

After Affirmative Action

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Political and constitutional pressure on explicit race preferences in university admissions may induce some universities to try to increase racial diversity by race-neutral means such as geographical or socioeconomic preferences. This Article explores whether such programs should be found to violate the Equal Protection Clause and concludes that they should not. True formalists ought not care at all about racially disparate results or racial purposes associated with laws that, by their term, do not discriminate on the basis of race. But even those who would inquire into purposes and effects should defer to laws aimed at increasing racial diversity by formally race-neutral means. For equal protection cannot forbid all race-consciousness; it must be understood as forbidding only the singling out of persons for race-based harm. Under this interpretation, race-neutral substitutes for affirmative action are constitutional, as any alteration in the expected white share in admissions opportunities is merely an incidental byproduct of such programs. But if the purpose of increasing racial diversity is not inherently racially discriminatory, then even race-specific admissions criteria should not be conclusively presumed to discriminate on the basis of race. Thus, the thought experiment of considering race-neutral proxies for race preferences helps to show why race preferences themselves may not be suspect after all.

For a generation, *Regents of the University of California v. Bakke*¹ has authorized a compromise in university admissions that the Court has increasingly foreclosed in the spheres of employment and contracting. So long as universities act discreetly by treating race as one factor among many in an admissions file, they may admit members of racial minorities for the sake of diversity rather than compensation for past wrong. While remedial justifications have become the predominant, and finally the exclusive but decreasingly successful, way to preserve affirmative action in the work context,² higher

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¹ 438 U.S. 265, 310 (1978) (holding that racially preferential admissions that establish a quota system violate the Equal Protection Clause).

² See *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) (plurality opinion) (“[P]ervasive, systematic, and obstinate discriminatory conduct’ justifi[es] a narrowly tailored race-based remedy.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–506 (1989) (plurality opinion) (striking down a municipal plan for race-based minority set-

education has remained a sphere in which forward-looking functional or distributive justifications remain constitutionally sufficient, independent of past sins of discrimination.³ As Justice Powell's pivotal opinion in *Bakke* suggests, racial diversity in the composition of a professional school's classes might well serve a pedagogical function, bringing epistemic diversity to the classroom in the form of "experiences, outlooks, and ideas that enrich the training of [the] student body."⁴ Racial diversity might likewise serve distributive goals by increasing the incidence and the quality of services rendered by graduates to the diverse communities from which they came.⁵ Nothing in the Powell opinion suggests that such consequentialist justifications would be any less constitutionally sufficient at the undergraduate than the graduate level.⁶

But *Bakke's* compromise is under deep pressure, caught in a pincer movement of political and constitutional change. A political backlash against affirmative action dates back at least to the shift of working-class white Democrats to the Republican Party in the first Reagan election. Meanwhile, the Supreme Court's equal protection jurisprudence has retreated ever further from an anti-subordination principle toward a color-blindness principle, although the Court has never quite attained a majority for strict scrutiny of affirmative action that is truly fatal.⁷

These waves, at first most visible in the contexts of employment and contracting, have begun to lap the shores of higher education. It is realistic to think they might soon gain greater momentum.⁸ Suppose, for example, that a

asides of city construction contracts in part because the plan was not "narrowly tailored to remedy prior discrimination").

³ For a discussion of the distinction between remedial and forward-looking functional or distributive justifications, see generally Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

⁴ *Bakke*, 438 U.S. at 314.

⁵ *See id.* at 310-11.

⁶ *See id.* at 313.

⁷ *See Adarand*, 515 U.S. at 237 (seeking to "dispel the notion that strict scrutiny in this context is 'strict in theory, but fatal in fact'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))); *see also Croson*, 488 U.S. at 509 (noting that "[n]othing we say today precludes a state or local entity from taking action"—including race-conscious action—"to rectify the effects of identified discrimination within its jurisdiction"). Justice Scalia concurred separately in both *Croson* and *Adarand* to emphasize his disagreement with the Court's failure to embrace a more robust color-blindness principle that would have authorized no race-conscious measures apart from remedies for "identified victims of discrimination." *Croson*, 488 U.S. at 526 (Scalia, J., concurring in judgment); *accord Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in judgment).

