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R. George Wright

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R. George Wright*

* Michael D. McCormick Professor of Law, Indiana University School of Law—Indianapolis.

I. INTRODUCTION

When something is true or valuable, we can often give a simple account of why this is so. There may be some single reason or some overwhelming item of evidence that underlies the truth or value in question. Even if we think that there are several different reasons why something is true or valuable, one of those reasons standing alone may establish the point.

We might, for example, sufficiently account for the truth of our belief that it suddenly became dark by noting that someone just flicked the light switch. Under other circumstances, we might point instead to the onset of a solar eclipse. These simple explanations are not complete in themselves, but they may be all we need.

By analogy, we might point to some single devastating piece of incriminating evidence—perhaps a confession or a fingerprint on the trigger of the murder weapon—as decisive in establishing a defendant's legal guilt. At the constitutional level, we might think of carefully promoting some single public interest as potentially sufficient, perhaps along with other legal requirements, to justify a government policy.

Thus, preserving the tranquility of a residential neighborhood may justify some sorts of restrictions on speech.[1] Discouraging street crime might be thought to justify other restrictions on speech.[2] Financial difficulties faced disproportionately by widows may, under the circumstances, justify differential tax treatment of widows and widowers.[3] Generally, arguably unequal treatment of men and women may be justified if an important government interest is at stake.[4] Other legal requirements may need to be met in these cases, but no underlying reason other than the single specified government interest need be cited.

In some cases in which a race or ethnic group has unintentionally been affected adversely by a government policy, the policy can be justified if, among other requirements, it promotes

1. *See* Kovacs v. Cooper, 336 U.S. 77, 89 (1949).

2. *See* City of Renton v. Playtime Theaters, 475 U.S. 41, 48 (1986).

3. Kahn v. Shevin, 416 U.S. 351, 353-55 (1974).

4. *See* United States v. Virginia, 518 U.S. 515, 533 (1996); Craig v. Boren, 429 U.S. 190, 197 (1976).

some legitimate public interest.[5] On the other hand, intentional differential treatment of individuals based on race may be justifiable only if, among other requirements, a compelling governmental interest is at stake.[6] Complications aside,[7] a government policy[8] is generally constitutionally justifiable only if there is some sufficient governmental or public interest underlying that policy. This interest can range from the merely legitimate to the genuinely compelling.

Debates over the presence or absence of a sufficient governmental or public interest are central to constitutional law. In particular, cases of alleged governmental racial discrimination, including challenges to racial and ethnic academic affirmative action programs,[9] typically focus at least on locating a compelling or otherwise sufficient government interest, if not on the degree of tailoring or fit between the scope of the government policy and the government interest. The judicial hunt for one or more[10] sufficient, and perhaps compelling, government interests in such cases is central to contemporary constitutional jurisprudence. Without some sufficiently vital state interest, the governmental policy cannot survive judicial challenge.

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5. Washington v. Davis, 426 U.S. 229, 242 (1976).

6. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

7. We set aside here issues of tailoring, or the degree of fit between the scope or severity of the government policy's adverse effects and the governmental interests thought to justify the policy in question.

8. For simplicity and convenience, we will assume that the legal challenge is brought against the government, for a constitutional violation, and not against merely private actors. *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345 (1974). The basic theses of this article could be extended to actions against private parties for non-constitutional claims. Our focus on governmental race-based affirmative action is thus, in a sense, merely a narrow example, but obviously an extremely important one, as a practical matter.

9. *See, e.g., Adarand*, 515 U.S. at 200; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). We shall take the term "affirmative action" herein to refer to the particulars of any specific program at issue, rather than attempt to define "affirmative action" so as to include all relevant programs and exclude all others. For an expression of general concern over the use of the term "affirmative action," see Carl Cohen, *Is Affirmative Action on the Way Out?*, 105 COMMENTARY 21 (March 1, 1998).

10. The courts quite realistically recognize that more than one alleged state interest may be thought to justify a given state policy. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (discussing various purported justifications for a one year residency requirement for welfare eligibility, and finding none sufficient). Typically, though, in such cases, the courts still look for a state interest that by itself would suffice, independent of the other possible justifications. *See, e.g., id.*

However, often this judicial search for some sufficient, and perhaps compelling, government interest is misguided and inappropriate; our ordinary experience and ordinary reasoning processes suggest as much. Often, our own decision-making implicitly, and quite properly, rejects what we might call the sufficient particular interest model of judicial decision-making. Frequently, we do not seek out some single sufficient reason to choose or justify a personal course of action. Nor is there, as we shall see, any logical need to seek out such a single sufficient reason.

The best way to see the distortedness of the sufficient particular interest model is to focus on an alternative model of decision-making and justification. We will focus herein on what are referred to as cumulative case arguments. Admittedly, the idea of a cumulative case argument or more simply, a cumulative argument, is not entirely precise.[11] Cumulative case arguments arise in ordinary life and in contexts ranging from literary criticism,[12] history,[13] politics,[14] and law[15] to the promotion[16] and critique[17] of religious claims. Roughly, the idea is that a belief or value may be establishable, to any degree of certainty, by means other than that of a single item of evidence in its favor standing in isolation. We may be able to establish a belief or value, to any degree of certainty, only through the somehow combined force of a number of different items of evidence, each of which, by itself, may lack real power to persuade.

This is not to say that a large number and variety of bad arguments add up to one good overall argument. Several differ-

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11. *See* J.C. Thomas, *Cumulative Arguments for Religious Belief*, 21 SOPHIA 37, 37 (1982) ("[C]oncepts of what a cumulative argument is . . . show[ ] a family resemblance rather than an identity of form.").

12. *See id.* at 42.

13. *See id.*

14. *See id.*

15. *See* J. Ralph Lindgren, *Criminal Responsibility Reconsidered*, 6 L. & PHIL. 89 (1987) (developing a cumulative case for a particular normative theory of criminal responsibility).

16. *See, e.g.*, Michael L. Diamond, *A Modern Theistic Argument*, 6 MOD. THEOLOGY 287 (1990); Keith J. Cooper, *Scientific Method and the Appraisal of Religion*, 21 RELIGIOUS STUD. 319 (1985) (discussing the cumulative case argument to the best explanation developed by Richard Swinburne).

17. *See* J.C.A. Gaskin, *The Design Argument: Hume's Critique of Poor Reason*, 12 RELIGIOUS STUD. 331 (1976) (Hume's varied arguments against design as not in any particular decisive but cogent when taken cumulatively).

ent bad arguments combined may still be jointly unconvincing. A false belief might be inadequately supported by different lines of argument. By analogy, we often cannot carry water in a leaky bucket merely by placing that leaky bucket inside a nest of one or more other leaky buckets.[18] The water may continue to leak. One leaky bucket may not somehow make up for another leaky bucket, and the joint argument may still not hold water.

But some leaky buckets, or by analogy, individual components of an overall argument, can sometimes be arranged in such a way as to complement one another, so as to minimize or even negate the defects of one or more of the buckets. In some cases, by more or less careful arrangement, the overall spill rate from the individually leaky buckets can be reduced to zero. It is as though we had a non-leaky bucket.

This analogy rightly suggests that in assessing the strength of a cumulative case argument, we cannot focus on the weaknesses of any individual component of the overall cumulative argument. But we also need not go so far as to take the term "cumulative" literally, so as to suggest that later elements of the overall argument must literally incorporate all of the earlier elements. Instead, the various elements of the overall cumulative argument may focus on separate matters or on similar matters from different angles.

The elements of a cumulative case argument may nest cozily or not at all. They may work toward a single conclusion through direct substantive mutual reinforcement. We may think of this particular kind of cumulative case argument as synergistic. Less dynamically, a cumulative case argument might also work merely through the force or weight of the separate arguments merely added together. Not all cumulative case arguments need to work in the same way.

The idea that the elements of a cumulative case argument may focus on separate aspects of a question often strengthens

18. *See* RICHARD SWINBURNE, THE EXISTENCE OF GOD 15 n.1 (1979); Thomas, *supra* note 11, at 41. For further discussion, see BASIL MITCHELL, THE JUSTIFICATION OF RELIGIOUS BELIEF 39-40 (1981) (responding to the "leaky bucket" argument with the observation that "[w]hat has been taken to be a series of failures when treated as attempts at purely deductive or inductive argument could well be better understood as contributions to a cumulative case").

the overall argument.[19] By analogy, if we are testing the general theory of relativity, we can be more confident in the truth of the theory if we have tested the theory from a variety of different angles, rather than by concentrating, however ingeniously, on some single aspect of the theory.[20] Furthermore, particularly in legal matters, the distinct elements of a cumulative case argument may appeal in different degrees to persons with different background beliefs.[21]

Importantly, some cumulative cases may not depend crucially upon each one of their constituent elements, as a tripod might depend upon each of its legs.[22] If any one leg of a tripod is defective, the tripod collapses. But some cumulative case arguments involve what we may call persuasive redundancy, so that the collapse of one component of the argument may not much affect the cogency and persuasiveness of the overall argument.[23] Cumulative case arguments often do not take the form of a chain, the breaking of any single link of which breaks the entire chain. Some persons might reject one or more elements of the cumulative case argument, yet still reasonably accept the conclusion.

Thus, cumulative case arguments have certain advantages. But we must not forget that cumulative case arguments typically rise to prominence only in the absence of any single, by itself, satisfactory argument or value. If there were a simpler way of reaching some result or of justifying some policy, we would surely prefer such a route to the complications of a cumulative case argument.

As well, we must be alert to possible misuse of cumulative case arguments. Once we build a cumulative case legal argument, we of course cannot consider that case in contrast merely

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19. *See* Thomas, *supra* note 11, at 40.

20. *See id.*

21. *See, e.g.*, Philip L. Quinn, *Divine Command Theory*, *in* THE BLACKWELL GUIDE TO ETHICAL THEORY 53, 57 (Hugh LaFollette ed., 2000).

22. *See id.* (analogizing his cumulative case argument to the legs of a chair).

23. By analogy, discrediting one element of a circumstantial evidence-based murder case may not do much to undermine the sense of an overall case established beyond reasonable doubt. That the cigarette butt might well have been left on the scene earlier by the gardener, rather than by the defendant, may or may not weaken appreciably the overall case against the defendant.

with some especially unappealing alternative.[24] Nor can we "double count" arguments or improperly discount arguments supporting conclusions for which we do not care.[25] Nor should we improperly manipulate the level of generality with which we formulate our cumulative case elements in order to minimize criticism.[26]

But since components of a cumulative case argument can strengthen or, less happily, weaken one another,[27] the opponent of a cumulative case argument must not improperly "divide and rule"[28] by treating the arguments[29] separately, and then pronouncing none of them sufficient by itself. Considering individual component arguments in isolation may help clarify each component argument in itself, but such isolation may crucially distort the overall nature, structure, and strength of the combined argument.[30] The overall cumulative case argument, even where each individual element is not by itself of overwhelming weight, may be just as strong as an argument relying solely on a single decisive consideration.

