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A Conservative Comment on Professor Crump

Stephen B. Presser

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My assignment was to comment on Professor Crump's article[1] from a conservative perspective, to complement the response to his article from Dean Dennis Shields,[2] who had been instrumental in administering the University of Michigan School of Law's affirmative action policies approved in *Grutter v. Bollinger*.[3] Professor Crump suggests that the conservative position on the issue of affirmative action in university admissions is to argue for a "color-blind" admissions policy, ignoring any distinctions of race or ethnic origin.[4] It is true that at least some conservatives have made this argument,[5] and I have made it on another occasion myself,[6] but advocacy of a "color-blind" Constitution, much in the manner of the first Justice Harlan,[7] is not all there is to a conservative constitutional jurisprudence, and it may be that there are elements of conservative thought that support, rather than undermine, affirmative action. Nevertheless, what most conservatives believe is inconsistent with what Justice O'Connor and her colleagues did in *Grutter*, and inconsistent

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* Raoul Berger Professor of Legal History, Northwestern University School of Law; Legal-affairs Editor, CHRONICLES: A MAGAZINE OF AMERICAN CULTURE.

1. David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in* Gratz *and* Grutter *of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483 (2004).

2. Dennis J. Shields, *A Response to Crump's Narrow Tailoring Analysis of* Grutter: *Does it Matter How Many Angels Can Dance on the Head of a Pin?*, 56 FLA. L. REV. 761 (2004).

3. 539 U.S. 306 (2003).

4. Crump, *supra* note 1, at 506.

5. Professor Crump cites John Leo for this proposition. Crump, *supra* note 1, at 505 n.130 (citing John Leo, *The Supremes' Sophistry*, U.S. NEWS & WORLD REP., July 14, 2003, at 7).

6. STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED 210-14, 219-25, 284 (1994) (advocating a color-blind Constitution).

7. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens.").

as well with what Professor Crump proposes as an alternative to *Grutter*'s approach. Accordingly, in this Commentary I will first set out what I believe to be the principal tenets of modern American conservatism and then suggest how they apply in the context of constitutional law. I will proceed to criticize the opinions in *Grutter*[8] and *Gratz*[9] in light of this particular version of conservative jurisprudence, and then subject Professor Crump's proposal to the same conservative scrutiny.

I. WHAT DO AMERICAN CONSERVATIVES BELIEVE?

There is some confusion over the core beliefs (if there are any) held by American conservatives. If one reads the English and American popular press, one can find references to "neo-conservatives,"[10] "paleoconservatives,"[11] "libertarians,"[12] and "Straussians,"[13] just to

8. Grutter v. Bollinger, 539 U.S. 306 (2003).

9. Gratz v. Bollinger, 539 U.S. 244 (2003).

10. *See, e.g.*, Alec Russell, *Fighting Talk from Prince of "Neo-cons" Alec Russell in Washington Meets Richard Perle, One of the Intellectual Driving Forces Behind the Iraq Conflict, Who Will Also Be in London*, DAILY TELEGRAPH (London), Nov. 17, 2003, at 12 ("The closest equivalent of neo-conservatives would be classical liberals: people who believe the blessings of freedom should be made widely available.").

11. *See, e.g.*, William A. Rusher, *Conservatism 101: A Checklist*, CHATTANOOGA TIMES FREE PRESS, June 16, 2003, at B7.

> In or about 1986 (there is some dispute over the exact year), a group of conservatives who disliked the interventionist foreign policies and alleged indifference to big government that was being displayed by the neoconservatives, ferociously denounced them, loudly abandoned the conservative movement altogether, and called themselves "paleoconservatives." Most of their names are not nationally familiar, but Pat Buchanan belongs in (or somewhere near) this group, since he favors America First isolationism and trade protectionism (tariffs).

Id.

12. *See, e.g., id.*

> From the start, the conservatives recognized the existence of a group of country cousins who called themselves "libertarians." The libertarians had been around for a while. Their big obsession was government, which they wanted to keep as small as possible. The conservatives had considerable sympathy for this view, but thought there was more to conservatism than just that. Moreover, the libertarians' antagonism to government action kept them from endorsing wholeheartedly government measures needed to win the Cold War.

Id.

13. Paul Starobin, *The French Were Right*, 35 NAT'L J. 1, Nov. 8, 2003 ("Straussians tend to believe in the ability of intellectual elites—modern-day philosopher-kings—to discern truths unavailable to lesser minds. 'It's a European style of getting the peasants to do what "we" say,' said James Pinkerton, a critic of the Iraq intervention who worked in the Bush I White House.").

mention a few groups thought to populate the Right of the American political spectrum. All have different ideas about how our polity ought to be run. The proliferation of these nuanced views probably owes something to the general success of Republican politicians in the post-New Deal era, as the centralized planning of socialist economies led to the collapse of the Soviet Union, in particular, and communism in general, in Western Europe. Still, there do seem to be a few general principles that define American conservativism set forth in what ought to be regarded as the bible of modern American conservative thought, the late Russell Kirk's *The Conservative Mind: From Burke to Eliot.*[14]

Slightly edited, these "six canons of conservative thought," as Kirk called them, are:

> 1) Belief in a transcendent order, or body of natural law, which rules society as well as conscience. . . .
> 2) Affection for the proliferating variety and mystery of human existence, as opposed to the narrowing uniformity, egalitarianism, and utilitarian aims of most radical systems . . . .
> 3) Conviction that civilized society requires orders and classes, as against the notion of a "classless society." . . .
> 4) Persuasion that freedom and property are closely linked . . . .
> 5) Faith in prescription and distrust of "sophisters, calculators, and economists" who would reconstruct society upon abstract designs. . . .
> 6) Recognition that change may not be salutary reform: hasty innovation may be a devouring conflagration, rather than a torch of progress. . . .[15]

These six canons are at odds with the currently ascendant philosophy in the academy, in general, and the law schools, in particular, which is dominated by the insights of Oliver Wendell Holmes, Jr. and the "legal realists." Most legal academics today probably believe that there are no transcendent principles governing law or society; that the best one can do at the macro level is to seek to implement democratic or utilitarian notions that are generally regarded as "convenient" at a particular time and place, while, at the micro level, leaving individuals free for themselves "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[16] Kirk's canons do, however, fairly characterize

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14. RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT (7th rev. ed. 1994).

15. *Id.* at 8-9.

16. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) (commonly referred to as the notorious "mystery passage"). This observation is, of course, a gross

the beliefs of Edmund Burke,[17] the leading English classical liberal and critic of the French Revolution, now regarded as the seminal modern conservative thinker;[18] William Blackstone,[19] whose *Commentaries on the Laws of England* were profoundly influential on the development of American law in the nineteenth century; and many of the American founding generation, most notably George Washington, John Adams, and Alexander Hamilton.[20]

Not everyone in the academy would agree with this assertion, but it seems to me to be undeniable that the United States Constitution of 1789 and the Bill of Rights, which followed in 1791, were designed to make permanent for American government many, if not most, of the principles suggested by these "six canons." These principles include, for example: deference to established precedents of the English common law and "ancient constitution" based on natural law; the primacy of the protection of private property, also thought to be guaranteed by that natural law; and, in general, the freedom of the individual, protected in person and property by the government, to engage in the spiritual and economic pursuits he preferred, so long as those pursuits were consistent with a government founded on the rule of law and what we now generally refer to as "Judeo-Christian" moral and religious notions.[21] Still, while the Constitution appears to have been conceived in a manner that sought to recognize the liberty, property, and dignity of individuals, its Framers also recognized that in order for American society to function properly, there needed to be a means to avoid some of the passions of the moment, to counter inevitable tendencies toward corruption in humankind and all government, and to elevate to positions of power those individuals of superior knowledge and character.[22]

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generalization, but for some further elaboration backing up this assertion please see, for example, Stephen B. Presser, *Some Thoughts on our Present Discontents and Duties: The Cardinal, Oliver Wendell Holmes, Jr., the Unborn, the Senate, and Us*, 1 AVE MARIA L. REV. 113 (2003), and PRESSER, *supra* note 6, at 49-58.

17. *See generally* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Frank M. Turner ed., Yale Univ. Press 2003) (1791) (providing perhaps the best introduction to Burke's thought).