⁸ *But see* Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997 (1998).

great many other jurisdictions were to copy the policy of the Board of Regents of the University of California, banning racial preferences in admissions,⁹ or were to endorse a ban on racial preferences in all public programs, including education, as California voters did in Proposition 209.¹⁰ Or suppose Congress were to require that all educational institutions, public or private, that receive public funds forego racial preferences in admissions as a condition of funding. Or suppose that the Supreme Court were to rule for the nation, as the Fifth Circuit did for the states within its jurisdiction in *Hopwood v. Texas*,¹¹ that subtle racial preferences in admissions for diversity's sake were no longer constitutional, as they have been considered for a generation since *Bakke*.

I. THE POLITICS OF RACIAL PROXIES

What would the world of higher education look like in the near term if, in light of such political or constitutional changes, race could no longer be used as an explicit basis for preferences in university admissions? Here are three possible scenarios:

1. *Resegregation*. Assuming a relatively small pool of minority candidates with grades and test scores equal to or exceeding the lowest grades and test scores of successful white applicants, one possibility is that university student bodies would rapidly return to the relatively homogenous white or Anglo student bodies that characterized them prior to *Bakke*. There would be distributional complexities within this trend. For example, so long as private institutions have more freedom to engage in racial preferences than public institutions, they might attract the best minority applicants in the national pool, exacerbating the resegregation effect on public institutions. Within public university systems, minority enrollment might decline more precipitously at the more selective schools than at others in the system.¹² And some regions might

⁹ See Susan Yoachum & Edward Epstein, *UC Scraps Affirmative Action: Regents' Vote Gives Wilson Major Victory*, S.F. CHRON., July 21, 1995, at A1.

¹⁰ See CAL. CONST. art. I, § 31(a) ("The state shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

¹¹ 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

¹² See Thomas J. Kane, *Racial and Ethnic Preference in College Admissions*, in THE BLACK-WHITE TEST SCORE GAP 431 (Christopher Jencks & Meredith Phillips eds., 1998), reprinted in 59 OHIO ST. L.J. 971 (1998); see also Pamela Burdman, *UC Breathes Sigh of Relief Over Minority Enrollment*, S.F. CHRON., May 21, 1998, at A26 (noting that minority enrollments decreased at the most selective institutions in the University of California system but increased at less selective campuses during the first year of the Regents' race-blind admissions policy).

have high concentrations of some minorities, such as Asian-Americans, who were not represented in large numbers prior to *Bakke* but who now would gain university admission in numbers relatively proportional to their percentage of the population. These complexities aside, the basic scenario would be either that higher education in the aggregate, or elite and flagship institutions in particular, would suffer a considerable and publicly visible drop in black and Latino representation as compared with the current levels achieved under racially preferential admissions policies.

2. *Proxies*. Assuming that such visible resegregation is politically intolerable, a second possibility is that universities will seek to achieve some approximation of the end-state of racial diversity in admissions that they achieved under *Bakke*-style policies, or at least mitigate the decline in minority enrollment, without abandoning altogether their principal traditional criteria for selection—grades and standardized test scores. In order to do so, they might employ supplementary admissions criteria that they believe will disproportionately favor minority applicants.

For example, the Texas legislature, in the aftermath of *Hopwood*, enacted legislation requiring public universities in Texas to admit any student who graduates in the top ten percent of his or her high school class.¹³ Given de facto residential racial segregation in Texas, and, therefore, the sizeable proportion of high schools with predominantly Mexican-American, and in some areas African-American, student bodies, such a program virtually guarantees threshold levels of minority representation among college admittees. Other institutions, such as UCLA Law School, are experimenting with giving preferences to some students identified by their relatively low socioeconomic status within the applicant pool. While some proponents of such measures regard socioeconomic diversity as independently desirable,¹⁴ others support such programs, at least in part, hoping that, given the disproportionate representation of racial minorities among the poor, class-based preferences will achieve greater racial diversity in incoming classes than would admissions policies that were both race- and class-neutral.¹⁵

3. *Revision of normative criteria for admission*. A third possibility is that

¹³ See Ken Herman, *Senate Passes Bill on College Admissions: Governor Expected to Sign*, AUSTIN AM.-STATESMAN, May 9, 1997, at B1.

¹⁴ See generally RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) (arguing that class-based affirmative action would be preferable to race-based affirmative action).