We should emphasize that cumulative case arguments can be used to establish not just minimal probability, but near certainty as well. A cumulative case argument in the law might be developed to establish some claim by a mere preponderance of the evidence or beyond a reasonable doubt.[31] This is a matter of reaching some required degree of certainty.

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24. *See* Charles E. Gutenson, *What Swinburne Should Have Concluded*, 33 RELIGIOUS STUD. 243, 245-46 (1997) (by way of loose analogy).

25. *See generally id.*

26. *See, e.g.*, J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1799 (1994) ("A historical situation or practice . . . can be described in different ways and at different levels of generality.").

27. *See* SWINBURNE, *supra* note 18, at 13.

28. *See id.*

29. Of course, it would be similarly improper to distort a hypothetical cumulative case argument against affirmative action, but the current litigation of concern to us is mainly a matter of the proponent of affirmative action trying to build a case. Typically, this is done by means of finding a compelling government interest and narrow tailoring. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

30. *See* SWINBURNE, *supra* note 18, at 13.

31. *See. e.g.*, United States v. DuPuy, 760 F.2d 1492, 1500 (9th Cir. 1985); United States v. Staten, 581 F.2d 878, 886 n.71 (D.C. Cir. 1978); Toney v. State, 572 So. 2d 1308, 1315 (Ala. Crim. App. 1990); Carlisle v. State, 533 So. 2d 645, 650 (Ala. Crim. App. 1988); People v. Ruiz, 72 Cal. Rptr. 572, 575 (1998); Moss v. State, 10 S.W.3d 508, 512 n.13 (Mo. 2000); State v. Cort, 766 A.2d 260, 266, (N.H. 2000);

However, quite apart from this, cumulative case arguments can also be used to show, for example, that some goal is valuable, or that the goal is overwhelmingly valuable. The limits to the degree of value that cumulative case arguments can establish are set only by the merits of the argument itself. There is no reason why the most overridingly important or compelling public interest we can imagine could not be best shown only by a cumulative case constitutional argument.

II. UNDERSTANDING CUMULATIVE CASE ARGUMENTS IN GENERAL

We may think of cumulative case arguments by analogy to a classic circumstantial evidence legal case. Circumstantial evidence is typically contrasted with direct evidence.[32] Direct evidence suggests immediate knowledge or direct perception of a fact,[33] whereas circumstantial evidence suggests the need for some sort of inferential process.[34] Actually, all evidence requires some sort of inference, if not on the part of a witness, at least on the part of the jury.[35] But it is not the mere inferential character of circumstantial evidence that is most interestingly analogous to cumulative case arguments.

Instead, the classic circumstantial evidence case is often structurally akin to a typical cumulative case argument. A circumstantial evidence case may actually be focused on some sin-

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State v. Brennan, 970 P.2d 161, 165 (N.M. Ct. App. 1998); People v. Sanchez, 463 N.E.2d 1228, 1229 (N.Y. 1984); State v. Grippon, 489 S.E.2d 462, 464 (S.C. 1977).

32. *See, e.g.*, People v. Sanchez, 463 N.E.2d 1228, 1229 (N.Y. 1984); Irene Merker Rosenberg & Yale L. Rosenberg, *"Perhaps What Ye Say Is Based Only On Conjecture"—Circumstantial Evidence, Then and Now*, 31 HOUS. L. REV. 1371 (1995); Daniel P. Collins, *Note, Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491 (1988).

33. *See, e.g.*, State v. Grippon, 489 S.E.2d 462, 464 (S.C. 1977) ("Direct evidence is the testimony of a person who asserts . . . actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.").

34. *See, e.g.*, Albert J. Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentary Intuitions*, 34 UCLA L. REV. 611, 613 (1987) ("[C]ircumstantial evidence permits the jury to infer that the advocate has established one or more legal elements she is attempting to prove.") (citation omitted).

35. *But see id.* at 618. ("Direct evidence is evidence which proves or disproves, without the need for an inference, an element which a party must establish.").

gle piece of evidence[36] that is thought by itself to establish a case beyond a reasonable doubt.[37] But more classically, we think of a circumstantial evidence case in terms of an accumulation of more or less separate items of evidence.[38] Thus, such a cumulative circumstantial case is built on some sort of aggregation of several pieces of evidence.

The cumulative nature of the classic circumstantial evidence case is unfortunately obscured by the fact that the technical term "cumulative evidence" already has an established, unfavorable meaning in the law. Cumulative evidence in this standard legal sense is thought to be redundant and, thus, perhaps inconsequential and excludable.[39] As we have been using the term "cumulative case argument," of course, we do not intend to suggest any sort of redundancy. We mean to suggest instead quite the opposite of redundancy.

More helpfully, the courts have recognized that it is possible to build a successful circumstantial evidence case out of various items of evidence, each of which may be of only minimal weight by itself. The courts have appreciated that "[c]ircumstantial evidence sufficient to support a jury's finding of guilt may be found in the accumulation of several relatively insignificant pieces of evidence. . . ."[40] No single piece of circumstantial[41] evidence by itself need be sufficient to meet the re-

36. *See, e.g.,* United States v. DuPuy, 760 F.2d 1492, 1500 (9th Cir. 1985) (quoting United States v. Morando-Alvarez, 520 F.2d 882, 884-85 (9th Cir. 1975)).

37. *See, e.g., Sanchez*, 63 N.E.2d at 1229; State v. *Grippon*, 489 S.E.2d 462, 464 (S.C. 1977).

38. *See, e.g., DuPuy*, 760 F.2d at 1500 (quoting *Morando-Alvarez*, 520 F.2d at 884-85).

39. *See, e.g.,* People v. Ruiz, 72 Cal. Rptr. 572, 575 (1998); Moss v. State, 10 S.W.3d 508, 512 n.13 (Mo. 2000); State v. Cort, 766 A.2d 260, 266 (N.H. 2000); State v. Brennan, 970 P.2d 161, 165 (N.M. Ct. App. 1998).

40. *DuPuy*, 760 F.2d at 1500 (quoting *Morando-Alvarez*, 520 F.2d 882, 884-85 (9th Cir. 1975)); United States v. Staten, 581 F.2d 878, 886 n.71 (D.C. Cir. 1978); Toney v. State, 572 So. 2d 1308, 1315 (Ala. Crim. App. 1990); Carlisle v. State, 533 So. 2d 645, 650 (Ala. Crim. App. 1988).

41. It is certainly possible as well that only a cumulation of items of direct, as opposed to circumstantial, evidence might suffice in a given case, but we simply do not as readily think of pure direct evidence cases as analogous to a cumulative case argument. A legal case in which only a combination of direct and circumstantial evidence sufficed to meet the required legal standard could also serve to model a cumulative case argument.

quired legal standard,[42] which may be as demanding as showing guilt beyond a reasonable doubt.[43]

The analogy between cumulative case legal arguments and the use of circumstantial legal evidence teaches two important lessons. First, it is possible for a successful legal case to be built from component parts, no single one[44] of which need by itself meet the ultimately applicable legal standard.[45] Second, cases in which no single argument, or no single item of evidence, is by itself especially persuasive, may meet even the most demanding legal standards.[46]

To further clarify the nature of cumulative case legal arguments, we may draw a somewhat more technical analogy. Philosophers distinguish, in several subject matter areas, between coherentist theories and foundationalist theories. The theories may be of truth,[47] meaning,[48] knowledge,[49] epistemic justifica-

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42. *See, e.g.*, Commonwealth v. Todaro, 701 A.2d 1343, 1345 (Pa. 1977) (quoting trial court instructions); Commonwealth v. Pursell, 495 A.2d 183, 195 (Pa. 1985) (quoting trial court instructions) ("If there are several pieces of circumstantial evidence, it is not necessary that each piece standing separately convince you of the defendant's guilt beyond a reasonable doubt.").

43. *See, e.g., Todaro*, 701 A.2d at 1345; *Pursell*, 495 A.2d at 195.

44. It is possible that in a given case, no proper subset of all of the items of circumstantial evidence, or no combination of evidence short of the entirety of the evidence, would suffice to meet the legal standard. Generally, though, we need not think about this even more extreme kind of cumulative case in order to see the arbitrariness of requiring some single compelling government interest in constitutional cases.

45. See sources cited *supra* notes 40-44 and accompanying text.

46. *See, e.g., Todaro*, 701 A.2d at 1345; *Pursell*, 495 A.2d at 195. *See also* State v. Grippon, 489 S.E.2d 462, 464 (S.C. 1977) (quoting 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 12.04 (4th ed. 1992)); People v. Sanchez, 463 N.E.2d 1228, 1229 (N.Y. 1984) ("While it is not necessary that the words 'moral certainty' be used, when the evidence is circumstantial the jury should be instructed in substance that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence.").

47. *See, e.g.*, Laurence Bonjour, *The Coherence Theory of Empirical Knowledge*, 30 PHIL. STUD. 281, 281 (1976); Nicholas Rescher, *Truth as Ideal Coherence*, 38 REV. METAPHYSICS 795, 795 (1985); Ken Kress, *Why No Judge Should Be a Dworkinian Coherentist*, 77 TEX. L. REV. 1375, 1380-81 (1999); Michael Williams, *Coherence, Justification, and Truth*, 34 REV. METAPHYSICS 243, 245 (1980).

48. *See, e.g.*, Bonjour, *supra* note 47, at 281.

49. *See id.*; Keith Lehrer, *The Coherence Theory of Knowledge*, 14 PHIL. TOPICS 5, 5 (1986).

tion or warrantedness of belief,[50] morality,[51] or of law and adjudication.[52] Coherentist theories, as the term is used by philosophers, vary in their description, and specifying the very idea of coherence is, itself, a problem. Roughly, foundationalism tends to take one or more beliefs or perceptions as basic or given, intrinsically credible, or directly evident.[53] Coherentism, on the other hand, is thought to be somehow more cross-referential, holistic, or web-like,[54] in that no single belief is thought to be indubitable or otherwise privileged.

Coherentism would thus suggest a focus not on any single knock-down argument but on some sort of mutual supportiveness among arguments,[55] with the network of arguments as a whole being stronger than the individually inadequate component arguments. This idea is captured by Professor Ken Kress' metaphor for coherence as a collection of identically-shaped puzzle pieces arranged in such a way as to jointly produce a meaningful picture.[56] However, no single sort of relationship need exist among the individual component arguments.[57] The individual component arguments may be related to each other in different ways, some more closely than others.