18. *See, e.g.*, KIRK, *supra* note 14, at 1 (calling Burke "the greatest of modern conservative thinkers").

19. *See generally* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Univ. of Chi. Press 1979) (1765-1769); *see also* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW (Univ. of Chi. Press 1996) (1941) (providing a modern classic interpretation of Blackstone).

20. For the argument that these Founders possessed a philosophy of government much like that of Burke, see, for example, PRESSER, *supra* note 6, at 65-67.

21. *Id.*

22. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-87 (1998 ed.) (1971).

The familiar constitutional principles of separation of powers, checks and balances, federalism, and the rule of law were means to the achievement of the kind of society suggested by Kirk's six canons, and they apparently were advocated by the most advanced works of "the science of politics" available to the Framers, most notably Blackstone and Montesquieu.[23]

From Montesquieu came the notion expressed by Hamilton in *Federalist 78*, that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'"[24] Hamilton was stressing the need for an independent judiciary with lifetime tenure and a guaranteed salary, but Montesquieu's remark also indicates that the task of judges is not to legislate, but simply to declare the law as it is, not as they might desire it to be. In our time, profoundly influenced as we are by Holmes and the legal realists' view that the task of judges is inherently legislative,[25] it is not easy in the academy to maintain such a view of the judiciary. Nevertheless, the argument that judges should interpret and reveal law and not make policy continues to be a staple of conservative constitutional thought, most forcefully expressed in works such as Learned Hand's *The Bill of Rights*. As Hand put it:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.[26]

This notion led Hand to suggest that when the Court is interpreting the Constitution, its only proper role is to determine what the document was understood to mean at the time it was written; it is not its job to depart from that original understanding. Others, who probably could be characterized as Burkean conservatives, went somewhat further than Hand and concluded that it was appropriate for the Court to depart from the original understanding of particular provisions, so long as the Justices remained faithful to the values contained within those provisions, and so

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23. On Blackstone and Montesquieu and their influence on American political thought at the time of the Founding see, for example, PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM (2003).

24. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoting Montesquieu's *Spirit of Laws*).

25. For Holmes's elaboration of this notion see, for example, OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Mark DeWolfe Howe ed., Belknap Press 1963) (1881). For the most radical statement of the legal realists' embrace of Holmes's thought that the nature of judging is legislative, see JEROME FRANK, LAW AND THE MODERN MIND (Coward-McCann 1949) (1930).

26. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

long as they were able to articulate "neutral principles," apart from a desire for results in the particular case then before them, that could be applied, in a general manner, to similar situations in the future.[27]

The folly of this conservative view was decried in the academy and even from the bench.[28] But, curiously, the conservatives' notion that judges should not be engaged in the task of formulating social policy for Americans continues to resonate with a significant part of our population. The idea that judges should interpret and not legislate was a major theme of George W. Bush's first presidential campaign, will likely be similarly invoked in his second,[29] and is still being bandied about in controversies over judicial appointments in the United States Senate.[30]

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27. For some representative works in this genre, see, for example, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (Touchstone 1990) (1989), ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), and Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

28. *See, e.g.*, J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971) (critiquing the thought of Wechsler, Alexander Bickel, and others whom Judge Wright, then sitting on the United States Court of Appeals for the District of Columbia Circuit, believed were advocating an impossible and wrong-headed constitutional jurisprudence).

29. *See, e.g.*, Nan Aron, *Judicial Disappointments*, IN THESE TIMES, Mar. 15, 2004, at 18.

> Bush's reelection would provide the opportunity to appoint at least three Supreme Court justices. Based on Bush's statements on justices he likes and the kind of judges he has nominated, all indications show his nominees would be in the mold of Antonin Scalia and Clarence Thomas. A second Bush term would cement the Republicans' hold on the federal judiciary for decades to come.

Id.; *see also* Jonah Goldberg, *It's Alive!*, NAT'L REV., July 8, 2003, ("Justice Scalia has summed up the Right's basic position succinctly. 'The Constitution is not an organism. It is a legal document.' Equally succinct, George W. Bush explained during the 2000 campaign that he likes judges like Scalia and Clarence Thomas."); *What is the Law?*, CHATTANOOGA TIMES FREE PRESS, Mar. 15, 2004, at B7 ("President George W. Bush wants judges who don't make law but apply what has already been written by the Founders and by the people's elected representatives.").

30. *See, e.g.*, Stephen B. Presser, *Should Ideology of Judicial Nominees Matter?: Is the Senate's Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245 (2001). For a somewhat lighter-hearted consideration of the current dispute over the selection of judges, compare Geoffrey R. Stone, *Judicial Activism & Ideology*, 6 GREEN BAG 2D 281 (2003) (arguing that it is appropriate for the Senate to examine the ideology of judges), with Stephen B. Presser, *What a Real Conservative Believes about "Judicial Ideology,"* 6 GREEN BAG 2D 285 (2003) (arguing that it is not appropriate).

II. APPLYING A CONSERVATIVE CRITIQUE TO THE *GRUTTER* DECISION

How, then, might one apply this conservative critique to what the United States Supreme Court did in *Grutter*?[31] It is very difficult to understand the Court as doing anything other than articulating an essentially legislative judgment. We might begin with the "compelling interest" and "narrow tailoring" elements that the Court is ostensibly following.[32] Nowhere in the Constitution, of course, does it talk about "compelling interests"; rather, the Court devised this concept to accomplish the tricky task of permitting state officials to perform acts that would otherwise be marked unconstitutional. After *Grutter*, no one knows what actually is a compelling interest that permits racial discrimination. As Justice Thomas pointed out, before *Grutter*, compelling interests seemingly had something to do with national security or remedying prior racial discrimination,[33] but neither of these is applicable to the Michigan situation. As Professor Crump and several of the Supreme Court Justices remarked, narrow tailoring is equally lacking in transparency.[34] If it is supposed to mean the narrowest possible constitutional breach to achieve worthy goals, the scheme used by the University of Michigan Law School does not seem to fit the bill.

Like other cases in which Justice O'Connor has written or participated in the majority or plurality opinions, the Court in *Grutter* sought to apply what is essentially a balancing test. The Court recognized that racial discrimination in any form is bad, but a little of it is permissible to accomplish more worthy goals (such as social advancement for previously discriminated-against races or ethnic groups). Justice O'Connor had considerable experience as a state legislator before serving on the Supreme Court, and it certainly appears as if her "balancing tests" are more the tools of someone engaging in the kind of policy choices characteristic of a state legislator than anyone seeking neutrally to apply a pre-existing rule of law.[35] Professor Crump is quite correct to call Justice O'Connor's

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31. Grutter v. Bollinger, 539 U.S. 306 (2003).

32. *See id.* at 324-26.

33. *Id.* at 351-52 (Thomas, J., concurring in part and dissenting in part).

34. *See, e.g.*, Crump, *supra* note 1, at 494 (noting that Justice O'Connor's conclusion that the University of Michigan School of Law's affirmative action policy was narrowly tailored was "unpersuasive").

35. On the inappropriateness of the kinds of balancing tests that Justice O'Connor is prone to embrace, see, for example, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). For specific recent criticisms of Justice O'Connor's essentially legislative approach to deciding questions of constitutional law see, for example, Charles Krauthammer, *Courting a Crisis of Legitimacy*, WASH. POST, July 4, 2003, at A23 ("A foreigner might then ask: What exactly is your Constitution? Now we know the answer. The Constitution is whatever Justice

pronouncement that the ruling in *Grutter* should expire after twenty-five years[36] "eye-popping"[37]—although I prefer "mind-boggling"—but such a sunset provision would not be surprising in a legislative act. It is, however, hardly the stuff of natural law, original understanding, or adherence to previous precedent.

Still, one should not be too hard on Justice O'Connor. If she is the worst villain when it comes to "balancing tests" and legislative pronouncements on our highest Court, she certainly has accomplices now (like Justices Kennedy and Souter in *Planned Parenthood v. Casey*,[38] and Justices Breyer, Ginsburg, Souter, and Stevens in *Grutter*[39]), and like-minded predecessors (including Justice Powell in *Regents of the University of California v. Bakke*,[40] and a majority of the Warren Court in decisions such as *Miranda v. Arizona*,[41] *Reynolds v. Sims*,[42] *Baker v. Carr*,[43] and even *Brown v. Board of Education*[44]). The Supreme Court's penchant for laying out detailed rules for state and local governments to follow that result from balancing tests and that are hardly clearly mandated by the Constitution is nothing new.