¹⁵ For a comprehensive account of the UCLA experiment and an assessment of its first year, see Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997). For a skeptical view of class-based affirmative action, whether race-conscious or race-neutral, see Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996).

backlash against the abandonment of race-based affirmative action would help precipitate a partial or wholesale reevaluation of traditional admissions standards. For example, colleges might cease to weight grade point averages (GPAs) to reflect the relative quality of the education given at different high schools, as Texas's ten percent solution effectively does.¹⁶ Graduate and professional schools might do the same with respect to undergraduate institutions, as Boalt Law School at the University of California at Berkeley has considered doing.¹⁷ Universities might increase the weight given to essays, interviews, or other more subjective grounds for evaluation and decrease the weight given to GPAs and standardized test scores.¹⁸ At the outer limit, universities might even abandon reliance on standardized test scores altogether. Professional schools might shift focus from inputs to outputs. For example, they might count favorably an applicant's commitment to serving under-served communities upon graduation. Or universities might embrace socioeconomically redistributive admissions policies for their own sake, without regard to their predicted effect on racial diversity. Even if precipitated initially by a concern about declining racial diversity, such approaches would ultimately involve a more wide-ranging, normative revision in the notion of the university's social role and proper function.

There is strong reason to think that scenarios one and three are so costly politically as to be unsustainable. The prospect of a return to "the inexorable zero," as Justice O'Connor once labeled the complete absence of women from supervisory positions in a public construction project,¹⁹ is daunting in the context of education, particularly in higher education because of the significance of college and graduate degrees in providing upward social mobility. If elite colleges and professional schools lack any significant number of minority students, they revive the dangerous symbolism of an entrenched, racially-defined underclass. On the other hand, the erosion or destruction of traditional indicia of merit risks undermining the privileged status of the university itself and the willingness of political bodies to support it.²⁰

¹⁶ See *supra* note 13.

¹⁷ See UNIVERSITY OF CALIFORNIA SCHOOL OF LAW, BERKELEY, REPORT OF AN AD HOC TASK FORCE ON DIVERSITY IN ADMISSIONS 24-26 (1997).

¹⁸ See, e.g., Margaret Y.K. Woo, *Reaffirming Merit in Affirmative Action*, 47 J. LEGAL EDUC. 514 (1997) (discussing perseverance in overcoming obstacles as a desirable admissions criterion).

¹⁹ *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 657 (1987) (O'Connor, J., concurring) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977)).

²⁰ See Sam Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669 (1998).

If this political prediction is correct, then continued pressure to eliminate race-based preferences in higher education admissions is likely, in the near term, to produce a variety of efforts of type two: deliberate attempts to achieve the end of racial diversity indirectly through apparently race-neutral means. Such efforts raise a number of policy questions: How efficient would they be as an empirical matter at producing racial diversity?²¹ Are geographical quotas, such as Texas's ten percent solution, likely to swamp public colleges and universities with more admitted students than they can handle? Will minority students admitted under such programs actually attend college in significant numbers? Would class-based preferences displace large numbers of more academically qualified whites in favor of less qualified whites and eliminate from admission affluent minority students admitted under current policies while yielding only small numbers of non-affluent minority admittees? These questions are important and difficult. But I would like to focus on a different, interpretive question: Would such efforts be held constitutional against an equal protection challenge?

II. FORM, PURPOSE, AND EFFECT

This question raises a tension between the form, purpose, and effect of laws that recurs across many areas of constitutional jurisprudence, from First Amendment to dormant Commerce Clause cases. For example, laws that are content-based in form are reviewed more strictly under the Free Speech Clause than laws that are content-neutral,²² but the Court has nonetheless deferred to laws formally directed at particular speakers or programs when found to serve a content-neutral purpose.²³ This result suggests that the form of the law merely

²¹ Analysts of the UCLA Law School's class-based preference scheme after its first year agreed that "class-based affirmative action is much less 'efficient' than race-based affirmative action in selecting minority students." Richard H. Sander, *Comment in Reply*, 47 J. LEGAL EDUC. 512, 512 (1997). They disagree about how much. Compare *id.*, and Sander, *supra* note 15, with Deborah C. Malamud, *A Response to Professor Sander*, 47 J. LEGAL EDUC. 504, 504-09 (1997) (arguing that the UCLA experiment did not achieve meaningful racial diversity); see also Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997) (arguing that class-based preferences are not a substitute for race-based preferences).

²² See generally GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1203-34 (13th ed. 1997) (discussing various arguments for making a distinction between content-based and content-neutral laws).