Of course, we need not claim here that coherentism offers the best understanding of truth, meaning, knowledge, justified belief, morality, or the law. Instead, we focus merely on the loose analogy between some aspects of coherentism and cumulative case legal arguments. Thus, as a matter of coherentist theory, no single element of our experience, itself, may rise to

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50. *See* Lehrer, *supra* note 49, at 5; Bonjour, *supra* note 47, at 281; Williams, *supra* note 47, at 245; Kress, *supra* note 47, at 1381.

51. *See, e.g.*, Michael R. DePaul, *Two Conceptions of Coherence Methods in Ethics*, 96 MIND 463, 463 (1987); Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 80 J. PHIL. 256 (1979).

52. *See, e.g.*, Kress, *supra* note 47, at 1384, 1404 (discussing in particular the legal and adjudicational coherentism of Professor Ronald Dworkin).

53. *See, e.g.*, Williams, *supra* note 47, at 343; Bonjour, *supra* note 47, at 281.

54. *See, e.g.*, Williams, *supra* note 47, at 244.

55. Coherentism seeks to avoid both vicious, unproductive circularity of argument, and merely formal consistency among the various elements of the argument, in which the degree of mutual supportiveness among those elements is near zero. *See, e.g.*, Bonjour, *supra* note 47, at 288 ("A coherent system must be consistent, but a consistent system need not be very coherent. . . . [C]oherence will obviously be a matter of degree.").

56. Kress, *supra* note 47, at 1381.

57. *See* Williams, *supra* note 47, at 247-48.

the level of establishing knowledge. But some sort of mutually supportive set of experiences and other considerations may, nonetheless, suffice to produce genuine knowledge.[58] By analogy, a cumulative case legal argument might rise to any level of strength and meet any legal standard of proof, despite the insufficiency in isolation of each of the individual component arguments.[59]

III. THE VARIED INTERESTS UNDERLYING AFFIRMATIVE ACTION IN HIGHER EDUCATION: OUTLINING A CUMULATIVE CASE ARGUMENT

A. *The Interests at Stake*

One way to show the distortion of the commonly conducted judicial hunt for some single, compelling interest is to consider the broad range of interests served by current forms of affirmative action admission programs in public and private higher education.

We can begin a survey of a number of such interests by recognizing that some can be classified, in some rough sense, as more "forward-looking"[60] and others as more "backward-looking."[61] A "forward-looking" justification might take the present circumstances as a baseline and apply principles of distributive justice, equality, or utilitarianism to produce a morally superior

58. *See, e.g.,* Bonjour, *supra* note 47.

59. A possible disanalogy is that coherentism aspires to more than mere logical consistency among arguments that are somehow mutually supportive. *See* Bonjour, *supra* note 47, at 288. In contrast, there seems to be no reason why the various elements of a cumulative case argument could not be merely mutually consistent, if not even in some mutual tension. Of course, we could say that the elements of a cumulative case argument necessarily support one another in the sense that they jointly cooperate or coordinate to establish some particular conclusion that none of the arguments could establish separately. And it seems fair to go further. The more clearly incomplete or somehow deficient any of the "leaky bucket" individual components is, the more likely it will be that other components, perhaps equally "leaky," but in different places, will have to be carefully fitted, dovetailed, and coordinated with those components. We cannot remedy the problem of one leaky bucket by placing it at random within another, differently leaky bucket. Instead, we must coordinate the buckets so as to effectively stop the leak. For discussion of the "leaky bucket" objection to cumulative case arguments, see Thomas, *supra* note 11, at 41; MITCHELL, *supra* note 18, at 39-40.

60. *See, e.g.,* Albert G. Mosley, *in* ALBERT G. MOSLEY & NICHOLAS CAPALDI, AFFIRMATIVE ACTION: SOCIAL JUSTICE OR UNFAIR PREFERENCE? 44 (1996).

61. *See, e.g., id.* at 24.

future.[62] A more "backward-looking" justification might focus on past injustices and the resulting present unjust enrichment; and then apply principles of corrective or retributive justice to roughly restore a moral equilibrium.[63] However, completely disentangling these two general approaches may be more difficult than it seems.[64]

"Forward-looking," as opposed to "backward-looking" justifications constitute only one axis of affirmative action interests. Both public and private schools may see an affirmative action program as contributing to the school's "external"[65] goals, its "internal"[66] goals, or a mixture of the two.[67] Although other axes of affirmative action interests might be cited, we may already suppose that academic affirmative action can promote many interests and be supported by many arguments.

Probably, the family of arguments on which the greatest legal hopes are currently pinned is a set of arguments classified under the rubric of diversity. While we might say that there is a diversity argument for affirmative action, it is more accurate to say that there is a range of diversity-based arguments for affirmative action. Some forms of diversity arguments, admittedly, are closely related and difficult to separate. Potentially, some forms of diversity arguments may come into conflict with

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62. *See id.* at 44.

63. *See id.* at 24.

64. *See* George Sher, *Diversity*, 28 PHIL. & PUB. AFF. 85, 85 (1999) ("[I]n every version, the [forward-looking] appeal to diversity raises difficult questions whose most plausible answers turn on tacit [backward-looking] appeals to past wrongdoing."); Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 602 (2000) (citing Professor Jack Balkin for the view that diversity is really primarily about distributive justice in the allocation of human capital).

65. *See* Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 867 (2000) (redistribution of educational opportunities for the sake of racial justice on a national scale).

66. *See id.* (focusing not on broad-scale racial justice, but on creating optimal conditions for learning).

67. *See id.* (societal racial justice and genuine equality of opportunity as prerequisites to any assurance that a school's admissions criteria are not in practice skewed or biased).

other forms.[68] Yet, other diversity arguments may supplement, reinforce, or complement one another.[69]

Precisely who benefits from the presence of academic diversity depends on just what sort of diversity argument is being made. Beneficiaries of diversity might vary from the individual admittees, to fellow group members on campus; to fellow group members more generally; to the school as an ongoing institution; to future clients; or to the broader society. Thus, different diversity arguments may emphasize different beneficiaries.

As few as one member of any minority group in an entire entering class of a public or private school may impart some minimal diversity value. That single person's mere membership in the entering class may, by itself, have some modest educational value, at least for some non-minority students. Furthermore, a minority student's mere physical presence in a particular classroom may affect the way a class is taught. But even this limited further effect requires at least one minority student in each particular classroom.

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68. Suppose, unrealistically, that an admissions committee, seeking to fill the last admissions slot, were faced with a choice between a minority applicant and a white applicant. The minority applicant, miraculously, is known to hold precisely the median, already well-known viewpoint among that particular minority group on all issues. The white applicant has recently been unfrozen, and is equally miraculously known to have first hand knowledge of the views of a number of Constitutional framers, and to largely share those views. At least in this rather artificial case, a conflict may arise between enhancing racial or ethnic diversity and enhancing viewpoint or perspectival diversity. For background, see *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001), *injunction stayed*, 247 F.3d 631 (6th Cir. 2001), *cert. granted*, 123 S. Ct. 617 (2002). See also the argument discussed in *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 824 (E.D. Mich. 2000); Wessmann v. Gittens, 160 F.3d 790, 798 (1st Cir. 1998) (public high school context).

69. Typically enough, enhancing racial or ethnic diversity by admitting, say, a Mexican-American, Haitian-American, or Puerto Rican-American may also expand the range of observations and viewpoints expressed in class on a variety of issues. When racial or ethnic diversity contributes to what we might call perspectival or viewpoint diversity, as will be typical, we may refer to the circumstance of "pedagogical diversity." This term is borrowed from Rachael F. Moran, *Diversity, Distance, and the Delivery of Higher Education*, 59 OHIO ST. L.J. 775, 776 (1998). There may also be differences in the diversity arguments made regarding public schools and some or all private schools. In general, we shall set aside the complex uncertainties associated with possible differences in the constitutional standards applicable to public schools and the civil rights statutory standards applicable to private schools. For concise discussion, see Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 673 n.11 (1998).

Going beyond these limited effects, we might then consider more active sorts of student classroom contributions. The substance of a minority student's contributions to class discussions may often depend upon whether he or she is the sole minority student in the class, or one of a meaningful number. A single minority person in a class may feel a burden of group representation; therefore, she may shade her own contributions toward the expected, or toward the most commonly expressed, perspectives among that particular minority group. As the number of members of any given minority group rises in any particular classroom, we may expect more diversity of viewpoint and perspective from each minority student. This result is due to both increased numbers and the diffusion of responsibility to act as the group's spokesperson.[70] In this respect, ethnic diversity and viewpoint diversity reinforce one another.

This dynamic may be worked through for each relevant minority group[71] and for each particular law school class or other academic course. Just as it is false to imagine that members of a minority group think alike on any real issue, it is false to imagine that minority voices contribute distinctively only to particular law school classes and not to others. It is mistaken to imagine that minority group students will bring fresh perspectives to a course in civil rights, immigration, or constitutional

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70. For background see Brief for Appellants at 10-11, Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2001) (No. 01-1447), *available at* www.umich.edu/~urel/admissions/legal/grutter/grutter_appeal.html (last visited November 1, 2002).

71. *See, e.g., Wessmann*, 160 F.3d at 798 (The relevant school policy "takes into account only five groups-blacks, whites, Hispanics, Asians, and Native Americans-without recognizing that none is monolithic."). It is of course a truism that any distinctive ethnic group will exhibit internal diversity in various respects, in addition to some generally shared historical experiences. Diversity arguments for affirmative action may in turn emphasize either the intra-group similarities or dissimilarities. Deciding which racial, ethnic or other sorts of groups may also contribute distinctively to the various benefits of diversity is, of course, a difficult problem, based in social science, public policy, and community history and sentiment. In practice, to include minorities who have played only a quite limited role in local community history invites the criticism that the affirmative action program is unduly broad and ahistorical. But excluding such groups invites the charges of arbitrariness and underinclusiveness. *See id.* As it will always be possible to judicially second-guess the inclusion or exclusion of one or more groups as affirmative action beneficiaries, it is, realistically, open to any court to find lack of narrow tailoring in any affirmative action program if the court is so inclined. *See* R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do,* 31 LOY. L.A. L. REV. 167, 194-99 (1997).

law but not to a course in consumer protection, income tax, insurance, or banking.