Moreover, the champions of "neutral principles" have never been able to articulate a means of solving the difficult problem that some constitutional values, such as the freedom of association purportedly guaranteed by the First Amendment[45] and the Fourteenth Amendment's guarantee of "equal protection,"[46] are somewhat at odds. Deciding how to prioritize them (as must inevitably be done) is not an activity for which the Constitution itself offers much guidance.[47] A conservative might suggest

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Sandra Day O'Connor says it is. On any given Monday."), and Goldberg, *supra* note 29. Jonah Goldberg intoned:

> As Charles Krauthammer and others have noted, Sandy Baby (as John Riggins once dubbed her) is the Constitution of the United States of America. If she wants the text to mean free speech for everybody, then free speech for everybody it is. If she wants it to mean censorship for everybody, well shut my mouth!

Id.

36. *Grutter*, 539 U.S. at 343.
37. Crump, *supra* note 1, at 494.
38. *See* 505 U.S. 833, 850 (1992).
39. *See Grutter*, 539 U.S. at 324-25.
40. *See* 438 U.S. 265, 299 (1978) (Powell, J.).
41. *See* 384 U.S. 436, 515 (1966).
42. *See* 377 U.S. 533, 578 (1964).
43. *See* 369 U.S. 186, 258-60 (1962).
44. *See* 347 U.S. 483, 492-93 (1954).
45. U.S. CONST. amend. I.
46. U.S. CONST. amend. XIV.
47. *See, e.g.*, Wechsler, *supra* note 27, at 25-26 (stating that he is unable to prioritize

that in such a situation the job of the Court is to defer to the political branches of the government, and this seems to be the reason that Learned Hand,[48] Alexander Bickel,[49] and others were critical of the Warren Court's attempts at societal reconstruction.

Even if one conceded the propriety of some balancing on the part of the Court, even if one were able to make sense of the basis for calling some interests compelling and others not, and even if one were willing to sign on to narrow tailoring and twenty-five-year sunset provisions in judicial opinions, it would still be difficult to defend *Grutter* from a conservative perspective. From a conservative perspective, one ought to be able to demand of the Court, at a minimum, some sincerity, honesty, or transparency (this must be the meaning of "reasoned elaboration" after all)[50] in the interpretation of the Constitution.

Undoubtedly there have been other opinions where the dissenters attack the basic integrity of what the majority has done, but *Grutter* surely now wins the prize. Justice Rehnquist found that what the majority had approved was "a naked effort to achieve racial balancing"[51] and rejected the "critical mass" argument of the Michigan Law School, since there was apparently no attempt to secure critical masses of Native Americans or Hispanics.[52] The Law School's "alleged goal of 'critical mass,'" the Chief Justice explained, "is simply a sham."[53] Justice Kennedy was equally forthright. Joining in Justice Rehnquist's opinion, he stated:

> [Rehnquist] demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is, by the Court's own admission, "patently unconstitutional."[54]

Even one of the majority Justices, Justice Ginsburg, to her credit, writing in *Gratz*, appears to understand that what the Court was approving

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competing constitutional values of First Amendment Freedom of Association and Fourteenth Amendment Equal Protection in the context of court-mandated racial integration). *But see* Wright, *supra* note 28, at (suggesting that such prioritization is possible and it is the Court's job to do it).

48. *See* HAND, *supra* note 26, at 73.

49. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 6-8 (Yale Univ. Press 1978) (1970).

50. On "reasoned elaboration," see generally Wechsler, *supra* note 27.

51. Grutter v. Bollinger, 539 U.S. 306, 379 (2003) (Rehnquist, C.J., dissenting).

52. *Id.* at 379-83 (Rehnquist, C.J., dissenting).

53. *Id.* at 383 (Rehnquist, C.J., dissenting).

54. *Id.* at 389 (Kennedy, J., dissenting) (quoting *id.* at 330).

in *Grutter* is a procedure conducted by "winks, nods, and disguises."[55] Justice Scalia ridiculed the *Grutter* majority for advancing as a compelling interest in a law school the teaching of the kind of "good 'citizenship'" lessons that are more appropriate for the Boy Scouts or kindergarten.[56] Scalia essentially labeled what the majority had done as incoherent and counterproductive because of the litigation it will encourage.[57] From Justice Thomas came some of the most biting observations. In particular, Thomas wrote: "The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti."[58] Professsor Crump also does a fine job of exposing the fact that the majority's reliance on "diversity" as a compelling constitutional goal is fatally flawed, or at least deeply "'fudged.'"[59]

Neo-conservatives are said to endorse the purported teaching of Plato that sometimes the telling of "noble lie[s]" or the maintenance of manufactured state "myth[s]" is justifiable because of the limited capacities of the masses, and the need to secure their obedience and allegiance.[60] The great Dostoevsky made a similar observation about most Russians' need to find "miracle, mystery, and authority" in the Church.[61] There has even been a recent article in a political science journal defending *Grutter* as a necessary exercise in deception to achieve a greater good.[62]

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55. Gratz v. Bollinger, 539 U.S. 244, 305 (Ginsburg, J., dissenting).

56. *Grutter*, 539 U.S. at 347-48 (Scalia, J., concurring in part and dissenting in part).

57. *Id.* at 348 (Scalia, J., concurring in part and dissenting in part) ("Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.").

58. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part).

59. *See, e.g.*, Crump, *supra* note 1, at 528 & n.336 ("Michael Kinsley, often thought of as a liberal columnist, describes the Court's opinion as permitting a 'fudged' result. '[C]onfusion,' he says, 'seems to be a purposeful strategy' of the Court, which he thinks is 'in denial on this point.'") (alteration in original) (quoting Michael Kinsley, *Want Diversity? Think Fuzzy*, WASH. POST, June 25, 2003, at A23).

60. *See, e.g.*, Danny Postel, *Noble Lies and Perpetual War: Leo Strauss, the neo-cons, and Iraq*, OPEN DEMOCRACY (Oct. 16, 2003), *at* http://www.opendemocracy.net/debates/article-3-77-1542.jsp (discussing the "neo-cons'" dependence on the thought of Leo Strauss, who is said to have borrowed the concept of the "noble lie" from Plato).

61. FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 307 (Andrew R. MacAndrew trans., Bantam Books 1970) (1880). *See generally* William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 850 (1993) (concluding that embracing "miracle, mystery, and authority" entails surrendering freedom, while acknowledging the complexity of Dostoevsky's portrayal of the Grand Inquisitor).

62. Daniel Sabbagh, *Judicial Uses of Subterfuge: Affirmative Action Reconsidered*, 118 POL. SCI. Q. 411, 411, 435-36 (2003). Sabbagh argues:

Whatever the social scientists, novelists, or political partisans might say, however, it is difficult for any conservative with any remaining belief in "reasoned elaboration" or the "rule of law" (which amounts to the same thing) to defend a constitutional jurisprudence, like that in Justice O'Connor's opinion in *Grutter*, built upon a tissue of lies. Alexander Hamilton's *Federalist 78* and several of the other *Federalist Papers* were devoted to suggesting that character and integrity were important in the choice of judges and other officials. Opinions perpetrating "shams," "faddish slogans," or "nods and winks" would not seem to be what Hamilton, Madison, and Jay had in mind.[63]

Why, then, the need for this deception? What really is sought to be concealed? Professor Crump is clearly onto something when he advances a goal of "nondiscrimination" rather than "diversity,"[64] and I'll have a bit more to say about this below, but what really seems to prompt the majority's approval of what we might label the thinly disguised quota system in *Grutter* is the intractability of the gap between the standardized test scores and grades of blacks and other minorities when compared to those for whites and Asians.[65] Perhaps Justice O'Connor's sunset provision

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> [S]ome of the most important developments in the Supreme Court's case law on affirmative action and racial discrimination in general can be understood as reflecting a tendency to approximate the hypothetical end state that would result from the unknown implementation of affirmative action programs. Affirmative action is a policy that requires a measure of dissimulation to succeed.

Id. at 411. Sabbagh suggests that is what the majority was up to in *Grutter*. *Id.* at 435-36.