²³ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997) (Turner II) (upholding under intermediate scrutiny a law requiring cable operators to carry broadcast programming in preference to other video programming); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (Turner I) (holding that a law requiring cable operators to carry

gives rise to a rebuttable presumption of a permissible or impermissible purpose, which in turn is the touchstone of constitutionality. Formally neutral laws with a disproportionate adverse effect on speakers trigger heightened scrutiny under the Free Speech Clause.²⁴ But formally neutral laws with a disproportionate adverse effect on adherents of a religion are now reviewed deferentially under the Free Exercise Clause,²⁵ unless their formal neutrality is unmasked as a subterfuge for anti-religious discrimination.²⁶ Formal preferences for religious practices or symbols may be upheld against Establishment Clause challenge when found to have a sanitizing secular purpose.²⁷ Under the negative implications of the Commerce Clause, the Court strikes down laws it finds protectionist in purpose.²⁸ The Court has also struck down laws, regardless of their purpose, that formally discriminate between in-state and out-of-state interests²⁹ or that, while formally neutral, have a disproportionate adverse effect on out-of-state interests.³⁰

broadcast programming merited intermediate scrutiny, not strict scrutiny, because it was aimed at the economic structure of the video market rather than at programming content); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) (upholding, as permissibly content-neutral in part, an injunction against specified anti-abortion protestors, noting that "[w]e . . . look to the government's purpose as the threshold consideration"); *see also* *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550-51 (1983) (holding permissibly viewpoint-neutral in purpose a facially selective tax benefit for veterans' lobbying organizations); *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 55 (1983) (holding permissibly viewpoint-neutral in purpose a facial preference for expression by an incumbent over a rival union).

²⁴ *See* *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding a law banning draft card destruction against the requirement of a close fit to an important government interest).

²⁵ *See* *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (holding that denials of religious exemptions from generally applicable laws are subject only to rationality review).

²⁶ *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating ban on ritual animal slaughter as impermissibly aimed at suppressing Santeria worship service).

²⁷ *See, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding public placement of a Christmas nativity scene); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws).

²⁸ *See, e.g., Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 13-14 (1928) (invalidating a state law requiring in-state processing of exported shrimp on grounds of its "purpose" to favor local business).

²⁹ *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) (invalidating state ban on waste importation on grounds that whatever the law's purpose, "the evil of protectionism can reside in legislative means as well as legislative ends").

³⁰ *See, e.g., Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (invalidating state apple grading law that effectively gerrymandered Washington apples out of the state market); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (requiring facially neutral

In short, while form, purpose, and effect sometimes point in the same direction, either for or against the constitutionality of a law, they sometimes diverge, and the Court has not been consistent in according them lexical priority. Now consider the form-purpose-effect problem in the context of equal protection law. The analysis that currently governs this area of the law would appear to be something like the following: the equal protection guarantee is presumptively violated—that is, the government is put to the test of strict scrutiny—only when there is racially discriminatory purpose *and* effect.³¹ A law racially neutral in form, but racially disproportionate in impact, is not subject to strict review unless revealed through direct or circumstantial evidence to have a racially discriminatory purpose.³² But laws that are racially discriminatory in form tend to be presumed racially discriminatory in purpose and effect, and hence subject to strict scrutiny.³³ This holds true despite a generation of argument that purpose, not form, should be determinative, and that benign racial discrimination should be distinguished from that aimed at the impermissible purpose of racial subordination.³⁴ In this respect, constitutional

state laws with a disproportionate adverse effect on out-of-state commerce to be justified by significant state interests). For the view that the dormant Commerce Clause cases are best understood, regardless of their rhetoric, as aiming at impermissible protectionist purposes, see Donald Regan, *The Supreme Court and Economic Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

³¹ See *Washington v. Davis*, 426 U.S. 229 (1976) (upholding a civil service exam with racially disparate effects in the absence of a showing of racially discriminatory intent); *Palmer v. Thompson*, 403 U.S. 217 (1971) (upholding municipal pool closure as lacking racially disparate effect even if motivated by racist resistance to a desegregation order).

³² See *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977) (finding no racially discriminatory intent in a local government's denial of a zoning variance, but noting that such purpose might be shown by circumstantial evidence).

³³ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229–30 (1995) (plurality opinion) (“[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.”). In his concurrence, Justice Thomas stated “there is a ‘moral [and] constitutional equivalence’ . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster . . . equality.” *Id.* at 240 (Thomas, J., concurring).