This would rightly suggest the value of a critical mass of relevant minority group students, not only for explicitly racially-related courses, but for any particular subject-matter class of substantial size. However, the value of diversity cannot be exhausted at even this level. For example, a law school would lose much of the potential value of racial and ethnic diversity if it pursued racial and ethic diversity, but all other university departments and schools did not. It is helpful to think both of the ways in which group members may reach common conclusions based on common group experiences, and of the ways in which many members of any group importantly differ among themselves. The value of diversity is not exhausted by the ways in which minority perspectives may differ from those of others. Part of the value of racial and ethnic diversity consists of bringing home to all students the range of commonly-held student beliefs that run across racial and ethnic lines. There is certainly value in the discovery or the reassurance of some degree of commonality. All of these considerations suggest both different values of, and different arguments for, racial and ethnic diversity.

While racial and ethnic diversity do not exhaust the forms of diversity with educational value,[72] racial and ethnic diversity may certainly constitute an important element of an overall broader pattern of diversity.[73] Even those academic institutions

72. *See, e.g.,* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (opinion of Powell, J.); Johnson v. Bd. of Regents of Univ. Sys. of Ga., 106 F. Supp. 2d 1362, 1368 (S.D. Ga. 2000), *aff'd,* 263 F.3d 1234 (11th Cir. 2001). *See also* Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000) ("'True diversity' . . . may certainly be defined more broadly than race.").

73. *See, e.g., Bakke*, 438 U.S. at 311-14. For critical discussion, see *Hopwood v. State*, 78 F.3d 932, 942-50 (5th Cir. 1996) (rejecting an ethnic or racial diversity justification for the University of Texas' Law School admissions affirmative action program). For an alternative perspective, see *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 816-31 (E.D. Mich. 2000) (discussing, among other cases, *Hopwood v. State*, 78 F.3d at 932, in the context of a university's affirmative action diversity rationale). In a different context, see *UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163, 1176 (E.D. Wis. 1991) (campus hate speech overbreadth case) (citing Justice Powell's opinion in *Bakke* for the constitutional permissibility of campus diversity along racial or ethnic dimensions, but striking down the speech restriction at issue as limiting intellectual diversity or "the diversity of ideas among students"). For further critical discussion of the *Hopwood*

that choose to legally justify their affirmative action programs solely by means of the value of diversity recognize that racial and ethnic diversity are merely components of a broader, more general diversity policy.[74]

We do not question the purely tactical soundness in litigation of waiving all possible justifications for an affirmative action program apart from diversity. Such decisions must reflect realism regarding the courts and the case law as much as any broader logic of persuasion. As a matter of merely predicting what a particular court will do, exclusive reliance on a diversity argument as opposed to a broader-based or an explicitly cumulative case argument may be sound.[75]

Tactics aside, it is important to understand how a unitary, "all eggs in one basket" legal argument for academic affirmative action fits in among the available alternative approaches. We

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court's rejection of the opinion of Justice Powell in *Bakke*, see *Smith v. University of Washington, Law School*, 233 F.3d 1188, 1197-1201, 1200 n.9 (9th Cir. 2000) (educational diversity, of which racial or ethnic diversity may be an element, as a compelling governmental interest for equal protection purposes unless and until Justice Powell's opinion in *Bakke* is authoritatively repudiated).

74. *See* Brief for Appellants, at 3, 5; Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2001) (No. 01-1447), *available at* http://www.umich.edu/urel/admissions/legal/grutter/grutter_appeal.html) (last visited Nov. 1, 2002). The opinion of the district court in *Grutter* is *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001), *injunction stayed*, 247 F.3d 631 (6th Cir. 2001), *cert. granted*, 123 S. Ct. 617 (2002).

75. *Cf.* Oliver Wendell Holmes, Jr., *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 173 (1920) (reprinting O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897)) ("The prophecies of what the courts will do in fact . . . are what I mean by the law."). As to the soundness of placing all the affirmative action eggs in the single basket of diversity, *Hopwood v. State*, 78 F.3d 932 (5th Cir. 1996), serves as a warning: "[A]ny consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest . . . ." *Id.* at 944. *See also* Builders Ass'n of Greater Chicago v. County, 256 F.3d 642, 644 (7th Cir. 2001) ("Whether nonremedial justifications for 'reverse discrimination' by a public body are ever possible is unsettled."); Grutter v. Bollinger, 247 F.3d 631, 633 (6th Cir. 2001); *Brewer*, 212 F.3d at 747 ("[W]hat interests government may legitimately invoke to justify race-based classifications is largely unsettled.") (quoting *Wessmann*, 160 F.3d at 795); Hill v. Ross, 183 F.3d 1219, 1222 (7th Cir. 1998). For a sampling of some law review commentary on the uncertain status of diversity-based justifications for affirmative action, see, e.g., Leslie Yalof Garfield, *Hopwood v. Texas: Strict in Theory or Fatal In Fact?*, 34 SAN DIEGO L. REV. 497 (1997); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1 (2000); Susan M. Maxwell, *Racial Classifications Under Strict Scrutiny: Policy Considerations and the Remedial-Plus Approach*, 77 TEX. L. REV. 259 (1998).

cannot understand or intelligently reform our legal system until we grasp the full range of alternative legal arguments, some of which may be generally superior to an approach that promises a tactical advantage on a single occasion. An appellate brief, admittedly, is generally not the best venue in which to explain and argue for basic changes in the logic of constitutional analysis. But such basic changes may still be ultimately appropriate.

For the sake of discussion, we will assume that in academic affirmative action cases, diversity constitutes a single valuable government interest, and that there is only a single diversity argument for affirmative action. We will make this oversimplification merely for the sake of clarifying the nature of a cumulative case argument for academic affirmative action.

However, if we unrealistically assume a single unified interest in diversity, we must pay the price of artificial and distorted analysis of affirmative action. The values underlying academic affirmative action are too complex to be captured by any unitary idea of diversity. The idea of diversity inevitably displays its own multi-faceted nature and points beyond itself to other values, interests, and other justifications for academic affirmative action.[76]

Of course, not all of the alternative, non-diversity-based arguments in favor of academic affirmative action are uncontroversial or individually compelling; perhaps none of these arguments is uncontroversial or individually compelling, but that is precisely the important point. The hunt for some single, compelling (and narrowly tailored) interest underlying affirmative action distorts legal and moral reality. There may well be no such single argument. However, this does not show that a sufficiently compelling cumulative case, comprising separately weaker component arguments, cannot be made to support affirmative action.

We can continue to outline a cumulative case argument for academic affirmative action by listing and briefly documenting some of the other public interests and values, beyond diversity, underlying typical academic affirmative action plans. Again, no single such interest may, by itself, seem sufficient to justify af-

76. *See* Sher, *supra* note 64, at 85 and accompanying text; Levinson, *supra* note 64, at 602 and accompanying text.

firmative action. But the logic of argument, even regarding momentous constitutional decisions, actually requires no such thing.

Let us at this point consider some of the more "backward-looking" justifications for academic affirmative action, and then move generally "forward" as we further survey the arguments beyond diversity. Certainly, one important theme of some academic affirmative action cases is the constitutional value of remedying identifiable past or present discrimination by some unit of government, if not more generally, by the local or national society. The central focus of legal discussions of this counter-discriminatory value has been Justice Powell's crucial opinion in the *Bakke* case.[77] Justice Powell concluded in the medical school admissions context that the state had "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination[,]"[78] at least on the basis of adequate findings by competent bodies.[79] Today, Justice Powell's language of "legitimate and substantial"[80] interest would likely require elevation to the level of genuinely compelling interests, at least in the case of race and ethnicity.[81]

The current case law does not rule out the possibility of academic affirmative action justified, in an appropriate case, solely on remedial or counter-discriminatory grounds.[82] One compli-

77. *See Bakke*, 438 U.S. at 265, 307 (opinion of Powell, J.).

78. *Id.* at 307. For extended discussion from a more philosophical perspective of some of the issues attending compensation-based arguments for affirmative action, see, e.g., ALAN H. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION, 65-140 (1979).

79. *See Bakke*, 438 U.S. at 309 (opinion of Powell, J.).

80. *Id.* at 307.

81. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 222 (1995); Billish v. City of Chicago, 989 F.2d 890, 893 (7th Cir. 1993) (en banc). *See also* Chicago Firefighters Local 2 v. City of Chicago, 249 F.3d 649, 657 (7th Cir. 2001) (affirmative action requires "not only that there be a compelling case for it but also that it discriminate as little as is consistent with the achievement of its valid objective."). Anomalously or not, the standard for gender-based affirmative action seems to be mid-level scrutiny. *See, e.g.*, Danskine v. Miami Dade Fire Dep't, 253 F.3d 1288, 1293 (11th Cir. 2001).

82. *See, e.g.*, Smith v. Univ. of Wash., Law Sch., 233 F.3d 1188, 1197 (dicta); Gratz v. Bollinger, 122 F. Supp. 2d 811, 816, n.5 (E.D. Mich. 2001) (dicta). More broadly, see, e.g., Majeske v. City of Chicago, 218 F.3d 816, 820 (7th Cir. 2000) ("It is well-settled law in this Circuit that a governmental agency has a compelling interest in remedying its previous discrimination[,] and the agency may use racial

cation is that some courts interpret the narrow tailoring required in such a case with particular rigor.[83] But from the uncertain state of the Supreme Court cases and other precedents, it is unclear how relatively broad affirmative action programs can be universally justified on purely remedial grounds, especially where a school in question may have been practicing affirmative action conscientiously for more than a generation. By itself, a remedial approach to academic affirmative action may turn out to be less than universal in its range of justificatory power.

This is not to minimize the remedial argument for affirmative action in academia, in which the need for such remedial action can be established to the satisfaction of the courts. But such a remedial argument must meet compelling interest and narrow tailoring requirements. If a reviewing court is so inclined, it is not difficult to find any remedially-justified academic affirmative action program constitutionally defective, at least on grounds of alleged lack of narrow tailoring.

One problem is that the long established existence of a meaningful affirmative action program at a school can lead some courts to minimize the amount of any remaining, redressable, past discrimination by that school. A school may be perceived as less serious about truly making up for past discrimination the more it limits its affirmative action program. On the other hand, more ambitious affirmative action programs may be said to not only redress past wrongs, but also to unduly trample the opportunities of some non-minority students. Thus, such programs remedy past discrimination but lack narrow tailoring.[84]

Similarly, any court can find an unconstitutional lack of narrow tailoring or proportionality between any specific, nu-

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preferencing to rectify that past conduct.") (citing McNamara v. City of Chicago, 138 F.3d 1219, 1221 (7th Cir. 1998)).