63. For the importance of character and integrity in *The Federalist Papers*, and on the part of the Framers generally see, for example, Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666 (1999) (arguing that the importance that the Framers accorded to character and integrity would have led them, if they had the chance, to vote to impeach former President Clinton).

64. Crump, *supra* note 1, at 506-13.

65. *See, e.g.*, Sabbagh, *supra* note 62, at 431 ("Within a theoretically flexible affirmative action program, the average SAT scores of black and Hispanic applicants may lag too far behind those of white and Asian applicants for a suitable degree of diversity to obtain if one is to consider race and ethnicity simply as 'one factor among others.'") (citing THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998) and Jeffrey Rosen, *Is Affirmative Action Doomed?*, NEW REPUBLIC, Oct. 17, 1994); *see also* Lino A. Graglia, *The "Affirmative Action" Fraud*, 54 WASH. U. J. URB. & CONTEMP. L. 31, 31-32, 36 (1998). Graglia notes:

> The whole point of all racial preference programs is to evade and camouflage the fact that the groups preferred by the programs cannot otherwise compete with others for admission to selective institutions of higher education on the basis of the standard criteria for academic achievement or ability. It is necessary, therefore, that misdirection and concealment characterize every aspect of such programs. . . .
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> The virtual nonexistence of blacks at the level of academic achievement required for admission to highly selective schools means that their admission in

is advanced in the belief that this gap will somehow recede in the next quarter-century, but the statistics cited by Justice Thomas do not support such an assertion.[66]

The majority in *Grutter* seems also to be revealing its policy-making role, and its departure from traditional constitutional analysis, by indicating its reliance on social scientists to support its advancement of "diversity" as a compelling state interest.[67] There is, of course, some precedent for the reliance on the work of social psychologists in matters of race. *Brown v. Board of Education* depended, for its conclusion that "[s]eparate educational facilities are inherently unequal," on the conclusion of psychologists and others that separating students by race damaged the "hearts and minds" of the black students in a manner that made it more difficult for them to learn.[68] While this conclusion was the

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> substantial numbers requires that the ordinary admission criteria be not merely bent or relaxed, but virtually ignored.

Id.

66. Grutter v. Bollinger, 539 U.S. 306, 375-77 (2003) (Thomas, J., concurring in part and dissenting in part). Thomas noted:

> The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that timeframe. In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black.

Id. at 375-76 (Thomas, J., concurring in part and dissenting in part) (footnote omitted).

67. *Id.* at 330-32 ("In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'") (quoting Brief for American Educational Research Association et al. as Amici Curiae at 3, *Grutter*, 539 U.S. 306 (No. 02-241) (citing W. BOWEN & D. BOK, THE SHAPE OF THE RIVER (1998), DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (G. Orfield & M. Kurlaender eds., 2001), and COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES (M. Chang et al. eds., 2003))). *But see id.* at 2358 (Thomas, J., concurring in part and dissenting in part) (providing a scathing critique of these conclusions); *infra* text accompanying notes 74-82.

68. 347 U.S. 483, 493-94 (1954). To support the assertion that "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding [of the psychological damage that racial segregation does to black students] is amply supported by modern authority," *id.* at 494, the Court cited the following authority:

> K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J.Psychol. 259 (1948); Chein, What are the Psychological Effects of

ostensible reason for deciding *Brown*, a later attempt to allow racial segregation in the schools, on the grounds that the work of other social scientists suggested that racial homogeneity actually fostered an atmosphere more conducive to learning, was summarily rejected.[69] The *Brown* Court's professed reliance on social science allowed it to make an end run around *Plessy*'s concept of "separate but equal" without actually overruling that decision.[70] However, one suspects the *Brown* Court was really using the data of psychologists as a prop to support a decision based not on the psychology of learning, but rather on some set of assimilationist notions grounded in a concept of a color-blind Constitution that some members of the Court must not have believed the nation (or at least constitutional lawyers) was quite prepared for. That the psychological aspects of *Brown* were far less important than the political or internationalist aspects now seems to be a staple of scholarship on the decision.[71]

The fact that *Brown* must have been about more than social psychology roiled its critics, such as Herbert Wechsler, who wondered how damage to "hearts and minds" of schoolchildren could explain the Court's subsequent summary decisions that there could be no racial discrimination in public parks, swimming pools, and golf courses.[72] Wechsler took the Court to task for failing to decide according to traditional canons that required at least some support in the reasoning of prior cases to decide subsequent ones.[73] One wonders whether Wechsler, as a good conservative, was also concerned that the Court really had no competence to decide cases on the grounds of social psychology in the first place.

Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-81. And see generally Myrdal, An American Dilemma (1944).

Id. at 494 n.11.

69. *See* Stell v. Savannah-Chatham County Bd. of Educ., 220 F. Supp. 667, 668-75, 682 (S.D. Ga. 1963) (upholding segregated schools based on extensive social science data), *rev'd* 333 F.2d 55, 61-62, 67 (5th Cir. 1964) (summarily dismissing the social science data presented below).

70. Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896) (holding that "separate but equal" was constitutional with regard to the provision of public transportation).

71. *See, e.g.*, MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 90-113 (2000) (arguing that *Brown* was designed to send a message in the cold war era that ours was a just society); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1998) (describing the Warren Court's general effort to implement its conception of democracy and justice); Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450 (1988) (demonstrating how the Warren Court used the insights of legal realism to seek to transform American law).

72. Wechsler, *supra* note 27, at 22.

73. *Id.* at 15.

One might conclude that the *Grutter* Court's support of the Michigan Law School admissions policy could be attacked on the same grounds. Among other things, this argument is what Justice Thomas (another good conservative) writes in his dissent. Thomas observes that the majority in *Grutter* relies on "social science evidence to justify its deference" to the Law School's conclusion that including a "critical mass" of black students will lead to educational benefits for all students.[74] Thomas then criticizes the majority for failing to take into account other social science data that suggest, for example, that "the racial mix of a student body produced by racial discrimination of the type practiced by the Law School in fact hinders students' perception of academic quality" or "the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students."[75] Indeed, turning to a prior opinion of the Court on racial matters, Thomas states: "Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination 'engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race.'"[76] Or worse, "'[t]hese programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.'"[77] For Thomas, the University of Michigan Law School and the Supreme Court majority that supported it were favoring a trendy "aesthetic"[78] concept that demanded the proper proportion of black and minority faces in the classroom—a concept that actually harmed those it ostensibly sought to help.

Thomas' key point was that rather than assessing the costs of the Law School's program to all students, the majority blithely accepted the University of Michigan's claim that counting by race has educational benefits. Indeed, as Thomas implies, if deference to these kinds of judgments on the part of schools was constitutionally required, then the Court should have upheld discrimination by sex in the *VMI* case.[79] Justice Thomas thus highlighted the three most troubling aspects of *Grutter* for conservatives (or those who care about the rule of law); the intellectual

74. Grutter v. Bollinger, 539 U.S. 306, 364-66 (2003) (Thomas, J., concurring in part and dissenting in part).

75. *Id.* at 364 (Thomas, J., concurring in part and dissenting in part).

76. *Id.* at 373 (Thomas, J., concurring in part and dissenting in part) (alteration in original) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in judgment)).

77. *Id.* (Thomas, J., concurring in part and dissenting in part) (quoting *Adarand Constructors, Inc.*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in judgement)).

78. *Id.* at 354 n.3 (Thomas, J., concurring in part and dissenting in part).

79. *Id.* at 364-68 (Thomas, J., concurring in part and dissenting in part) (discussing *United States v. Virginia*, 518 U.S. 515 (1996)).

incoherence of the majority's refusal to ground its decision in prior precedent; the emptiness of the compelling interest and narrow tailoring standards; and the abandonment of the Constitution in favor of a set of social scientists (or "aesthetes") whose questionable views are uncritically accepted.

Thomas powerfully condemned the majority's condescending attitude toward blacks, which manifested itself in the deference the majority gave to the Law School and the social scientists. He began his dissent with a quotation from Frederick Douglass indicating that the best thing for blacks was to subject them to the same tests, requirements, and standards applied to non-minorities.[80] For Thomas and for other conservatives, the Court should have invoked the "color-blind" approach of the great Harlan dissent in *Plessy*[81] and some of the Court's more recent rejections of racial set-aside plans,[82] and Michigan Law School's "color-conscious" admissions plan should have been rejected.