³⁴ The tension between an anti-discrimination and an anti-caste reading of the Equal Protection Clause is as old as the first Justice Harlan’s dissent from the separate-but-equal holding in *Plessy v. Ferguson*; he stated both that “[o]ur Constitution is color-blind,” and that “there is in this country no superior, dominant, ruling class of citizens. There is no caste here.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). For examples of the argument that the Equal Protection Clause should be read as forbidding only racial discrimination that aims to subordinate or subjugate a racial group, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16–21 (2d ed. 1988); Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994). For a recent restatement of the view that purpose,

race discrimination law is like dormant Commerce Clause law, where discriminatory form triggers a virtual per se rule of invalidity, and unlike free speech or religion law, where the presumption from form is rebuttable. Unlike dormant Commerce Clause law, however, it does not accord heightened scrutiny to laws with disparate effects.³⁵

Traditional affirmative action, even in the discreet form encouraged by *Bakke*, is racially discriminatory in form, at least if that notion is understood, as the Supreme Court seems to have understood it, as requiring the formal use of race as a criterion for legal advantage or disadvantage, and not animus or hostility rooted in notions of racial supremacy or inferiority. Thus, the Court has no experience in its affirmative action jurisprudence with challenges to facially neutral laws disproportionately favoring racial minorities; it has yet to entertain a reverse *Washington v. Davis*. Questions about the purpose or effect of such laws have not arisen as they have with respect to laws that disproportionately disadvantage members of minority groups. But efforts to employ formally race-neutral criteria of selection that are predicted to operate as substitutes or partial substitutes for racial criteria, such as Texas's ten percent solution or the class-based preferences pioneered by UCLA's law school, would bring such questions to the foreground.

A. Purpose

It might be relatively easy to demonstrate that such programs aim, at least in part, at increasing the racial diversity of student bodies. In some cases the evidence might be direct; for example, an institution might confess dismay at the precipitous drop in minority admissions caused by a ban on the use of racial criteria and declare that a new method is being adopted in amelioration. In other cases, policymakers might be coy in concealing their motives on the record, but the timing of the change might give rise to an inference that maintenance of racial diversity was an important objective. Of course, policymakers might seek to refute such circumstantial evidence, and such arguments will be more successful the more they shift from approach number two toward approach number three above—that is, the more they couch their policy shift in terms of a broad, normative alteration of the university's goals.

not form, is determinative and that only formally racially discriminatory laws "expressing caste animosity or imposing caste status" have an impermissible purpose, see Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 461 (1997).

³⁵ Compare *Washington v. Davis*, 426 U.S. 229 (1976) (Disproportionate impact, "[s]tanding alone, . . . does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny . . ."), with *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (subjecting law with a disproportionate effect on out-of-state commerce to heightened scrutiny).

For example, Texas might argue that its policy reflects a policy of genuine geographical diversity rooted in notions of local autonomy over public school governance.³⁶ Or the University of California schools employing socioeconomic preferences in admissions might argue that expanding opportunities for social mobility is generally an appropriate goal for public institutions of higher education. Assume for the moment, though, that at least some such programs might be found unambiguously race-conscious in their objectives.³⁷

But even if a proxy policy is animated by the goal of racial diversity, such a goal does not necessarily establish a case of impermissible race discrimination. This proposition should be clear to any true formalist, who would enforce, under the Equal Protection Clause, only a rule against explicit legal distinctions on the basis of race. But even those who would peer behind a law's form to its purposes and predicted effects ought not find proxy policies discriminatory. It is simply not the case that uncovering a purpose to increase racial diversity, in the absence of racially discriminatory means, simultaneously reveals a proxy policy to be a "subterfuge" for discrimination against whites.³⁸ Rather, consideration of such policies permits a thought experiment: what happens to the analysis of affirmative action when racially discriminatory purpose is decoupled from racially discriminatory form? Put another way, is the purpose of increasing racial diversity itself racially discriminatory if race is not used as the legal trigger for the allocation of burden or benefit?

The most global argument against this proposition is simply that the Equal Protection Clause embodies an anti-caste rather than an anti-discrimination principle.³⁹ From this point of view, racially discriminatory purpose is defined as a purpose to subordinate the race disadvantaged by a law. Thus, strict scrutiny of facially race-neutral laws is appropriate only when impermissible racial animus or supremacism can be distilled from behind their neutral masks—for example, as an inference from grossly disproportionate racial

³⁶ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding unequal per capita financing of local public education based partly on the importance of local control of public schools).

³⁷ If the program were enacted for race-neutral reasons—that is, despite rather than because of its racial impact—the disproportionate impact on whites would not give rise to strict scrutiny. Cf. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) (upholding veterans' preference in civil service positions as neutrally motivated despite the fact that the beneficiary class was 98% male).