83. *See, e.g.,* Hopwood v. State, 78 F.3d 932, 951-55, n.44 (5th Cir. 1996). *But cf.* Hopwood v. Texas, 84 F.3d 720, 724-25 (5th Cir. 1996) (Stewart, J., dissenting). Judge Stewart traced the adjudicated history of racial discrimination practiced by the University of Texas Law School, beginning with the well-known law school admissions case of *Sweatt v. Painter*, 339 U.S. 629 (1950), and the post-admission treatment of *Sweatt*, through continuing discrimination in the 1950's and 1960's, the desegregation plan of 1983, and beyond.

84. For discussion, see Wright, *supra* note 71, at 197-98.

merical, affirmative action remedy provided for any group and the degree of suffering or exclusion that group has historically faced locally. A court may find that group A suffered worse than group B in the local area but is not being provided remedial affirmative action to a proportionate degree. This arguable lack of proportionality can always be claimed, if only, because specific affirmative action programs cannot be based on universally shared historical judgments, and because no affirmative action program considers only degrees of past discrimination to the exclusion of all other relevant factors. Lack of narrow tailoring may also be found if a reviewing court disagrees with the school's inclusion or exclusion of particular benefitted groups.

Perversely, a school's failure to specify a particular numerical minority admissions goal may also count as lack of narrow tailoring. Any specific number may, again, be viewed as arbitrary, rigid, or as a quasi-quota, but the absence of a specified number suggests the fatal vices of subjectivity, standardless discretion, open-endedness, and indefiniteness.[85] The more a group has been historically injured, the greater the remedy that may seem appropriate. However, as the remedy expands for those most adversely affected by discrimination, so does the likely disparity in standard "paper-and-pencil" credentials between the most victimized groups and other groups. A court so inclined can find that such a disparity in paper credentials amounts to an excessive burden on persons who are not members of the most severely victimized group.[86] Thus, both quantification and lack of quantification in remedial affirmative action admissions programs can be seen as insufficiently narrowly tailored, arbitrary, and excessively burdensome.

Remedial academic affirmative action, itself, leaves great discretion in the hands of the courts. The judicially-imposed requirement that the need for remedial affirmative action still be compelling and the program be narrowly tailored practically invites arbitrary rejection by unsympathetic courts or confinement of the remedy to relatively narrow circumstances.

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85. For discussion, see Taxman v. Bd. of Ed. of Township of Piscataway, 91 F.3d 1547, 1575 (3d Cir. 1996) (en banc) (Sloviter, C.J., dissenting). *Cf.* Johnson v. Bd. of Regents of Univ. Sys. of Ga., 106 F. Supp. 2d 1362, 1372-73 (S.D. Ga. 2000) (lack of numerical goal), *aff'd*, 236 F.3d 1234 (11th Cir. 2001).

86. *See, e.g., Hopwood*, 78 F.3d at 955 n.50.

This is not to deny the moral logic of remedially-driven affirmative action.[87] But it is doubtful whether purely remedial arguments will by themselves generally be found both compelling and narrowly tailored for the selective academic institutions where affirmative action is commonly practiced. Even as a tactical matter, it makes more sense to include remedial interests along with diversity arguments and other concerns in a cumulative-case argument for the constitutionality of affirmative action. In this supplementary, contributory role, remedial arguments need not be uniformly compelling or by themselves narrowly tailored to some overall goal. Yet, they may still, in a cumulative case argument, contribute to a sufficient overall argument for academic affirmative action programs.

Academics and other professionals have raised a related argument for affirmative action as a form of compensation for broader past or present societal injustices.[88] Such a broader compensatory approach need not be as narrow and constrained as the remedial argument mentioned above. However, such broader societal compensatory approaches may raise controversial issues of their own.[89] Again, one advantage of a well-constructed cumulative case argument is that no single component of the cumulative case argument need be by itself decisive, convincing, universally relevant, overwhelmingly popular, or narrowly tailored.[90]

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87. Redressing past and even present academic discrimination, along with reassessing what should count as genuine merit, remain as unfinished business. *See, e.g.,* Charles R. Lawrence, III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931 (2001).

88. For an endorsement of such a compensatory approach as one element among other approaches, see, e.g., GERTRUDE EZORSKY, RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION 93 (1991) (referring to "compensation to blacks for past wrongs against them"); S. Kershnar, *Strong Affirmative Action Programs and Disproportionate Burdens*, 33 J. VALUE INQUIRY 201, 201 (1999) (referring to "compensatory justice," among other justifications, as "[a]mong the most widely cited moral justifications for strong affirmative action").

89. *See, e.g.,* John Kekes, *The Injustice of Affirmative Action Involving Preferential Treatment*, *in* THE AFFIRMATIVE ACTION DEBATE 193, 197 (Steven M. Cahn ed. 1995) (discussing, but ultimately largely rejecting as inadequate, broad compensatory justice-based arguments for broad affirmative action programs).

90. While there has been discussion of the sufferings of and discrimination practiced against non-minorities, the recent arrival of many affected persons, problems of victim identification and racial group identification, and the arguable subjective innocence of many of those adversely affected by compensation-based affirmative action, see generally *id.*, there are of course familiar responses to each

Arguments in favor of academic affirmative action are also sometimes formulated in terms of corrective justice,[91] of somehow restoring a competitive economic balance that presumably would have existed but for discrimination,[92] or in terms of distributive justice[93] or simply racial justice,[94] which may have "forward-looking" as well as "backward-looking" dimensions. These arguments may, to a degree, overlap with and renew the remedial[95] and compensatory[96] arguments noted above. But the

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of these concerns. *See, e.g.,* Albert G. Mosley's contribution *in* ALBERT G. MOSLEY & NICHOLAS CAPALDI, AFFIRMATIVE ACTION: SOCIAL JUSTICE OR UNFAIR PREFERENCE? 1-63 (1996). For supplementary argumentation based on what appears to be the largest and most useful database of university experience with affirmative action, thereby permitting some progress beyond speculation and anecdote, see WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998). For responses to the work of Bowen & Bok from several distinct points on the political spectrum, see Lawrence, *supra* note 87, at 935-40; Ronald Dworkin, *Is Affirmative Action Doomed?,* N.Y. REV. BOOKS, Nov. 5, 1998, 56-60; Terrance Sandalow, *Review of The Shape of the River,* 97 MICH. L. REV. 1874 (1999); Stephen Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River,* 46 UCLA L. REV. 1583 (1999). As for the advantages of cumulative case arguments in addressing appropriate narrow tailoring issues, see *infra* Section IV.

91. *See, e.g.,* Moran, *supra* note 69, at 776 (discussing "a corrective justice rationale" for academic affirmative action).

92. *See* Robert Amdur, *Compensatory Justice: The Question of Costs, in* THE AFFIRMATIVE ACTION DEBATE 91, 93 (Stephen M. Cahn ed. 1995) (focusing not so much on provable guilt or malicious intentions, but on unjust enrichment or unfairly accrued advantages, resulting in skewed opportunity structures).

93. *See, e.g.,* MOSLEY & CAPALDI, *supra* note 90, at 44 (characterizing a distributive justice rationale for affirmative action as "forward-looking"); Richard Delgado, *Why Universities are Morally Obligated to Strive for Diversity: Restoring the Remedial Rationale for Affirmative Action,* 68 U. COLO. L. REV. 1165, 1165-67 (1997). Professor Delgado recognizes the distributive justice case for affirmative action. *Id.* at 1165. But Professor Delgado sees the national commitment to both the *Bakke* case and to distributive justice in general as in some jeopardy. *Id.* He therefore seeks to develop a "complementary" backward-looking approach focusing on "retributive or remedial" justice. *Id.* at 1166. As we have suggested, the backward-looking justifications for affirmative action have their own limitations as well. See sources cited *supra* notes 83-89 and accompanying text. Furthermore, Professor Delgado cites additional concerns. *See* Delgado, *supra* at 1166. Therefore, we would emphasize the use of "complementary" retributive or remedial justice arguments not as a "fall-back" or "second-best" argument, but along with all other sorts of arguments with which it can coherently and constructively be teamed, as one limited element of a broader cumulative-case argument, in which the overall argument may be stronger than the sum of its parts.

94. Professor Gertrude Ezorsky has referred generally, and usefully, to "racial justice" in one's workplace. EZORSKY, *supra* note 88 and accompanying text.

95. *See* sources cited *supra* notes 82-87 and accompanying text.

96. *See* sources cited *supra* notes 88-90 and accompanying text.

idea of distributive justice certainly need not be essentially backward-looking. A rule of genuinely fair and equal opportunity in the present must be informed by history and by an understanding of past injustice, but its primary focus may be on present day comparisons and on future patterns of accomplishment.

Distributive justice arguments in particular are, thus, often distinguishable, at least in emphasis from more "backward-looking" retributive or corrective justice arguments. The crucial point, though, is to see these arguments not as competing approaches, or one as weaker than the other, but as mutually compatible, and perhaps, mutually reinforcing components of a cumulative case argument. The overall argument may, in some cases, be stronger and more persuasive than any single element of the argument. This synergism may arise in part because only the overall affirmative action argument can tell a coherent, consistent, and powerful story about history, current practice, and the future. An argument coherently accomodating past, present, and future synergism may be stronger than the sum of its parts, and perhaps much stronger than any one of its parts.

Let us continue, though, with our survey of some of the arguments for academic affirmative action. The remainder of the affirmative action arguments mentioned below refer to particular elements of the present or the future and to present and future consequences of affirmative action policies. Broadly utilitarian considerations, as well as matters of right and justice narrowly conceived,[97] are emphasized here.

There are a number of possible utilitarian arguments in favor of academic affirmative action.[98] For example, if we assume that minority beneficiaries of affirmative action typically have less income than the persons they effectively dislodge from the particular academic admission slot in question, the principle of the declining marginal utility of money may argue for af-

97. For a strong distinction between arguments of social utility and arguments of justice, see Thomas Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. 348, 361 (1973).

98. *See* MOSLEY & CAPALDI, *supra* note 90, at 44 (referring to "maximizing social utility"); Kershnar, *supra* note 88, at 201 (referring to consequentialist justifications more generally).

firmative action,[99] all else equal.[100] As well, if academic affirmative action programs signal a broadening in the range of realistic alternative career paths open to minorities and such programs credibly convey socially valuable information to minorities, they may promote optimal career choices.[101] This provision of valuable information may lead to enhanced social welfare.

Further, there is a utilitarian component, in addition to a focus on individual desert,[102] in an affirmative action program that exposes and partially remedies the arbitrary biases, undue narrowness, and social unresponsiveness of current "paper-and-pencil" criteria for law school and other selective academic admissions.[103] There is nothing unrealistic in imagining that the admissions criteria commonly used in affirmative action programs may lead to genuinely better and more socially valuable lawyering, in many instances, than the narrower reliance on some function of grade point averages, LSAT scores, and other traditional considerations.[104] Merit is often casually assumed to be reflected by grades and test scores, but this focus is certainly not a neutral, objective measure of merit.

