



2005

Neutralizing Grutter

Girardeau A. Spann

Georgetown University Law Center, spann@law.georgetown.edu

Georgetown Public Law and Legal Theory Research Paper No. 12-182

This paper can be downloaded free of charge from:

<https://scholarship.law.georgetown.edu/facpub/244>

<http://ssrn.com/abstract=2175797>

7 U. Pa. J. Const. L. 633-668 (2005)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.

Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Education Law Commons](#), and the [Jurisprudence Commons](#)

NEUTRALIZING GRUTTER

Girardeau A. Spann*

INTRODUCTION

The Supreme Court's 2003 decision in *Grutter v. Bollinger* upheld the use of racial affirmative action as a means of increasing student diversity at the University of Michigan Law School.¹ But in doing so, the Court also prohibited the use of racial quotas in affirmative action programs, finding the pursuit of racial balance to be a "patently unconstitutional" governmental objective.² *Grutter's* prohibition on racial balance is nominally rooted in a desire to promote colorblind race neutrality in the culture's allocation of resources.³ But ironically, it is the Supreme Court's aversion to racial balance itself that perpetuates contemporary racial discrimination.

For people who believe that the conscious pursuit of racial balance offers the only realistic hope of achieving a meaningful level of racial equality in the United States, *Grutter* is disappointing. It is reminiscent of earlier Supreme Court decisions, such as *Dred Scott*,⁴ where the Court curiously chose to invalidate efforts by the political branches to promote racial justice. There are a variety of ways in which the political branches can resist the racial balance restriction that *Grutter* imposes. They range from mild efforts to camouflage the pursuit of racial balance, to more radical efforts that challenge the legitimacy of judicial review itself. However, the degree to which contemporary culture is willing to resist the Supreme Court's prohibition

* © Girardeau A. Spann, Professor of Law, Georgetown University Law Center, Washington, D.C. I would like to thank Lisa Heinzerling and Steven Goldberg for their help in developing the ideas expressed in this Article. Research for this Article was supported by a grant from the Georgetown University Law Center.

¹ See *Grutter v. Bollinger*, 539 U.S. 306, 336 (2003) (upholding an educational affirmative action program that gave holistic and individualized consideration to applicants); cf. *Gratz v. Bollinger*, 539 U.S. 244, 271–76 (2003) (invalidating an educational affirmative action program that awarded a specified number of points to minority applicants as too mechanical to be narrowly tailored).

² *Grutter*, 539 U.S. at 330.

³ See *id.* at 326–27 (asserting preference for race neutrality, and applying strict scrutiny to all racial classifications, including benign affirmative action classifications).

⁴ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1857) (invalidating a congressional statute prohibiting slavery in the Louisiana Territory).

on achieving racial balance will be a direct function of the degree to which the culture is committed to the principle of racial equality.

Part I of this Article argues that the Supreme Court lacks the institutional competence to formulate racial policy for the nation, and highlights the tension that exists between the Court's abstract preference for race neutrality and the concrete reality of contemporary race relations, in which dedicated efforts to promote racial balance offer the only meaningful hope of eliminating systemic discrimination. Part II discusses moderate strategies that can be used to deflect the impact of *Grutter's* prohibition on racial balance, suggesting that racial balancing can be restructured in ways that the Supreme Court may view as constitutional. Part III discusses more radical strategies that can be used to promote racial balance, and advocates a direct confrontation with the institution of judicial review in the context of affirmative action. The Article concludes that the political branches of government possess the power to overcome Supreme Court impediments to racial justice, and hopes that they also possess the will to exercise that power.

I. RACIAL POLICY

The Supreme Court's recent affirmative action decision in *Grutter v. Bollinger*⁵ insists that efforts to achieve racial balance are unconstitutional.⁶ However, it is far from clear that the Supreme Court should be viewed as having the institutional competence to make such a determination. Moreover, even if one concedes to the Court the power to formulate affirmative action policy, the Court's racial balance prohibition still seems wrong on the merits. The current Court is preoccupied with the concept of race neutrality, but the nature of contemporary racial discrimination is such that only explicit efforts to achieve racial balance seem likely to promote racial equality.