³⁸ For an example of such a mistaken argument, see Chapin Cimino, Note, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289 (1997).

³⁹ See *supra* note 34.

effects.⁴⁰ No such supremacist purpose is present, according to the anti-caste view, when racial integration and diversity are the motivating principles behind a law. I am entirely sympathetic to such an approach. But since the Court has repeatedly declined to embrace this interpretation of equal protection, it is worth asking whether an argument can be made, independent of the anti-caste principle, for the constitutionality of formally neutral efforts aimed at increasing racial diversity. The following is a brief sketch of such an argument:

First, while holding that it is impermissible to disadvantage a person on the basis of race, the Court has never said that it is impermissible to take race into account in government policymaking. The view that mere advertence to race is per se discriminatory would jeopardize a variety of familiar governmental practices that take race into account, from racial record keeping in the national census to parental expression of preference for a same-race child in applying for a publicly brokered adoption.⁴¹ Indeed, the Court has not held that even a racially discriminatory purpose automatically invalidates a law. For example, in allowing whites, even in the absence of vote dilution, to challenge congressional districts drawn to include a majority of minority-race voters, the Court has held that race must not be the “predominant” factor in the legislature’s decision, but has been careful to note that this does not mean that race-consciousness must be wholly purged from the districting process.⁴² Similarly, outside of the voting context, the fact that a facially race-neutral law is motivated in part by a racially discriminatory purpose does not by itself trigger strict scrutiny; such a purpose must be the law’s but-for cause.⁴³ Thus, some constitutional latitude exists for

⁴⁰ See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 229, 233 (1985) (invalidating disenfranchisement of persons convicted of crimes of moral turpitude where such a provision, enacted when a “zeal for white supremacy ran rampant,” had the effect of eliminating ten times as many black as white voters from the rolls); *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 347 (1960) (invalidating municipal redistricting as racial gerrymander where it fenced out of the city all but “four or five of its 400 Negro voters while not removing a single white resident”).

⁴¹ For an argument that racial preferences in fact should not be entertained in public adoptions, see Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 *YALE L.J.* 875 (1998).

⁴² See, e.g., *Bush v. Vera*, 517 U.S. 952, 958 (1996) (“Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts.”); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (“Redistricting legislatures will . . . almost always be aware of racial demographics, but it does not follow that race predominates in the redistricting process.”); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (“This Court has never held that race-conscious state decisionmaking is impermissible in *all* circumstances.”).

⁴³ See *Village of Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 270 n.21 (1977) (noting that proof of a racially discriminatory motive merely shifts the burden to the government to show that “the same decision would have resulted even had the

state advertence to race and race-based distinctions. Racially discriminatory purpose in the air does not condemn a law; it must first attach itself to an act of discrimination.⁴⁴

Second, the goal of increasing the racial diversity of a group of people organized by a government policy does not automatically entail a purpose to harm or to single out on a racial basis any member of the group whose relative share is decreased, in the case of a shared benefit, or increased, in the case of a shared burden. The two are not the obverse of one another, like flip sides of a coin; rather, there is some distance between them.

For example, the federal government might decide to draft troops by lottery in time of war rather than allow a volunteer army with a disproportionately high minority membership to bear the burden; a white draftee would not likely get very far with a race discrimination claim. The goal would be the fair distribution of burdens, and the increased incidence of burden on whites is a mere by-product of that goal. But even if an additional goal were to eliminate the reality or symbolism of racial exploitation, it entails no purpose to harm white conscripts—assuming, as the Court has, that knowledge of probable effects is not sufficient to establish purpose.⁴⁵

Or the federal government might require states to allow voter registration as an adjunct to motor vehicle registration and driver licensing, consciously intending to increase the share of racial minorities registered to vote as well as to maximize total registration. Again, a white voter cannot plausibly claim to have been the target of race discrimination in such a scheme.

The problem with white claims of discrimination in such examples is not simply that any injury to whites is generalized or diffuse.⁴⁶ Rather, the problem is that the effects on whites are simply incidental to the government's concerns and there is no background entitlement to a disproportionately low share of a burden (combat exposure) or large share of a benefit (voting power) based on one's race. The government action is taken despite, rather than because of, the effect on white interests.⁴⁷ In a counterfactual world where the government

impermissible purpose not been considered").

⁴⁴ Cf. *Maier v. Roe*, 432 U.S. 464 (1977) (holding that selective medical insurance "may have made childbirth a more attractive alternative," but did not entail discrimination against the right to abortion).