There are, after all, a wide variety of legal jobs in which there is much more to relevant sorts of merit than the "paper-and-pencil" versions of merit that traditional admissions criteria purport, however ineffectively, to measure. Not all legal work is heavily-lawyered, abstract, lengthy document-drafting work for large corporations by large law firms. Some effective lawyering instead requires knowledge of local customs, foreign

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99. *See* Sterling Harwood, *Affirmative Action is Justified: A Reply to Newton*, 1990 CONTEMPORARY PHIL. 14, 14-17 (1990).

100. For an exposition of the principle of the declining marginal utility of money, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 500-04 (5th ed. 1998). For applications of the theory in non-affirmative action contexts, see, e.g., Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1329 (2000); Lawrence Zelenak, *The Puzzling Case of the Revenue-Maximizing Lottery*, 79 N.C. L. REV. 1, 38 (2000).

101. *See, e.g.*, Sarah Stroud, *The Aim of Affirmative Action*, 25 SOCIAL THEORY & PRAC. 385, 386 (1999); Harwood, *supra* note 99, at 14-17.

102. *See* Kershnar, *supra* note 88, at 201.

103. *See, e.g.*, Harwood, *supra* note 99, at 14-17.

104. *See* EZORSKY, *supra* note 88, at 88; Richard H. Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U. L. REV. 815, 818-19 (1980) (discussing leadership, judgment, and character).

language and idioms, local culture, local actors and institutions, skill with people, the ability to inspire trust, insightfulness into circumstance, realism, personal judgment, and shrewdness. It is difficult to imagine that such qualities are better measured by GPA or LSAT score than by other criteria. "Paper-and-pencil" merit is often rather a far cry from other equally reasonable views of merit.

To some, the traditional emphasis on "paper-and-pencil" merit seems natural and self-evidently justified. The idea that non-minorities have a natural right to be judged on GPA, LSAT scores, and other traditional criteria, even where detrimental reliance on these indicators can no longer be reasonable, dies hard.[105] Arbitrarily taken for granted is that the society overall benefits from heavy reliance on GPA and LSAT score, as opposed to other indicators of various legal skills.

But these claims are quite contestable at the level of social welfare, particularly when we consider the likely welfare gains to minority clients. This is so even if, for simplicity, we here set aside the idea that merit selection itself requires opportunities to acquire the necessary background education to compete for admission.[106] Especially for legally underserved minority communities, facility with synonyms and antonyms may be less crucial than a genuine understanding of local circumstances.[107]

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105. For discussion, see Norman Daniels, *Merit and Meritocracy*, 7 PHIL. & PUB. AFF. 206, 215-16 (1978).

106. *See* Christopher McCrudden, *Merit Principles*, 18 OX. J. LEGAL STUD. 543, 553 (1998).

107. For a selection, see Fallon, *supra* note 104, at 818-19; Richard Delgado, *1998 Hugo Black Lecture: Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 144-45 (1998) (noting both the contingency and reasonable alterability of conceptions of merit, and the correspondence between the criteria imposed upon applicants and the typical strengths and interests of law professors themselves); Harwood, *supra* note 99, at 14-17; Herma Hill Kay, *The Challenge to Diversity in Legal Education*, 34 IND. L. REV. 55, 64-65 (2000) (discussing the broadening of Boalt Hall admissions criteria); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997); Rennard Strickland, *Rethinking Fairness, Diversity, and Appropriate Test Use in Law School Admission Models: Observations of an Itinerant Dean*, 31 U. TOL. L. REV. 743, 746 (2000) ("[A] law school's thorough soul-searching will result in a lengthy list of qualities that are desirable in students . . . ."); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 957 (1996) ("[C]ertain paper-and-pencil tests have been used as 'wealth preferences' or poll taxes. . . ."). *See also* Rachel Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241,

Academic affirmative action is, even in its forward-looking dimensions, not entirely a matter of welfare maximization. Affirmative action, in its more forward-looking dimensions, is also a matter of the sheer values of equality,[108] non-subordination,[109] and the minimization of inherited group privilege.[110] In addition, the idea of genuine, healthy overall social integration is related to, but not the same as, that of equality. Two groups might be roughly equal in power and opportunity yet isolated from or distrustful and ignorant of one another.[111] Thus, equality is not identical with genuine social integration or social solidarity. There are important affirmative action arguments aimed at promoting occupational[112] and broader societal[113] integration and full participation[114] in American life, with genuine acceptance and appreciation of historical minorities.[115]

The alternative to these anti-subordination and integrationist values is said to involve the resegregation of higher education.[116] The relative absence of some racial and ethnic

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2325-27 (2000) (cataloguing a mix of law student reactions to the question of the value and use of the LSAT).

108. *See* Richard Wasserstrom, *Preferential Treatment, Color-Blindness, and the Evils of Racism and Racial Discrimination*, *in* THE AFFIRMATIVE ACTION DEBATE 153, 155 (Steven M. Cahn ed., 1995) (discussing the harms and unfairness of systemic racial inequality, and various kinds of inequalities based on race, disadvantage, dominance, and subordination).

109. *See id.* at 155; Grutter v. Bollinger, 137 F. Supp. 2d 821, 864 (E.D. Mich. 2001) (quoting Professor Frank Wu to the effect that "[f]or many people of color, racism has decreased the amount and value of economic, social, and cultural capital inherited from our ancestors. Not only did we receive less material wealth, we also received less 'insider knowledge' and fewer social contacts so instrumental to one's educational and professional advancement in America"). *See also* Giradeau A. Spann, *Writing Off Race*, 63 L. & CONTEMP. PROBS. 467, 468 (2000) (promoting racial equality). Professor Spann favors leaving affirmative action issues to the political branches, on the theory that the Constitution says nothing about affirmative action. *See id.*

110. *See, e.g.*, MOSLEY & CAPALDI, *supra* note 90, at 44; Wasserstrom, *supra* note 108, at 155.

111. *See, e.g.*, Wasserstrom, *supra* note 108, at 155; Lawrence, *supra* note 87, at 931.

112. *See, e.g.*, EZORSKY, *supra* note 88, at 93.

113. *See, e.g.*, David Cole, *Rainbow School Colors*, 272 NATION 23, 23 (April 16, 2001).

114. *See* Sandalow, *supra* note 90, at 1912.

115. *See id.*

116. *See* Brief for Appellants at 10-11, Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2001) (No. 01-1447).

minorities on campus[117] would presumably lead to a similar relative absence from key positions in business and the professions,[118] reinforcing a racial and socioeconomic divide[119] whose origins were partly in state action.[120] Among the consequences of resegregation would presumably be a continuation of rather limited minority confidence in most aspects of the legal system.[121]

It is thus easy to argue for the value of affirmative action from the standpoint of various legally underserved minority communities. It is certainly possible to argue that affirmative action enhances either the actual availability of legal services to those communities,[122] or the visibility and quality of legal service delivery.[123] Over time affirmative action may lead to an enhanced sense of the legitimacy of the broader legal system in minority neighborhoods.[124]

Suppose affirmative action did result in more, and better, professional services in traditionally underserved and often alienated communities. Could this argument itself be somehow turned to the service of, say, a dominant social group whose own preferences as consumers might be for service providers ethnically like themselves?[125] Such a constituency might be happiest with the absence of affirmative action.

Even if we imagine, however, a dominant group that prefers all legal service providers—not just for themselves, but for

117. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (opinion of Powell, J.).

118. *See* Dworkin, *supra* note 90, at 60 (referring to "the still-deplorable absence of blacks from key positions in government, politics, business, and the professions"). *See also* Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 682 (1998).

119. *See* Issacharoff, *supra* note 118, at 682.

120. *See id.*

121. As well, the broader, more inclusive, responsive logic under which minority lawyers are recruited and selected might help "to build the confidence of minority persons in the legal system." Robert A. Sedler, *The Constitution and Racial Preference in Law School Admissions*, 75 MICH. B.J. 1160, 1160 (1996).

122. *See, e.g., Bakke*, 438 U.S. at 306 (opinion of Powell, J.).

123. *See* MOSLEY & CAPALDI, *supra* note 90, at 52 ("A number of studies have shown that underrepresented minority physicians are more likely than their majority counterparts to care for poor patients and patients of similar ethnicity."). *See also* Lawrence, *supra* note 87, at 937; Nagel, *supra* note 97, at 361; Wasserstrom, *supra* note 108, at 156.

124. *See, e.g.*, Sandalow, *supra* note 90, at 1991-12.

125. For generally relevant discussion, see Levinson, *supra* note 64, at 587-88.

all ethnic groups as well—to be members of the dominant group, we do not thereby logically put affirmative action at risk. A dominant group's insistence on dominant group member service for everyone is not legitimized by the preceding community welfare and community preference arguments. The logic of affirmative action does not somehow also legitimize racial exclusiveness in academic admissions.

Affirmative action, after all, does not restrict access by dominant group members to professionals of any ethnicity; it only enhances freedom of consumer choice, for consumers of all ethnic backgrounds. As well, there is more broadly a crucial lack of symmetry between a dominant group and many historically subordinated minority groups. They are not, realistically, mirror images of one another. The sensible preference of, let us say, an immigrant with limited English language skills for an attorney he or she can easily communicate with, and who may more quickly grasp the practical realities of the client's circumstances, does not somehow legitimize the obviously dramatic consequences of dominant group discrimination.

Let us consider a final argument that tends to support academic affirmative action. This argument focuses on the social value of institutional academic freedom and autonomy, perhaps under the general supervision of a board of trustees or an accountable state legislative body. This argument itself has several dimensions, but it is largely institutional and procedural. The academic freedom argument focuses less on the merits of an affirmative action policy, and more on who should make such policy decisions and with what degree of judicial deference.

This academic freedom argument cannot be encompassed within any of the arguments discussed above, as there is actually no guarantee that a university board of trustees, or a supervising legislative body, will always favor affirmative action. But a distinct argument in favor of academic affirmative action arises if, say, the university faculty and administration, the board of trustees or, perhaps, the elected state legislature approves this decision.

Admissions decisions are, on this argument, complex. Accumulated direct experience and sometimes inarticulable exper-

tise play a role.[126] Of course, constitutional rights must not be trampled under the prerogatives of expertise. But institutional judgment and expertise may tell us something useful about the proper scope of rights in the first place. It is the universities and their departments who will tend to be most acutely aware of many of the complexities and consequences of affirmative action, including the program's effects on academic achievement, the records of graduates, and inter-group relations.