Still, if conservative constitutional law, as currently practiced, requires adherence to the original understanding of constitutional provisions, one has to at least hesitate before accepting the concept of a color-blind Constitution applied to state educational systems. At least one scholar, examining the founding era and the history of the Fourteenth Amendment, has constructed a powerful originalist case for interpreting the Fourteenth and Fifth Amendments as permitting race-conscious remedies and affirmative action of the kind practiced by the University of Michigan.[83] Indeed, one of the leading proponents of "originalism," Raoul Berger, in criticizing the Court's interpretation in *Brown* and a host of other Fourteenth Amendment decisions, has passionately argued that the Fourteenth Amendment should be restricted to its original purposes: protecting from state interference the freedoms guaranteed by the 1866 Civil Rights Act, specifically the right of black citizens (and others) to enjoy the same enforcement of property and contract rights available to white citizens.[84] In areas of education, criminal law enforcement, and even

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80. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part) ("Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators.").

81. Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

82. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

83. Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998). Professor Siegel addresses the power of the Federal Government to enact such remedial legislation, but his work has implications as well for state law. *Id.* at 481.

84. Raoul Berger, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997). *But see* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (criticizing Berger for slighting sources indicating that the Fourteenth Amendment was intended to have a broader reach than just to legitimate the 1866 Civil

voting, originalists such as Berger might argue that the states should be free to administer whatever policies they find appropriate, and thus accumulate a critical mass of black and other minority students in law schools (or colleges), at least if the only objection was grounded in Fourteenth Amendment constitutional law.

But whether the Constitution itself is color-blind, and whether the Fourteenth Amendment had limited objectives, a conservative who sought merely to get courts to follow statutory directives should have been troubled by the conduct of the majority in *Grutter*. This dismay results because, while the Constitution may not clearly be color-blind, for some time now Congress has adopted a national policy that might be so characterized. There was, for example, a famous moment in congressional history when then Senator Hubert Humphrey promised that he would "'eat the paper the bill was written on'" if the Civil Rights legislation then before the federal legislature (Title VII of the Civil Rights Act of 1964) could ever be construed as allowing preferential treatment by race.[85] More to the point, there is now legislation, Title VI of the Civil Rights Act of 1964,[86] relied on in part by the plaintiffs who sought to overturn the University of Michigan's admissions policies,[87] which provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[88] There is some Supreme Court authority that these words only forbid discrimination forbidden by the Fourteenth Amendment,[89] but they are clearer and more specific than the Fourteenth

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Rights Act).

85. *See* PRESSER, *supra* note 6, at 186 (quoting JARED TAYLOR, PAVED WITH GOOD INTENTIONS: THE FAILURE OF RACE RELATIONS IN CONTEMPORARY AMERICA 126 (1992)).

86. 42 U.S.C. § 2000d-2000d-4a (2000). The United States Supreme Court also noted in *Gratz* that the 1866 Civil Rights Act, 42 U.S.C. § 1981 (2000), "was 'meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race,'" and "that a contract for educational services is a 'contract' for purposes of § 1981." Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003) (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295-96 (1976)).

87. *See* Gratz v. Bollinger, 122 F. Supp. 2d 811, 813-14 (2000), *rev'd*, 539 U.S. 244 (2003).

88. 42 U.S.C. § 2000d (2000).

89. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 325 (Brennan, J., concurring in part and dissenting in part) ("[A]s applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself."). It should be noted that in Bakke:

> THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*, prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that

Amendment's "equal protection" language and can clearly stand on their own. The Fourteenth Amendment may be ambiguous as to whether it guarantees a color-blind Constitution, but Title VI seems more clearly to guarantee color-blind federal funding.

If the University of Michigan Law School's plan, as Chief Justice Rehnquist, Justices Scalia, Kennedy and Thomas, and Professor Crump have demonstrated, really did amount to impermissible counting and admitting by race (the obfuscatory pronouncements of the majority notwithstanding), then because the University of Michigan clearly was in receipt of federal funds, the majority, relying on the statute, should have struck down the Law School's admission program. Whatever the original understanding of the Fourteenth Amendment mandates, there seems to be no constitutional objection, at least where the allocation of federal funds is concerned, to Congress's formulating a national policy that seeks to bar all discrimination based on race. Where it has clearly indicated a desire to do so, even a minimal belief in conservative concepts of the rule of law should have dictated deference to that congressional policy. As Justice Samuel Chase put it in June 1804:

> I know that in England construction has gone a great way in construction of the words of Statutes. This doctrine I explode. If the words of Statutes are clear, I am bound, tho' the provision be unjust. This I hold to be the duty of an American Judge. [A] Judge has in this Country only to say Sic lex est scripta.[90]

On any conservative test, whether it is transparency, avoidance of public policy pronouncements based on social science data of a kind only a legislature is equipped to evaluate, or even the minimal requirements of the adherence to previous precedent or the dictates of statutes, the majority opinion in *Grutter* fails. But what of Professor Crump's alternative?

> respondent Allan Bakke's rights have been violated and that he must, therefore, be admitted to the Medical School."

Id. (Brennan, J., concurring in judgment in part and dissenting in part).

90. Penn's Lessees v. Pennington (Del. Cir. Ct. 1804), *available at* Richard S. Rodney, *The End of the Penns' Claims to Delaware, 1789-1814*, 61 PA. MAG. HIST. & BIOGRAPHY 182, 196 (1937) (alteration in original). For similar adherence to the *sic lex est scripta* rule on the part of a sitting Supreme Court Justice, see generally SCALIA, *supra* note 27.

III. APPLYING THE CRITIQUE TO PROFESSOR CRUMP'S PROPOSAL

Professor Crump's article is a subtle, indeed, one is tempted to say, *nuanced*, approach to the problem of what to do with race in law school admissions, and, if ultimately I find his suggested solution unsatisfactory, I still think he has made a laudable contribution to the discussion. As I have previously indicated, he has done a fine job pinpointing inconsistencies and weaknesses in the majority opinion in *Grutter*. In particular, he correctly suggests that the majority appears to be approving what is better described as "racial diversity" than as "viewpoint diversity."[91] He astutely notes John O. McGinnis and Matthew Schwartz's observation that if universities were really interested in viewpoint diversity, they would be out seeking affirmative action means of hiring more Evangelical Christians and Republicans.[92] He is similarly correct to stress the inevitable invidiousness that the *Grutter* majority is condoning, which may ultimately result in identifying who is black and who is white by "bloodline percentages" or other distasteful means.[93] He makes much of the arbitrary behavior the *Grutter* majority may allow, such as that of the Professor who hated Republicans and thus protested classifying Cubans as Hispanics.[94] As did Justice Thomas, Professor Crump rightly notes that "[w]e should not be surprised if race-driven admissions produce a student body that discounts the competence of minority group admittees" and if the kind of affirmative action now allowed by the United States Supreme Court will result in a situation that is unfair to racial minorities who got in on their merits, or to those who did not, but who later do succeed as well as other neutrally admitted students.[95] As Justice Thomas also stressed, this results in harm to the very group the majority seeks to protect.[96]

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91. Crump, *supra* note 1, at 500-01.

92. *Id.* at 502 n.159; *see also* Graglia, *supra* note 65, at 35 (noting that on law school faculties and in other institutions we have no problem accepting disproportionate representation of some minorities). Graglia writes:

> We seem generally to have no difficulty in accepting gross racial and ethnic disproportions in educational institutions and elsewhere. For example, Jews make up about forty percent of many law faculties, Asians dominate Ph.D.'s in math and science, and blacks make up two-thirds of the players in professional football and four-fifths in basketball.

Id.

93. Crump, *supra* note 1, at 503.

94. *Id.* at 504, 525-28.

95. *Id.* at 505.

96. *See* Grutter v. Bollinger, 539 U.S. 306, 364-74 (2003) (Thomas, J., concurring in part and

But while Thomas suggests, quoting Frederick Douglass, that all the "'negro'" wants is to be permitted to "'stand on his own legs'" on a basis of equality with others,[97] and thus race-neutrality ought to be favored in admissions, Professor Crump appears, ultimately, to rely on the same counting by race that he condemns in the *Grutter* majority.