⁴⁵ See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

⁴⁶ The racial redistricting cases, to take one example, discounted such objections. See *Bush*, 517 U.S. at 952; *Miller*, 515 U.S. at 900; *Shaw*, 509 U.S. at 630.

⁴⁷ Cf. Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 292 (1996) (arguing that the racial redistricting decisions wrongly treat white voters who reside in majority-minority districts as having "suffered a racial classification," for "[t]he race of these 'filler people' is irrelevant: whether they are white, Asian, Hispanic, or purple with green spots has no bearing on their assignment to a

expressly sought to injure whites, this argument might falter, but such injury is certainly not a necessary, or even plausible, inference from the structure of such laws in the absence of direct evidence of such intent.

One might object that the racial redistricting decisions actually foreclose this line of argument because they allow white equal protection claims even where the express and plausible legislative goal is to ensure the satisfaction of black voter preferences or to increase black representation in Congress, not to harm white interests. But these goals differ in important ways from the goal of racial diversity in university admissions. Because they focus on outputs, these goals assume that black voters vote monolithically, favoring black legislators. This raises a specter of group-based stereotyping⁴⁸ that is not presented by race-based preferences in university admissions. To the contrary, the pedagogical function of racial diversity rests rather on the premise that experience will vary by race even if interests, desires, and preferences might not, and that, as Justice Powell's *Bakke* opinion suggested, such experience will enrich classroom debate and discussion.⁴⁹ Under this view, a young Clarence Thomas and a young Thurgood Marshall would equally contribute race-specific experiential perspective to a university setting no matter how diametrically opposed their normative views. In the education setting, racial experience is merely an input, not a predictor of any particular discursive outcome. This is so whether the function of education is understood as simply the pursuit of knowledge or as a kind of civic enculturation as well.⁵⁰

Note that compensatory justifications for race-based preferences arguably do entail singling out displaced whites for racial harm in a way that racial diversity justifications do not. Compensatory justifications proceed from a baseline of unjust enrichment, seeking to disgorge white privilege that would

particular district"). *But see* John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 595 (1997) ("To favor pro-minority gerrymanders and at the same time deny the filler people standing to challenge them is to engage in a profound inconsistency . . .").

⁴⁸ *See, e.g., Shaw*, 509 U.S. at 647 (noting that race-based districting "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls"); *cf. Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("[T]he Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.").

⁴⁹ *But cf. Jim Chen, Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811 (1998).

⁵⁰ For variations on the view that education is an adjunct to democratic citizenship, see Rachel Moran, *Diversity, Distance, and the Delivery of Higher Education*, 59 OHIO ST. L.J. 775 (1998); Akhil Amar & Neal Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745 (1996); Nathan Glazer, *In Defense of Preference*, NEW REPUBLIC, Apr. 6, 1998, at 18.

not have existed but for past discrimination. A compensatory transfer of a benefit differs from a redefinition of the criteria by which the benefit will be allocated in the first place. Where no compensatory rationale is advanced, it is difficult to argue that a race-conscious program is intended primarily, or even partially, to disadvantage whites.

B. Effect

Just as the use of race-neutral form precludes any conclusive presumption of racially discriminatory purpose, so too it precludes any conclusive presumption of racially discriminatory effect. Individual whites might be able to demonstrate that programs such as the Texas ten percent solution and the UCLA experiment with socioeconomic preferences diminish their ex ante chances of admission as compared with the prior system or some alternative possible admissions policy. They will face two problems nonetheless.

First, individual whites may have a difficult time showing that they lost any discrete opportunity to a member of a racial minority group, the type of claim made by Alan Bakke. This will be increasingly true as inefficiency of the chosen policy at generating racial diversity becomes greater. The more whites from lower socioeconomic backgrounds or inferior high schools swept in by the race-neutral proxy, the less salient any white applicant's claim to have suffered racial discrimination will be. Still, it might well be possible to demonstrate that, under some such programs, white admissions will fall and minority admissions will rise as a percentage of the total, as compared with alternative admissions policies.

The second, deeper problem is conceptual. The baseline from which these adverse effects are to be measured is simply the prior admissions system or some alternative to that system. This baseline is entirely contingent, an artifact of a particular conception of a college's or university's social function at a particular moment. If the polity wants its higher education system to do more to serve the goals of geographical representation or class mobility, it may do so even if that alters relative racial shares in that system. Among alternative admission policies that are race-neutral in form, no one in particular is constitutionally compelled over any other. Thus, it is not clear that loss of a group share, or an individual group member's probability of admission, as compared with any other race-neutral alternative, constitutes a racially discriminatory effect.