There is certainly a basis in law for judicial deference to university judgment where rights are at stake. Even Justice Powell's opinion in *Bakke* can be read as deferring to an academic judgment that diversity, including ethnic diversity as a component thereof, may bring certain educational benefits to a school.[127] This is not to claim that autonomy of academic judgment or institutional freedom by itself rises to the level of a compelling governmental interest in the affirmative action context.[128] Again, our aim is merely to bring this consideration into a cumulative case argument. The crucial underlying point is that in a cumulative case argument for affirmative action, no single element need by itself be compelling, or of any particular degree of independent weight.[129]

Judicial deference to academic decision-making, based partly on differences in institutional competencies, political and other accountability, and the value of institutional independence, has been recognized in the law in several contexts.[130]

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126. For a classic discussion of this dichotomy, see MICHAEL POLANYI, THE TACIT DIMENSION (1967).

127. *See* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 306 (opinion of Powell, J.). *Cf.* Strickland, *supra* note 107, at 746 ("[D]iversity . . . makes for the most interesting and broadening learning environment for students and faculty.").

128. For discussion, see, e.g., Gratz v. Bollinger, 122 F. Supp. 2d 811, 817-21 (E.D. Mich. 2000). For discussion of several of the more general uncertainties underlying what counts as a compelling interest, see Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term In Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

129. *See supra* Part II. It may also be true that in some contexts, several component arguments may be more persuasive than a single unitary argument. *See* Paul T. Wangerin, *A Multidisciplinarian Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y 195, 201 (1993).

130. *See, e.g.,* Bd. of Curators v. Horowitz, 435 U.S. 78, 91 (1978) ("By and large, public education in our Nation is committed to the control of state and local authorities") (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)). *Horowitz* was a standards and procedures of academic dismissal case, rather than any sort

Justice Frankfurter and Justice Harlan classically quoted with approval a statement of academic freedoms, including a university's prerogative to determine "who may be admitted to study."[131] The Court has certainly recognized that "[c]ourts are particularly ill-equipped to evaluate academic performance."[132] Courts have no obvious overall advantage in second guessing schools on the value of diversity in enhancing the learning environment, or on related affirmative action justifications, as those values are perceived by a university or by democratically accountable overseers.[133]

Judicial deference to apparently disinterested affirmative action admissions decisions would certainly not leave the courts powerless in a case of old-fashioned discrimination against racial minorities.[134] Dominant and subordinate groups are, again, not in generally symmetrical relationships. Most major law schools and other leading academic institutions would not operate affirmative action policies without the support of non-minority academics, whose own ethnic groups do not directly benefit from affirmative action in the obvious sense, and who do not selfishly identify with the benefitted minority groups. The affirmative action practice of enhanced appreciation for those least like oneself is, again, hardly symmetrical with the common historical practice of discriminating in favor of one's own socially dominant ethnic group.[135]

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of admissions case. *See also* Sweezy v. New Hampshire, 354 U.S. 234 (1957) (official inquiry into professor's lectures and knowledge of political party as invasion of academic freedom and free expression).

131. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). *See also* Victor G. Rosenblum, *Surveying the Current Legal Landscape for Affirmative Action in Admissions*, 27 J.C. & U.L. 709, 723-25 (2001) (discussing Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 232 (2000) ("It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.") (addressing the free speech constitutionally of mandatory student activity fee organizational funding program)).

132. *Horowitz*, 435 U.S. at 92.

133. *See* Strickland, *supra* note 107, at 746 (discussing diversity enhancement of law school admissions procedures).

134. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950).

135. A similar point is made in Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 461 (1997). Professor Rubenfeld reports that "[i]f there is a colorable argument that whites are purposefully reduced to lower-caste status when the proportion of white students at prestigious public universities declines from ninety-five percent to eighty-five percent, I have yet to hear it." *Id.* Professor Rubenfeld adds that "[i]f there is a colorable argument that any white person is stamped with

B. *Summarizing the Cumulating Interests in Defending Affirmative Action*

Putting a number of argument components together, then, it is possible to construct a cumulative case argument in favor of standard sorts of academic affirmative action. We have considered argument components of several sorts, occasionally overlappingly,[136] but also selectively.[137] We have raised, in particular, more or less distinct arguments focusing on various aspects of diversity,[138] remediation,[139] compensation,[140] corrective and distributive justice,[141] broad utilitarianism,[142] anti-subordination,[143] integrationism and community preference,[144] and the value of free and expert academic judgment.[145] Of course, some of these arguments might be rearranged or combined, but the underlying pluralism of argument would remain.

There is also the interesting possibility that some of these elements of the overall affirmative action argument may interact synergistically, rather than simply combining elements in a crudely arithmetic sort of way. Certainly, separate argument

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a badge of status inferiority when a white President and a white Senate appoint a black man to the Supreme Court in part because of the color of his skin, I have yet to hear it." *Id.*

136. *See, e.g., supra* notes 95-96 and accompanying text.

137. We have made no attempt to include every argument in favor of affirmative action that is compatible with those listed above. It might be noted that while affirmative action advocates often discuss the value, in one respect or another, of "role models," we have for the sake of simplicity either set aside such arguments or incorporated some of the underlying concerns into one or more of the other arguments. *See, e.g.*, Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991) (discussing academic affirmative action as a homeostatic device, often benefitting students in inverse proportion to need). For discussions of the potential moral value of role models, see, e.g., EZORSKY, *supra* note 88, at 89; Richard Wasserstrom, *supra* note 108, at 155. For a critique of role model theory, particularly on grounds of lack of narrow tailoring, see *Hopwood v. State*, 78 F.3d 932, 942 (5th Cir. 1996) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986) (plurality opinion). For discussion, see, e.g., Levinson, *supra* note 64, at 576-77.

138. *See* sources cited *supra* notes 68-72 and accompanying text.

139. *See* sources cited *supra* notes 77-87 and accompanying text.

140. *See* sources cited *supra* notes 88-90 and accompanying text.

141. *See* sources cited *supra* notes 91-96 and accompanying text.

142. *See* sources cited *supra* notes 97-107 and accompanying text.

143. *See* sources cited *supra* notes 108-110 and accompanying text.

144. *See* sources cited *supra* notes 112-125 and accompanying text.

145. *See* sources cited *supra* notes 126-135 and accompanying text.

elements raised in the course of ordinary life may take on a holistic quality, in which their combined force exceeds that of the sum of the parts. Consider, for example, two arguments in favor of choosing a particular allergist. The first argument or, as it would be more accurate to say, argument contributor, might be that Doctor A is a competent, licensed allergist. The second argument, or argument contributor, might be that Doctor A's practice is geographically within a reasonable travel distance. These two argument contributors are clearly separate and distinct.

It seems fair to say that, in isolation, each of these two argument contributors is of only modest weight in making an actual final choice among allergists. By itself, though, the first argument contributor does little to distinctively commend Dr. A to us. Many allergists are competent and licensed, and most allergists are inconveniently geographically remote. By itself, the second argument contributor, that Dr. A's practice is nearby, is of only modest weight, especially if Dr. A, unlike other nearby practitioners, is incompetent, or if we know little about Dr. A's competence.

When these two separate argument contributors are put together, their combined force is greater than the sum of their individual strengths. Admittedly, there is less than full interactive synergy between the two argument contributors. It is not as though proximity somehow would make incompetence trivial or turn incompetence into a virtue. Nor would mere competence make geographic distance inconsequential, or even a virtue.

When these two distinct argument contributors are thus put together, in the sense of being assumed to be simultaneously true, we are much closer to seeing Dr. A as a reasonable final choice as one's allergist. Doubtless we may still want to consider other matters, such as scheduling or insurance. But if Dr. A is known to be competent, licensed, and close by, we have clearly come a substantial distance toward justifying a choice of Doctor A, and in a way that cannot be fully accounted for by merely arithmetically combining the two separate argument contributors.

Can we say that this positive[146] interactivity or synergy effect is at all paralleled in our cumulative case argument for affirmative action? It is important to bear in mind that no true interactivity of the affirmative action argument contributors may be necessary. The argument contributors may be of less than compelling weight when taken in isolation, but of compelling weight when merely fairly and non-duplicatively added up. Cumulative case arguments may be of irreplaceable value even in the absence of synergy.

In the case of affirmative action, though, there may actually be a degree of positive correlation among some of the component arguments. One way to look at this would be to say that in an area as complex, practically significant, morally charged, and sometimes as emotional as affirmative action, we are likely to distrust relying on any single, relatively narrow argument. Focusing on some single argument or theme offers intellectual convenience. But we are likely to be less than fully convinced by any single argument, when no single argument can possibly address the breadth and complexity of the issue. We want an overall, multidimensional argument that sees the whole picture, over time, and in all its complexity.

This would mean that we are less likely really to be persuaded by any relatively narrow single component argument in favor of affirmative action, where the argument does not take into appropriate account all of the relevant historical past, all of the relevant present, and all of the relevant possible futures. The most convincing argument on academic affirmative action will thus look backward as well as forward in a comprehensive, integrated, consistent way.[147] Such an argument will want to see the academic institution itself and the broader society in all contexts and in all relevant fullness.[148] We will want to think procedurally about relative institutional competencies as well

146. It seems possible that two argumented contributors, each of some positive value, could peculiarly interact in such a way as to negate their own individual values, even combining to produce a negative value. Consider, for example, that carbon and oxygen each contribute toward and are indeed necessary for life, but the combination of the two in the particular form of carbon monoxide may be of negative net value for life.

147. *See* sources cited *supra* notes 61-64 and accompanying text.

148. *See* sources cited *supra* notes 65-67 and accompanying text.

as about the various substantive normative issues directly.[149] And this is to ask for just the sort of cumulative case argument for academic affirmative action we have briefly outlined above.[150]

IV. CUMULATIVE CASE ARGUMENTS AND NARROW TAILORING

Thus far, we have devoted most of our attention to showing that it is possible for several less than compelling interests to combine into a sort of cumulated, or conjunctive, overall interest that might be of compelling weight. This is the most significant way in which cumulative case arguments can modify traditional constitutional analysis.

But it is also extremely important to notice that cumulative case arguments may call for important changes in the courts' use of narrow tailoring requirements as well. We have briefly seen that courts may use the narrow tailoring requirement to strike down affirmative action programs almost without regard to the particular features of the affirmative action program.[151] Narrow tailoring analysis is, in general, readily manipulable.

