without damaging academic quality, while African American and Latino admissions would decline only slightly, from a current 12% to 10%.²⁵² Economic affirmative action, in other words, would yield nearly as large a "racial dividend" as the current race-conscious selection, while also substantially broadening the socio-economic base from which elites are chosen. If elite formation is the core concern of Justice O'Connor's *Grutter* opinion, it is a measure of her unreflective conservatism that she does not even consider how this alternative to race-conscious action might democratize entry into the elite.

Instrumental, not normative, considerations lie at the core of Justice O'Connor's *Grutter* opinion. Her concerns are quite literally optical: How can a "set of leaders" be "cultivate[d]" so as to have "legitimacy in the eyes of the

248. For a brief history of Benetton's ethnically varied advertising imagery, see generally *About Benetton: Our Campaigns*, http://press.benettongroup.com/ben_en/about/campaigns/history/ (last visited Nov. 28, 2007) (on file with the Washington and Lee Law Review).

249. See Kahlenberg, *supra* note 27 (discussing Justice O'Connor's failure to mention economic affirmative action as an effective race-neutral alternative to making decisions based on race).

250. Carnevale & Rose, *supra* note 156, at 11.

251. BOWEN & BOK, *supra* note 163, at 48–49.

252. Carnevale & Rose, *supra* note 156, at 53–55.

citizenry"?²⁵³ Affirmative action of this kind is not designed to threaten entrenched hierarchies, but to reinforce and stabilize them.²⁵⁴ The historic losses caused by slavery, Jim Crow, and racial segregation are left to lie where they fell. The condition of African Americans, other than those fortunate enough to be selected into the nation's leadership ranks, is to be left essentially undisturbed, except to the extent that African Americans can derive vicarious satisfaction from seeing their peers in prominent public roles. Instead of a radical remedy for the persisting effects of the injustices of the past—what one academic apologist for *Grutter* has derided as the "parsimonious reckoning of institutional debts owed"²⁵⁵—they are offered a placebo.

In these respects, *Grutter* is in line with the powerful recent trend of courts throughout the world to use their powers of constitutional review in ways that protect threatened elites and sustain entrenched hegemonic patterns.

Channeling pressures for social justice to courts has a considerable potential to harm reformist social movements by pacifying activists with the illusion of change and by luring resources away from political processes and lobbying strategies through which substantial change might be achieved. The institutional, pro-status-quo, and inherently pacifying nature of the legal system is especially significant when claims for restorative justice that have potentially revolutionary implications for redistribution of wealth and power . . . are transferred from the potentially open-ended political sphere to the inherently more conservative judicial sphere.²⁵⁶

Indeed, throughout its history the U.S. Supreme Court has manifested this same tendency—not least in its Fourteenth Amendment decisions. For example, the Court's offhand and unreasoned ruling in 1886 that corporations are "persons" within the meaning of the Fourteenth Amendment's Due Process Clause,²⁵⁷ constitutionalized guarantees for business interests even at a time when the

253. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2000). To be sure, there are other, valid reasons that could support the preferential selection of minority group members for leadership roles. For instance, policy makers might wish "to insulate the minority from future hostile action by strategically placing members of the group in positions of power." Fiss, *supra* note 112, at 130. However, Justice O'Connor's opinion does not explicitly note these other reasons.

254. See Bell, *supra* note 27, at 1632 (viewing "diversity" as endorsed by *Grutter* as "a shield behind which . . . administrators can retain policies of admission that are woefully poor measures of quality, but convenient vehicles for admitting the children of wealth and privilege").

255. Estlund, *supra* note 166, at 218.

256. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 198–99 (2004).

257. *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

Court was severely narrowing the Amendment's protections for African Americans.²⁵⁸

When *Grutter* is seen in this light, the Court's companion decision in *Gratz* makes also perfect sense. There is, in the end, no analytically defensible distinction between a permissible "goal" and an impermissible "quota." The distinction is not analytic, but pragmatic. The opacity of the law school's race-conscious admissions process was its virtue, the transparency of the college's admissions process was its vice. Opacity in this context mutes racial envy and antagonism, transparency breeds them.

Likewise, *Grutter*'s ostensible retention of the strict scrutiny standard also makes sense. Justice O'Connor echoes herself: Citing *Adarand*, *Grutter* tells us that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'²⁵⁹ Rather, "strict scrutiny" is strict in theory, but flexible in fact. As Justice O'Connor puts it, "[c]ontext matters. . . ."²⁶⁰ By purporting to retain the strict scrutiny standard, the Court can continue to speak the tough language of color-blindness: "[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands."²⁶¹ (Whites, too, are thus offered a placebo.) But by applying the strict scrutiny standard in a flexible, context-dependent way, the Court can be lenient while seeming to be demanding, opportunistic while seeming to be principled.