A. Institutional Competence

Grutter is premised on the belief that the political branches of government must ask the Supreme Court for permission to solve the longstanding problem of racial discrimination in the United States. That is a curious premise for at least three reasons. First, the institution of judicial review cannot plausibly be understood to give the Supreme Court the countermajoritarian power to formulate racial policy in a democratic society. Second, the Fourteenth Amendment

⁵ 539 U.S. at 306.

⁶ See *id.* at 330 (stating that the use of racial quotas "would amount to outright racial balancing, which is patently unconstitutional.").

gives Congress—not the Supreme Court—the power to remedy discrimination against racial minorities, thereby making it anomalous for the Supreme Court to invalidate majoritarian affirmative action programs on the grounds that the Court knows better than the political branches what will satisfy the equal protection demands of the Fourteenth Amendment. Third, the Supreme Court has such a dismal record in the protection of racial minority rights that it is difficult to see why anyone with a genuine interest in promoting racial justice would believe that the Court could do a better job than the political branches in protecting minority rights.

The existence of judicial review in a democratic society has always been problematic. It poses the countermajoritarian danger that unelected judges, who are intentionally insulated from political accountability, will have the ability to formulate social policy in ways that trump the policy preferences of the representative branches of government.⁷ Although the constitutional legitimacy of judicial review is now widely accepted, it is difficult to imagine that the Framers envisioned anything like the role that the Supreme Court has come to play in the debate over controversial social issues such as abortion, school prayer, and affirmative action.⁸ A species of judicial review that limited Supreme Court involvement in the political process to the enforcement of determinate norms that were clearly expressed in the Constitution could perhaps be reconciled with the process of democratic self governance.⁹ However, it is difficult to deem democratic the Supreme Court's substitution of judicial policy preferences for political policy preferences in the interpretation of constitutional norms that are inherently political in nature.

⁷ See, e.g., GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 35–45 (4th ed. 2001) (discussing the countermajoritarian difficulty posed by judicial review). The Constitution attempts to insulate the Supreme Court from political influence through the devices of life tenure and salary protection. See U.S. CONST. art. III, § 1 (declaring that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”). See generally GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* 14–15 (1993) [hereinafter *RACE AGAINST THE COURT*] (discussing formal safeguards for Supreme Court independence).

⁸ In asserting the power of judicial review, Chief Justice John Marshall recognized the difficulty inherent in allowing the Supreme Court to resolve innately political questions. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (stating that “[t]he province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”).

⁹ See, e.g., *United States v. Butler*, 297 U.S. 1, 62–63 (1936) (describing the mechanical process of judicial review); see also STONE ET AL., *supra* note 7, at 35–39 (discussing mechanical interpretations of the Constitution as a response to the countermajoritarian difficulty).

The Constitution, of course, says nothing about affirmative action, and the Supreme Court's only constitutional basis for regulating the content of affirmative action programs stems from the Equal Protection Clause.¹⁰ But it is hard to find in the phrase "equal protection" any justification for Supreme Court invalidation of affirmative action burdens that the political majority has chosen to impose upon itself to "equalize" the status of those racial minorities whom American culture has historically treated as inferior. One could, of course, vigorously dispute what it takes to promote racial "equality" in contemporary culture. However, it is difficult to see why the Supreme Court should be viewed as institutionally more competent than the political branches of government to resolve that dispute.¹¹

Things get worse when one remembers that the equal protection guarantee used by the Supreme Court as the basis for regulating affirmative action is contained in the Fourteenth Amendment.¹² The Fourteenth Amendment was not intended to authorize the Supreme Court to formulate racial policy. Rather, it was adopted in order to authorize *Congress* to enhance the status of racial minorities, and to *protect* such congressional "affirmative action" from Supreme Court invalidation. After the Civil War, Congress passed the Civil Rights Act of 1866, which was designed to end discrimination against former black slaves in places of public accommodation. However, federalism doubts about the constitutionality of the Act prompted adoption of

¹⁰ See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). The Supreme Court has held that the Due Process Clause of the Fifth Amendment also contains a tacit equal protection component that applies to the federal government. See *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954) (finding a tacit equal protection safeguard in the Fifth Amendment).