A court might, briefly, find lack of narrow tailoring either because an affirmative action program involves numerical goals, or because it does not involve such goals.[152] Numerical goals can be seen as suspiciously like quotas, and, thus, too rigid. But the absence of numerical goals can be seen as too open-ended. This sort of tailoring analysis can closely approach that of "heads I win; tails you lose." This is merely one example of the sheer manipulability of the narrow tailoring inquiry.[153]

Interestingly, cumulative case arguments might to some degree reduce the significance of the judicial narrow tailoring inquiry precisely because of the multi-facetedness and complex-

149. *See* sources cited *supra* notes 126-135 and accompanying text.

150. This is not to suggest that we have comprehensively considered all possible counterarguments running against academic affirmative action. Our focus has been mainly on the logic of constructing cumulative case arguments in general, and on developing a potentially compelling interest in the academic affirmative action context from constituent elements of arguably lesser individual weight.

151. *See supra* notes 84-86 and accompanying text.

152. For further discussion, in a variety of contexts, of this judicial manipulability, see Wright, *supra* note 71, at 183-87, 195-98.

153. See *id.* for additional discussion.

ity of cumulative case arguments. Currently, courts can simply choose out of the air some hypothetical alternative government policy and solemnly declare it to be both feasible and more narrowly tailored than the actual challenged government policy. Typically, it will not be difficult for a court to conceive of such an alternative policy. Any court so inclined can on that basis find lack of narrow tailoring, and thus strike down the government policy.[154]

But a court cannot so easily and casually find lack of narrow tailoring where the government's overall argument is cumulative, encompassing multiple distinct interests and arguments. It is not difficult to simply imagine a more narrowly tailored alternative policy if the court is permitted to focus exclusively on any single government interest. But a court faced with a multi-part, perhaps even synergistic, cumulative argument cannot as casually find lack of narrow tailoring merely because the government policy is not narrowly tailored with respect to any one of the various component arguments or interests.

This is because a sensible government policy may well need to be less than maximally narrowly tailored in some, or any single respect, in order to be maximally narrowly tailored overall, with respect to all of the interests and component arguments by which the policy is to be judged. Making the government policy more narrowly tailored in some respects may mean that the policy does not promote other interests as well, or promotes them in a less narrowly tailored way. It is hardly unusual for a policy aimed at several goals, or justified on several grounds, to be changed so as to be less burdensome in one respect, but as a result to be more burdensome, perhaps to other people, in other respects. Given these obvious tradeoffs and complications, it may be harder for courts to dismiss a policy as not narrowly tailored without a correspondingly more complex and serious discussion.

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154. If the costs in time and money of operating the affirmative action component of the admissions process are not to be exorbitant, it will commonly be possible for an unsympathetic court to characterize key stages of even a non-quota program as unattractively "mechanical" or "inflexible." *See, e.g.*, Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1253-57 (11th Cir. 2001). Automatic admits based on test scores and grades somehow tend to seem less disturbingly insensitive to the individualities of the applicant.

Actually, some of these complex tradeoffs in degrees of policy effectiveness, shifting of costs, and narrowness of tailoring arise only when a single government interest is thought to be at stake in a case.[155] But these complexities are more obvious and more difficult to deny in multiple-interest, and especially, cumulative case arguments. If we all appreciate that any allegedly more narrowly tailored alternative will likely have less narrowly tailored effects on some component interest, it becomes more difficult for courts to find a lack of narrow tailoring in cumulative argument cases without undertaking their own sustained policy analysis.

In a case in which the government relies only on some single, compelling interest, an assumed lack of narrow tailoring with regard to that interest may seem decisive. But in a cumulative case argument, the overall argument may be compelling even if no single component of the argument is, itself, compelling. Lack of narrow tailoring with regard to any single component argument may be less decisive, and even inevitable. The narrow tailoring need only be of some overall, inclusive understanding of the various interests as a whole. In a sense, a narrow tailoring inquiry with regard to a cumulative case argument could, thus, seek narrow tailoring overall, taking due account of the various argument components. But the presence or absence of overall, global narrow tailoring is obviously an especially complex, easily disputable, and typically subjective matter, which is not casually resolvable by an untested judicial assertion in an appellate court opinion.

Suppose, for example, that the government and a court agree that there are five component arguments or interests underlying some affirmative action policy and that only the conjunction of all five suffices to constitute a compelling overall interest. A court can certainly look for some sort of overall narrow tailoring in such a case. But it is clear that reasonable per-

155. *See, e.g., id.* at 1253-57 (The court assumed merely for the sake of argument that diversity is or can be a compelling governmental interest in the university affirmative action context, but then went on, as have other courts, to find the diversity admissions program to be insufficiently narrowly tailored). Other courts have followed this pattern of waiting until the narrow tailoring inquiry stage before finding the particular diversity admissions program unconstitutional. *See, e.g.*, Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 705 (4th Cir. 1999); Wessmann v. Gittens, 160 F.3d 790, 794 (1st Cir. 1998).

sons can and will disagree as to the weights of and relationships among the component arguments. Different views of what overall narrow tailoring requires may be, thus, inevitable and perhaps equally reasonable. Synergies of various sorts may be involved. Argument components A and C, for example, may separately be of little weight apart from their interaction. But reasonable persons could plainly differ as to such interactive effects.

All of this in a sense expands the options available to a court with regard to narrow tailoring. But in an important sense, the court is more constrained. In a complex cumulative case, with or without synergies among arguments, it will be all too obvious that a court may tell a number of stories about the presence or absence of overall narrow tailoring. And this obviousness is itself a limitation on judicial arbitrariness. Because it will always be obviously possible for the court to choose from a range of, perhaps, equally reasonable stories about narrow tailoring, any particular story the court chooses to tell will be less uniquely authoritative or logically binding. In many cases, a court's opting for some inevitably available story finding lack of overall narrow tailoring, as opposed to other reasonable and more sympathetic stories, will seem obviously arbitrary and unconvincing, and, thus, perhaps less attractive to the court. A court may wish to make an ideologically driven decision, but not if the ideological character of the opinion is too painfully obvious.

This is not to suggest that courts should not find lack of narrow tailoring in any cumulative case context. A cumulative case for an affirmative action program that barred the admission of any and all Caucasians in odd-numbered years would, presumably, be struck down as insufficiently tailored, regardless of how the arguments in favor of affirmative action were reasonably weighted. Sometimes even the subtle tradeoffs in narrow tailoring of the component arguments lead us to an adverse overall conclusion. But in less extreme cases, the sheer obviousness of the possibility of finding any complex government policy to lack narrow tailoring, in some respect, may remove some of the practical incentive for courts to so find.

V. CONCLUSION—SOME FINAL SPECULATIONS

Let us conclude with a bit of speculation as to why courts typically do not recognize the possibility of a cumulative case argument in favor of any given state policy. Probably the simplest explanation is that legally-trained persons—including those defending and evaluating state policies—are accustomed to thinking in other terms. Lawyers do often think in terms of plural arguments. Pleading may be done in the alternative,[156] and the alternative pleas need not be mutually consistent.[157] Typically, though, arguments are evaluated separately, in series, and without regard to any possible holistic or synergistic effect. Thus, the overall argument is not assumed to be functionally cumulative in character.

Often, no harm arises from considering multiple arguments as merely a series of separate arguments. Consider, for example, the case of *Shapiro v. Thompson*,[158] in which durational residency requirements for welfare benefits were held to violate a constitutional right of interstate travel.[159] In *Shapiro*, the Court considered a total of eight distinct arguments or state interests offered in support of the durational residency requirements.[160] The Court considered each of these interests essentially in isolation from the others, apart from the organizational grouping of the arguments by their nature or weight.

The Court in *Shapiro* was looking, unsuccessfully, for a compelling government interest underlying the residency requirements that was narrowly tailored to serve that interest.[161] In considering the eight arguments separately, the Court re-

156. *See* FED. R. CIV. P. 8(e)(2) ("A party may set forth two or more statements of a claim or defense alternately . . . .").

157. *See id.* ("A party may also state as many separate claims or defenses as the party has regardless of consistency . . . .").

158. 394 U.S. 618 (1969), *overruled in part on other grounds*, Edelman v. Jordan, 415 U.S. 651 (1974).

159. *See id.* at 627.

160. These eight interests included discouraging state entry by those likely to require assistance. *Id.* at 627-29. These interests have the effect of discouraging state entry solely for larger welfare benefits, distinguishing among residents based on prior tax contributions, preserving the fiscal integrity of state programs, facilitating the planning of the welfare budget, minimizing interstate welfare fraud, and promoting the early entry into the state's labor force by new residents. *Id.* at 631-34.

161. *See id.* at 634.

jected some of the arguments as constitutionally illegitimate.[162] The rest were deemed legitimate, but in each instance, either insufficiently weighty or insufficiently narrowly tailored to the goal of the statutory regulation.[163]

When confronted with multiple arguments for a single conclusion, a court may mistakenly assume that the individual arguments amount to a chain, and that the chain of the overall argument is only as strong as its weakest link. The Court clearly avoided this mistake in *Shapiro*. It is possible to argue that the Court did make an opposite mistake of the sort discussed in this article. The Court did not discuss the possibility that several merely legitimate, not particularly important state interests could, if properly related and combined, add up to a sort of compound interest of sufficient constitutional weight. The Court in *Shapiro* might have seen little actual reason to consider any aggregation of the several merely legitimate interests cited by the states. The Court, after all, saw those interests, not only as inconsequential, but as poorly promoted, if promoted at all, by the durational residency requirements.[164] It seems unlikely that adding up several trivial and only tangentially-pursued interests can somehow generate a compelling combined interest. The Court's lack of interest in the possibility of somehow aggregating one or more legitimate[165] interests into a jointly compelling interest may, under the particular circumstance of *Shapiro*, have been harmless, even if not fully justified.

But more generally, courts should be sensitive to what Stephen Toulmin, the distinguished exponent of informal logic, has referred to as "the versatility of reason."[166] Legal arguments can take different forms and should be evaluated according to

162. *See id.* at 627, 629.

163. *See id.* at 627, 631-38.

164. *See id.* at 633-38.

165. It seems technically possible that two illegitimate interests might somehow interactively affect one another so as to jointly result in an actually legitimate, if not compelling, interest. Two poisons, such as sodium and chlorine, may in the presence of one another produce an item essential for life. However, in the absence of an example of this phenomenon in the affirmative action area, we shall simply ignore this possibility.

166. STEPHEN E. TOULMIN, AN EXAMINATION OF THE PLACE OF REASON IN ETHICS 82 (1950) (reprint ed. 1968).

their form. To treat a cumulative case argument for affirmative action as though it could be fairly reduced to the pursuit of some single goal would simply be judicially irresponsible.