Instead of rejecting the whole dubious edifice of compelling interests and narrow tailoring, Professor Crump embraces them, apparently believing that all that is needed is a bit of fine-tuning. His tuning *is* finer than that employed by the *Grutter* majority, such as his definition of compelling interest "as one that transcends political philosophies, temporal constraints, and rhetorical tricks."[98] But if this is an improvement over the *Grutter* majority, it is because that majority has attempted no real definition at all. Moreover, it also seems difficult to cabin the meaning of something "that transcends political philosophies, temporal constraints, and rhetorical tricks." This definition has the ring of something like "reasoned elaboration"[99] and would, at the least, exclude lying about what one is doing, but it seems to permit virtually anything that has a long history of being perceived as worthy to be labeled a compelling interest. Anything a court might conceivably think of as consistent with our "republican tradition," for example, might qualify. This list might include anything from encouraging belief in a transcendent creator to the protection of private property. Indeed, such a view of compelling interest might well permit more freedom to the Court to disregard unconstitutional action than it has employed in the past.

Even so, Professor Crump's compelling interest of "active nondiscrimination"[100] is a worthy one and might even be interpreted, at first blush, to be what he calls the "conservative" move to race-neutral remedies.[101] He quickly explains, however, that "active nondiscrimination"

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dissenting in part).

97. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part) (quoting Frederick Douglass, What the Black Man Wants: An Address Delivered in Boston, Massachusetts (Jan. 26, 1865), *in* 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blassingame & J. McKivigan eds., 1991).

98. Crump, *supra* note 1, at 512.

99. "Reasoned elaboration" is a jurisprudential style that developed in the fifties and sixties as a means of refuting the assertions of "legal realism" that decisions by judges were essentially legislative, if not arbitrary. The essence of it seemed to be that judges should elaborate on the principles of prior decisions, extending them where the logic of prior decisions seemed to compel such extension, and that while judges were not necessarily bound only by original understanding, they should leave legislation to legislatures and administrative agencies, which were better equipped to formulate policy. For a paradigm example of this approach, see Wechsler, *supra* note 27. On the development of reasoned elaboration, see generally G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

100. Crump, *supra* note 1, at 485.

101. *Id.* at 506 ("The 'conservative' view, to the extent that it is susceptible of definition, rejects both affirmative action and diversity, and it insists on government neutrality toward race.").

"differs from the putative liberal position [of encouraging racial diversity] because it is targeted at distributive justice rather than diversity" and, further, that "[n]ondiscrimination, here, means an active effort to overcome the effects of prejudice. It implies a decision-making structure that achieves distributive justice rather than ignoring it."[102] Alas, at about this point he loses me, and my way is not more clearly marked by his confession that he proposes to determine whether the goal of "active nondiscrimination" is being met "by something closely akin to the putative liberal objective: something very much like [*well*], racial diversity.... The unexplained absence of diversity is important not for its own sake, but because it suggests that the State's policies are not truly nondiscriminatory."[103]

As a conservative, I get nervous whenever there is talk of "distributive justice," because "distributive justice," which I suppose means something like giving people what they truly deserve,[104] has a nasty way of shifting into efforts at redistribution,[105] and thus violating Kirk's canon about the linkage between "freedom and [the protection of private] property."[106] Moreover, if Crump's "distributive justice" is used to correct prior discrimination (as might seem to be required by his notion of "active nondiscrimination"), then it might require the same selective picking of favored races and ethnic groups, and the same rejection of those disfavored, that Professor Crump rightly condemns on the part of the *Grutter* majority.

If I understand Professor Crump correctly, he is suggesting we must ensure "active nondiscrimination" results in law school classes in which there is minority representation that convinces us that discrimination has not been practiced. He appears to imply that if we engage in the kind of laudable recruiting efforts that the University of Houston's law school conducts, where it seeks to promote applications from students at

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I am not certain that the "conservative view," if one exists, does actually reject diversity. *See supra* text accompanying note 15 (discussing Russell Kirk's second canon); *infra* text accompanying notes 139-42.

102. Crump, *supra* note 1, at 506.

103. *Id.* at 506-07.

104. See, for example, the definition of "distributive justice," supplied by Wikipedia, the "Free Encyclopedia" on the Internet: "Distributive justice is the doctrine that a decision is just or right if all parties receive what they need or deserve. It is often contrasted with procedural justice. Distributive justice concentrates on just outcomes, while procedural justice concentrates on just processes." WIKIPEDIA, *at* http://en.wikipedia.org/wiki/Distributive_justice (last modified Feb. 25, 2004).

105. *See generally* JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE (1996) (providing a recent monograph on theories of distributive justice).

106. *See supra* text accompanying note 15.

historically black (and, presumably, other minority) colleges,[107] this process will later result in a class containing some discernable proportion of minorities that will demonstrate to us that "nondiscrimination" is being practiced.[108] Unless I'm missing something, it appears Professor Crump assumes that the qualities law schools ought to be seeking in applicants are more or less evenly distributed among all racial and ethnic groups, so that a school following a policy of "active nondiscrimination" that recruits from all groups, and does not then discriminate by race or ethnic group, will inevitably end up with racial and ethnic groups represented in a way that can objectively be determined to be "fair" or "just," or, perhaps, "balanced."[109] I think Professor Crump is bringing back "disparate impact" analysis, with a bit of gloss.[110]

Professor Crump appears to take the position that while more men than women may seek to apply to engineering schools, this may be because (for whatever reason) more men than women want to become engineers, and, if so, no need for measures to promote "active nondiscrimination" would be indicated.[111] In other words, in the case of engineering schools, there may be a credible "neutral" reason for unequal representation of the sexes, and thus there may not be invidious discrimination against women being practiced.[112] On the other hand, says Professor Crump, "[t]he prospect of a virtually all-male, all-white law school, hypothetically unexplainable by any neutral phenomenon, raises the constitutional question of racial equality."[113] But as his own data demonstrates, law schools are no longer

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107. Crump, *supra* note 1, at 531.

108. *Id.*

109. *See* Graglia, *supra* note 65, at 35-36 (arguing that these qualities are not evenly distributed).

110. On "disparate impact," see, for example, Griggs v. Duke Power Co., 401 U.S. 424 (1971). In that case, the Court explained that Title VII of the 1964 Civil Rights Act:

> [P]roscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . .
>
> . . . .
>
> . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.

Id. at 431-32.

111. Crump, *supra* note 1, at 508 & n.199.

112. To be fair to Professor Crump, he suggests in his footnote 199 that there may be an acceptable "neutral" reason that women are underrepresented in engineering schools, but in the text accompanying that note he does suggest that the disparity in numbers calls for an investigation into whether there really is a "neutral" reason that explains it. *Id.* at 508 & n.199.

113. *Id.* at 508.

all-male.[114] There are now years when, for some law schools at least, applications from females outnumber those of males, and law school classes may consist of more females than males.[115] There are also significant numbers of Asian-Americans being admitted.[116] The "all-male, all-white"[117] American law school doesn't really exist anymore. Would a law school population consisting of roughly fifty percent women and roughly ten percent Asian-Americans, but only one or two percent blacks or Hispanics raise a constitutional question of "racial equality" under Professor Crump's "nondiscrimination" standard? His discussion of an "all-male, all-white" law school seems to suggest that there is no neutral explanation for a low number of blacks, but at least some data suggest that a color-blind admissions policy, if applied at the top law schools, would result in very low percentages of black and Hispanic students, since their LSAT scores and GPAs have tended to be significantly lower than those of White or Asian-American students.[118]

Apparently this result would concern Professor Crump, because he believes that "[r]hetoric of equality without results has, at times, proved worse than no rhetoric at all, causing racial unrest, disturbance, violence, and riot, and resulting in death, massive losses of wealth, and major political reactions."[119] Professor Crump thus appears to want "results," and it is difficult to understand how this can mean anything else to him than some kind of racial balancing. History demands something different than "neutrality," he tells us, because there has been discrimination in the past.[120] Professor Crump does not tell us whether, in his ideal world of admissions, law schools should simply abandon primary reliance on LSAT scores and GPAs when considering previously discriminated-against minorities. The logic of his position seems to call for this conclusion, and

114. *Id.* at 508 & n.197.