258. See Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371, 402–03 (1938) (questioning whether Section 1 of the Fourteenth Amendment aims to help corporations); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1462–64 (1987) (giving a historical background of the *Santa Clara* case); William M. Wiecek, *The Emergence of Equality as a Constitutional Value: The First Century*, 82 CHI.-KENT L. REV. 233, 255 (2007) ("In these late nineteenth-century cases [from 1873 to 1905], the Court fabricated an engine of law that gutted the Civil War Amendments, and particularly the Equal Protection Clause, as far as the freedpeople were concerned, while preserving the Amendment's façade as a sort of Potemkin village of human decency."); Robert P. Griffin, Comment, *Constitutional Law: Artificial "Persons" and the Fourteenth Amendment*, 48 MICH. L. REV. 983, 985–90 (1950) (same); Note, *The "Conspiracy Theory" of the Fourteenth Amendment*, 48 YALE L.J. 171, 194 (1938) (concluding that Section 1 was not originally designed to aid corporations). At various times, individual Justices have (unsuccessfully) urged the Court to reconsider its decision that corporations are Fourteenth Amendment "persons." See, e.g., *Conn. Gen. Life Ins. v. Johnson*, 303 U.S. 77, 85–89 (1938) (Black, J., dissenting) (stating that he did not "believe the word 'person' in the Fourteenth Amendment includes corporations"); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 578 (1949) (Douglas, J., dissenting) ("'Persons' in the first sentence plainly include only human beings, for corporations are not 'born or naturalized.'").

259. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

260. *Id.* at 327.

261. *Id.* at 342.

Viewed from a certain angle, *Grutter* is an amoral decision. But its amorality—its utter indifference to the normative demands of racial justice—is precisely what enables it to serve the cause of "constitutional peace." And peace, no less than justice, is a great good. As *Grutter*'s defenders rightly claim, the Court's decision is "forward-looking"²⁶²—that is, it seeks to induce a collective amnesia about American society's troubled racial history. Forgetfulness will do, in place of forgiveness.

V. *Constitutional Peace or Constitutional Justice?*

The question with which this essay must conclude is: Has "constitutional peace" come at too high a price? Plainly, American society has not escaped the consequences of its past racial history. The grim statistics of relative deprivation in the nation's African American population speak for themselves.²⁶³ The "American dilemma"²⁶⁴ remains unresolved. Yet, governmental attempts at corrective justice in the five decades since *Brown v. Board of Education*²⁶⁵ have been sporadic, rare, and unsystematic. Sometimes, too, as in *Croson*,²⁶⁶ they may suggest racial rent-seeking²⁶⁷ rather than serious attempts to secure remediation. American society (or most of it), after a brief flush of enthusiasm in the mid-1960s, seems largely unconcerned to remedy the past. America's vision of itself remains comedic, not tragic. Confronting,

262. Estlund, *supra* note 166, at 216.

263. For an overview, see Forde-Mazrui, *supra* note 81, at 695–97. See also Greenberg, *supra* note 168, at 1610–11 (addressing prison and infant mortality racial disparities); Westley, *supra* note 21, at 440–43 (describing racial disparities in home ownership, income, and wealth).

264. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY*, at lxxi (1944) (describing the "American Dilemma" as the conflict between (1) generalized moral and nationalistic valuations, and (2) individual- and group-specific valuations that encompass personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice; and various other miscellaneous wants, impulses and habits).

265. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding school segregation violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution).

266. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (holding that city failed to demonstrate a compelling interest in developing a program that favored minorities in awarding public contracts).

267. See Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 S. CT. REV. 45, 46–47 (1995) (attributing to Justice O'Connor a focus on "the danger that principles of remediation would slide ominously into simple racial factionalism in the distribution of societal goods . . ."); see generally GORDON TULLOCK, *THE RENT-SEEKING SOCIETY* (2005).

acknowledging, and repairing the sins of the past is for other societies—Germany, Japan, South Africa, Russia. They are not for us.

The Supreme Court's role in this situation is, without question, not an easy one. It is all very well to say with Immanuel Kant, *Fiat iustitia, pereat mundus*—translating freely, "Let justice be done even if the sky should fall."²⁶⁸ But what if the sky actually did fall? To Kant's statement one might well oppose Goethe's: "I would rather commit an injustice than countenance disorder."²⁶⁹ The very effort to redress the effects of past racial evils might well aggravate them. The dangers of racial polarization, hostility, and violence are themselves part of the disastrous legacy of slavery and Jim Crow—and those dangers are very real. The nation's racial problem may not be capable of being solved, but it might be capable of being managed. The Constitution was itself the child of compromise. It was framed, not only to "establish Justice,"²⁷⁰ but also to "insure domestic Tranquility."²⁷¹ Perhaps the Court, in choosing the path of compromise, has chosen prudently and well.

But then again, perhaps not. God said to Cain: "What have you done? The voice of your brother's blood is crying to me from the ground."²⁷² As long as the voice of our past evils cries out from the American ground, we will not sleep easy.

268. Immanuel Kant, *Perpetual Peace, A Philosophical Essay*, in KANT'S PRINCIPLES OF POLITICS 77, 133 (W. Hastie ed. & trans., 1891) ("Fiat justitia, pereat mundus. . . . It may be popularly rendered thus: Let righteousness prevail though all the knaves in the world should perish for it. It is thus a bold principle of Right cutting through all the crooked ways that are shaped by intrigue or force.").

269. PHILLIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA, at xv (1975) (quoting JOHANN WOLFGANG VON GOETHE, CAMPAIGN IN FRANCE (1793)).

270. U.S. CONST. pmbl.

271. *Id.*

272. *Genesis* 4:10 (New Am. Standard).