It might be objected that this argument proves too much. It might be argued that there are no constitutionally compelled baselines and, thus, that all equal protection claims concern relative rather than absolute deprivations. Literacy tests and poll taxes, for example, are barred in state elections even though the Federal Constitution nowhere guarantees the right to vote in state elections. The

answer to this objection must be that not all relative deprivations count equally seriously for equal protection purposes. Voting is fundamentally important; other public opportunities are not. Legislatures could not function if all predictably disproportionate effects constituted actionable discrimination. For example, suppose a public college decided to reallocate athletic scholarships from basketball and baseball to tennis and golf, consciously fully intending that the relative share of white scholarships will increase as a percentage of the total. Should the artifactual quality of the athletic scholarship allocation as between team and individual sports preclude a race discrimination claim by minority student athletes? Anti-caste advocates would likely say no, reasoning that retrogression in minority shares of a benefit is suspect in a way that retrogression in white shares is not. But the Court, which has rejected the anti-caste view, might well embrace symmetrical outcomes: the disproportionate racial impact of a reallocation of relative shares, where there is no background entitlement to any particular share, does not necessarily constitute a racially discriminatory effect.⁵¹

III. CONCLUSION

Opponents of affirmative action would do well to remember the adage that you should beware what you wish for, for your wish might come true. Bans on the modest and contained race-based preferences that *Bakke* authorized in university admissions might shift political energies into attempts to find crude proxies for race in race-neutral criteria, such as geography or class, that will alter traditional admissions criteria, or even to rewrite the criteria of academic "merit" altogether. The prospect of admissions criteria that are race-neutral in form but are intended disproportionately to favor minorities invites an intriguing

⁵¹ This point raises a more general issue about government market participation and affirmative action. When a government acts as a market participant, it is sometimes wholly immunized from anti-discrimination principles, *see, e.g.*, *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-93 (1984) (reviewing the market participant exception to the ban on interstate discrimination inferred from the Commerce Clause), and sometimes at least partially immunized from anti-discrimination principles, *see, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (holding that government speech subsidies may discriminate on the basis of content, if not viewpoint, because "when the government appropriates public funds to establish a program, it is entitled to define the limits of that program"). The Court has simply ignored this principle in the context of equal protection challenges to affirmative action programs. For example, neither *Crososon* nor *Adarand* gave the government any discount on scrutiny despite the fact that each involved a wholly gratuitous procurement program. The reason may well be that equal protection limits the government's use of racial criteria in both its sovereign and proprietary capacities in a way the negative implications of the Commerce Clause or the anti-censorship principle of the Free Speech Clause do not. But in the thought experiment under discussion here, the government is not using racial criteria.

thought experiment: should the goal of increasing racial diversity trigger constitutional skepticism when decoupled from race-specific means?

Strong arguments suggest that it should not. The purpose of achieving racial diversity, standing alone, does not entail a purpose to classify whites on the basis of their race or to make them targets of race-based harm. Any alteration in relative white shares of public burdens or benefits is a mere by-product. Thus, race-neutral proxy devices for seeking racial diversity should not be understood at the outset as implicating a racially discriminatory purpose. Nor should they be understood as implicating racially discriminatory effects. Racially disproportionate effects in relation to contingent baselines—that is, initial allocations to which one has no fixed entitlement—are not automatically racially discriminatory.

But if these propositions are correct, then it is difficult to see why any public university ought to be compelled to shift in the first place from *Bakke*-type policies to race-neutral policies that produce the goal of racial diversity less efficiently. If racial diversity is not an invidious government end, then policies that confer explicit race preferences in form should not be conclusively presumed to be racially discriminatory in purpose. It would seem perverse to require, as a matter of constitutional law, that a permissible goal be sought by the least efficient alternative means.

What, then, is the possible social gain in shifting from *Bakke* to proxies? The only possible answer would be that explicit race preferences cause symbolic or expressive harms, akin to the expressive harms Justice O'Connor has emphasized in the race-based redistricting cases⁵² and her Establishment Clause jurisprudence.⁵³ But it is difficult to see how symbolic gains from such a shift could be measured, or found to offset the material costs.

⁵² See, e.g., *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (“[W]e believe that reapportionment is one area in which appearances do matter . . .”).

⁵³ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (noting that the harm in government endorsement of religion is that it “sends a message to nonadherents that they are outsiders, not full members of the political community”).