115. *See, e.g.*, Susan Szalewski, *Women the Majority of NU Law Grads*, OMAHA WORLD-HERALD, May 10, 2004, News, at 2b (indicating that for the first time more women than men received law degrees at the University of Nebraska's law school, and reporting Nebraska's Dean Steve Wilborn's comment that "There is a national trend toward more women graduating from law schools than men."); Pam Kelly, *Working Moms Choose to Take Detours From Career Paths*, THE CHARLOTTE OBSERVER, Dec. 17, 2003 ("Some law schools graduate more women than men."); Gary Chapman, *Higher Education's Gender Shift Has Social, Fiscal Ramifications*, AUSTIN AMERICAN-STATESMAN (Texas), Aug. 28, 2003, at A19 ("Nationally, women are about to outnumber men in law schools. . . .").

116. *See, e.g.*, Graglia, *supra*, note 65, at 35.

117. Crump, *supra* note 1, at 508.

118. *See* Graglia, *supra* note 65, at 35-36.

119. Crump, *supra* note 1, at 512.

120. *Id.* at 513-16.

he at least hints at the possibility where he delightfully suggests taking into account competition in beauty pageants and ballroom dancing.[121]

Even so, Professor Crump, at the margins at least, does seem to be calling for different standards to be applied to previously discriminated-against minorities[122] in order to facilitate their admission to law school to compensate for injustices in the past. In doing so, he runs into the same difficulty faced by those who now argue for "reparations." Those who would, in effect, be paying, are not those who previously discriminated.[123] The University of Michigan probably would have been delighted to justify its policy as a response to prior discrimination, because that is one of the two compelling interests for counting by race that the Supreme Court had previously allowed.[124] Professor Crump's grounding of his approach in the

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121. Crump, *supra* note 1, at 531-32. Professor Crump writes:

> A completely different approach is to *adjust non-racial admissions criteria.* For example, I have always believed that participation in competitive activities should be treated as an important discretionary variable in admissions. This criterion would include not only competitive sports, but also debate, competing in the Miss Iowa pageant (as one of my more capable former students did), or, following the example of my law school dean, competitive ballroom dancing.

Id.

122. *Id.* at 535. Crump suggests:

> A school could admit most of its students (say, three-quarters of them), without considering applicants' races, reserving racial consideration to the smaller portion of qualified applicants. This proposal probably describes the results that prevail as a matter of practice in a pure-discretion system, but explicit reservation of race to only a portion of the class would avoid invidious treatment of the majority of applicants and allow more focused examination of the rest.

Id.

123. *See, e.g.*, Graglia, *supra* note 65, at 33.

> The most common substantive argument for "affirmative action" in higher education, as in other areas, is that it provides a "remedy" for disadvantages resulting from past racial discrimination. The argument is obviously fallacious in that it is not possible to remedy an injury to "A" caused by "B" by giving a benefit to "C" at the expense of "D."

Id. (footnote omitted).

124. For the suggestion that overcoming prior discrimination by race was a permissible "compelling interest," see, for example, *Grutter* v. Bollinger, 539 U.S. at 351-52 (2003) (Thomas, J., concurring in part and dissenting in part).

> A majority of the Court has validated only two circumstances where 'pressing public necessity' or a 'compelling state interest' can possibly justify racial discrimination by state actors. First, the lesson of *Korematsu* is that national

need to remedy prior discrimination[125] seems to argue for a case that is not the Michigan one.

I have similar difficulties with Professor Crump's articulation of his version of the narrow tailoring standard, but not with his critique of its prior application. Professor Crump nicely skewers the narrow tailoring requirement by labeling it the "Rodney Dangerfield" of constitutional doctrines, because it seems to get so little respect.[126] The lack of respect accorded to the doctrine seems appropriate, given that it was not originally part of the compelling interest justification,[127] and given that narrow tailoring seems to amount to the Court essentially asserting: "All right, we're going to permit you to engage in clearly unconstitutional behavior, given that we find your reason for doing so 'compelling,' but see that you don't do too much of it." This is balancing at its worst, and the objection of conservatives, or any one else who takes constitutional law seriously (as Professor Crump does), is that like the compelling interest justification itself, narrow tailoring is license for unbridled judicial discretion.

This is the essence of Professor Crump's critique of *Gratz* and *Grutter*'s use of the narrow tailoring test. Professor Crump correctly suggests that the Supreme Court gives us some guidance as to what narrow tailoring is not. It does not require "absolute perfection," it does not require the sacrifice of "legitimate objectives," and, accordingly, it ought not to interfere with the admissions process' need for "discretion" and need for a "complex inquiry requiring the intangible weighing of ostensibly incommensurate factors" (whatever that means).[128] All of this, as Professor Crump understands, is essentially obfuscatory and, in Professor Crump's fine words, "is inadequate because it allows not only narrow tailoring, but loose, broad, sloppy tailoring" as well.[129] The "wide-open discretion to consider race according to the individual preferences of administrators," which the Court's version of narrow tailoring permits, "is exactly what the University of Michigan Law School adopted."[130] The *Grutter* Court's version of narrow tailoring, in other words, is no tailoring at all.

> security constitutes a "pressing public necessity," though the government's use of race to advance that objective must be narrowly tailored. Second, the Court has recognized as a compelling state interest a government's effort to remedy past discrimination for which it is responsible.

Id.

125. *See* Crump, *supra* note 1, at 506 ("Nondiscrimination, here, means an active effort to overcome the effects of prejudice."); *id.* at 508 ("This Article will argue that this prospect corresponds to a compelling governmental interest in active redress to achieve nondiscrimination.").

126. *Id.* at 485.

127. *Id.* at 517.

128. *Id.* at 521.

129. *Id.*

130. *Id.* at 522.

Just as Professor Crump sought to save the compelling interest doctrine by providing a clear definition, he attempts to salvage the narrow tailoring standard. Borrowing from First Amendment "'overbreadth'" doctrine, he defines narrow tailoring in the context before us as "'license to indulge in harmful uses of race as a discriminant,'" so long as the harm caused is not "'substantial'" when compared to either an admissions program's "plainly legitimate sweep" or "its potential for advancing the State's compelling interest in active nondiscrimination."[131] Such a standard, he tells us, "would regard as unconstitutional a program that permitted administrators to make invidious decisions on racial grounds, at least if there was no need to do so to achieve the State's legitimate objectives."[132] "On the other hand," he points out, his standard "would uphold a program of affirmative action that allowed real achievement of racial justice through distributive equality with minimal opportunities for invidious discrimination."[133]

Some of this has the ring of a good idea, and there is more clarity in Professor Crump's argument than in *Gratz* or *Grutter*'s narrow tailoring jurisprudence, but ultimately his attempt at narrow tailoring is only marginally more satisfying than that of the Court. For Professor Crump, some racial discrimination is "invidious" and some is not, even though both may nominally be prohibited by the Constitution. He would permit programs that have an "insubstantial" amount of "invidious discrimination" where they further "real achievement of racial justice through distributive equality."[134] However, besides the elusive character of his concepts and goals, he has required the court, in every instance, to do balancing of a kind that can only lead to untrammeled discretion on the part of the Court, if not admissions departments as well. Other than some kind of suggestion that racial discrimination for good motives (so long as there's not too much of it) is all right while racial discrimination for bad motives (e.g., prejudice against certain races or ethnic groups) is not, this rule offers little guidance to a court. Professor Crump borrows from First Amendment "overbreadth" doctrine, but what he has really called for is the same kind of uncertainty that bedevils "interstate commerce" jurisprudence, where the Court, for so long, would allow Congress to regulate intrastate as well as interstate commerce so long as the former had a "substantial impact" upon the latter.[135] Professor Crump argues that just as Kenneth Culp Davis proposed for administrative law,[136] he has arrived

131. *Id.* at 523.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Compare* Wickard v. Filburn, 317 U.S. 111, 114-15, 124 (1942) (finding that a farmer growing wheat for his own consumption had a "substantial impact" on interstate commerce), *with* United States v. Lopez, 514 U.S. 549, 561 (1995) (finding that the federal government's interest in criminalizing the carrying of a firearm within 1000 feet of a school was not sufficiently related to interstate commerce).

136. Crump, *supra* note 1, at 527.

at a formulation that results in invidious discrimination being "structured, confined, and checked,"[137] but given the tremendous discretion even his formulation would allow to a reviewing court, I'm not so sure.

The difficulty of formulating any kind of standard that allows admissions officers to perform any sort of invidious discrimination by race for noble purposes without risking the exercise of pure bigotry is so profound that one can understand some conservatives' wishes to cut the Gordian knot by simply forbidding all discrimination by race altogether. According to this view, if I understand it correctly, any invidious discrimination is too much, and all racial discrimination is invidious.

That view, the view of Justices Thomas, Scalia, and Rehnquist (and Professor Crump's "conservative," John Leo),[138] has the virtues of being very easy to administer and completely cutting off any discretion on the part of the Court. It is certainly more consistent with the conservative notions of the rule of law than is Professor Crump's. It does not require the kind of balancing that really amounts to legislating on the part of the Court. It is tempting, then, to suggest that conservatives, as did Mr. Leo, should simply sign on to this color-blind Constitution view.

But, as suggested earlier, conservatives are cautious about abstract formulations,[139] and even the notion of a color-blind Constitution might tend to fall into that category. Kirk's canons emphasize what we might regard as the "diversity" of humankind,[140] they suggest the rejection of a "stifling uniformity,"[141] and, with regard to the matter before us, they might even be read to champion a certain amount of creativity and discretion on the part of admissions officers seeking to build a student body rich in human variety. Thus, while I have some trouble with what I believe to be Professor Crump's futile exercise in the resurrection of the compelling interest and narrow tailoring doctrines, I have some sympathy for his richer formulation of what he thinks admissions officers actually ought to be permitted to do. I believe he is on to something when he suggests that the Michigan Law School (or any other school interested in

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137. *Id.* at 528.

138. Leo, *supra* note 5, at 7. Leo writes:

> The Constitution and the 1964 Civil Rights Act say quite clearly that no one can be penalized or advantaged on the basis of race. Opinion polls say the same thing. For many years those polls, including separate surveys of minorities, have shown consistent and lopsided opposition to racial preferences. No matter. The elites want them, so the court stood up and delivered.

Id. Leo's article is cited by Professor Crump at 505 n.180, 506 n.187, 513 n.229.

139. *See supra* text accompanying note 15.

140. *See supra* text accompanying note 15.

141. *See supra* text accompanying note 15.

recruiting a truly diverse student body) ought to be permitted to engage in "aggressive outreach" by partnering with historically black colleges, opening admissions to students in the top percentages of those colleges, or, to facilitate "a different racial impact," by adjusting its overall admissions criteria (presumably LSAT scores and GPAs and the weighting of the two), or to pursue a variety of other strategies, as Rice University has.[142]

I would be more wary than Professor Crump of actually allowing admissions departments to make a small percentage of choices based exclusively on race, as he argues should still be possible,[143] since that would get us smack into the prohibited territory of racial quotas. He makes a provocative analogy to chemotherapy, remarking that both "[r]ace-conscious remedies" and chemotherapy are "drastic treatments, although both are necessary in some limited circumstances; . . . care should be taken that they are not over-used."[144] Often the cure is worse than the disease, and whether or not chemotherapy saves lives, I do not share Professor Crump's confidence that it is possible to structure, confine, and check racial discrimination when practiced by admissions departments, given the difficulty of understanding what is actually being done, and given the demands for close supervision and balancing that this places on the courts. Indeed, perhaps the *Grutter* Court's substantial deference to admissions officers (which Professor Crump rightly excoriates)[145] is a sign that a majority of the Supreme Court believes the federal courts should not be in the business of continually looking over the shoulders of admissions officers to make sure they are not unduly counting by race. Undoubtedly, a majority of the Court also believes that it should really not be permitting any counting by race at all, and thus the "eye-popping," as Professor Crump calls it,[146] suggestion that it will only be permissible for twenty-five years, after which time it should no longer be needed (and presumably a future Supreme Court will bar it).

IV. CONCLUSION

Professor Crump is surely correct that in *Grutter* and *Gratz* the United States Supreme Court applied the compelling interest and narrow tailoring tests in a manner that makes it difficult to understand them and ultimately permits invidious discrimination. The *Grutter* decision seems to authorize

142. Crump, *supra* note 1, at 533-34.

143. *See id.* at 534-36.

144. *Id.* at 537.

145. *See id.* at 491-94.

146. An unintended beneficiary of the *Grutter* and *Gratz* decisions might be Professor Crump's ophthalmologist. The Professor's eyes were popped not only by the twenty-five-year sunset provision from *Grutter*, *id.* at 494, but also by the size of the racial preference credit accorded by the undergraduate school at the University of Michigan, *id.* at 535.

counting by race in ways that current constitutional doctrine seems to condemn as the unacceptable use of quotas and as violations of a color-blind Constitution. Professor Crump has formulated some more precise definitions of both compelling interest and narrow tailoring, but the application of his tests, even if they might result in less discretion for admissions officers, creates the need for dubious balancing tests by federal courts and invites nearly as much litigation as will be encouraged by the *Grutter* and *Gratz* standards themselves. Still, many of Professor Crump's concrete suggestions for what admissions officers seeking a rich and ethnically diverse student body ought to do (borrowing from the experience of the University of Houston and Rice University) have merit, even if some go too far toward the kind of invidious discrimination against which he argues.

Forbidding all discrimination by admissions officers in state universities on the basis of race, a prohibition advocated by some conservatives and by several of the dissenters in *Grutter*, has the merit of checking invidious racial discrimination on the part of state officials (the ostensible goal of the Fourteenth Amendment) and the merit of getting the courts out of the business of supervising university admissions departments. Professor Crump rejects such an approach because he is sensitive to the fact that there is still a problem in American society with race and, in particular, with the results of past discrimination in America. There are debates about to what extent this is a problem that needs attention,[147] and it is undeniable that when one seeks to remedy the results of past discrimination one inevitably causes costs not only for those who did not contribute to or benefit from that past discrimination, but also, as Justice Thomas points out, to those whom one ostensibly seeks to help.

There is a further dilemma because there are at least two competing policy reasons for favoring counting by race to ensure that a substantial number of blacks, Hispanics, and other minorities are represented in law school and other college and university classes. One is to assure their assimilation into the broader society, which was the goal of the Civil Rights movements in the 1950s and 1960s, and which goal seems exemplified by such decisions as *Brown v. Board of Education*.[148] A second reason, however, possibly inconsistent with the first, is to furnish minority communities with the enlightened leadership that professional and university education can provide. Pursuant to this second goal, members of minority groups are expected to return to their communities and not necessarily be assimilated into a greater whole. We rarely recognize these competing possible policies, and I am not at all sure that

147. *See, e.g.*, Graglia, *supra* note 65, at 33-34 (arguing that some minority groups are now overrepresented).

148. 347 U.S. 483 (1954).

they ought to lead in the same direction with regard to college and professional school admissions. These policies, and others, may very well need to be weighed in a balance with policies such as the promotion of a color-blind Constitution. As a conservative, I am not comfortable with the federal courts doing that particular balancing act, since I believe the original understanding of the constitutional structural scheme was that this is a task allocated to our legislatures, and particularly our state and local bodies.

It must be admitted that so apparently radical a step (shifting these decisions back to states and localities) is not likely to happen in the near future. Still, I do believe that the sensible conservative position requires the jettisoning, in constitutional doctrine, of both compelling interest and narrow tailoring, as those concepts are now employed, because they are ultimately unsatisfactory means of performing policy-making and legislative balancing of a kind forbidden to the federal courts. I would interpret the Fourteenth Amendment, as it was originally understood, as not giving the federal courts license to supervise state and local school systems. I would seek the achievement of Professor Crump's goal of "racial justice through distributive equality"[149] not by tinkering with abstruse and incomprehensible strict scrutiny doctrines, but by trusting the pluralistic political process that now exists in the states and was contemplated by our system of federalism and dual sovereignty.[150] Racial justice, if not distributive equality, is now a widely accepted goal at federal, state, and local levels. Since, however, there is no agreement on the manner of its achievement by distributive equality or by other means, I would prefer to rely on Brandeis's fifty social laboratories,[151] rather than the federal courts or even constitutional scholars to ameliorate the problem.

149. Crump, *supra* note 1, at 523.

150. For a similar favoring of that pluralistic political process by a Conservative, see BICKEL, *supra* note 49. *But see* Wright, *supra* note 28 (condemning Bickel's reliance on such a political process).

151. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing states as laboratories for social and economic experiments).