¹¹ For a more extended argument against judicial review in the context of racial discrimination, see RACE AGAINST THE COURT, *supra* note 7. Other scholars have presented general arguments questioning the scope and desirability of judicial review. See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 4–5 (1996) (favoring "incompletely theorized agreements" over comprehensive or definitive judicial resolutions of controversial political issues); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (favoring narrow Supreme Court decisions that permit democratic reflection by the elected branches); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (disfavoring judicial review); see also Robert P. George, *Law, Democracy, and Moral Disagreement*, 110 HARV. L. REV. 1388, 1399–1400 (1997) (reviewing AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT: WHY MORAL CONFLICT CANNOT BE AVOIDED IN POLITICS, AND WHAT SHOULD BE DONE ABOUT IT (1996) and CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996), and favoring political over judicial resolutions of morally charged political conflicts); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 414 (1997) (arguing, as a positive matter, that judicial review often entails mere deference to majoritarian political preferences). But see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (favoring judicial supremacy in constitutional interpretation to be binding on other branches of government).

¹² See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (stating that affirmative action programs have to comply with the Fourteenth Amendment equal protection guarantee).

the Fourteenth Amendment. Section 1 of the Fourteenth Amendment contained the substantive equal protection guarantee,¹³ and Section 5 authorized Congress to enforce the provisions of Section 1¹⁴ precisely so that the Supreme Court would not invalidate such remedial efforts on constitutional grounds. The Fourteenth Amendment, therefore, was designed to authorize *political* remedies for racial discrimination, and to give federal remedies primacy over state “Black Codes” that had officially legislated the inferiority of blacks.¹⁵ Nothing in the history of the Fourteenth Amendment can plausibly be read to authorize the Supreme Court to invalidate state or federal political enactments that are designed to *enhance* the status of racial minorities. Rather, Section 5 of the Fourteenth Amendment establishes that questions about the policy prudence and the constitutional validity of affirmative action are questions that, in *Marbury* terms, are “in their nature political.”¹⁶

When the majority, acting through the political branches of government, chooses to impose a burden on itself in order to advance its understanding of racial equality, there is no basis for invoking the heightened judicial scrutiny that the Court typically reserves for cases involving suspect governmental motives. In representation-reinforcement terms, there is no reason to fear that the majoritarian political process is seeking to disadvantage a discrete-and-insular minority group that is unable to protect its own interests in the pluralist political process.¹⁷ The Supreme Court asserts that judicial intervention in the affirmative action debate is needed to protect the individual equal protection rights of whites who are burdened by affirmative action.¹⁸ But that merely begs the question. Whites burdened by affirmative action are not unconstitutionally discriminated against any more than methadone users who are denied municipal employment because of their participation in drug treatment programs. But the

¹³ See U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection to all individuals).

¹⁴ See U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”). The other Reconstruction Amendments had similar provisions authorizing Congress, rather than the Supreme Court, to enforce their substantive guarantees. See U.S. CONST. amend. XIII, § 2 (authorizing Congress to enforce the prohibition against involuntary servitude); U.S. CONST. amend. XV, § 2 (authorizing Congress to enforce the right to vote without abridgment on account of race, color, or previous condition of servitude).

¹⁵ See STONE ET AL., *supra* note 7, at 431–33 (discussing the history of the Reconstruction Amendments).

¹⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

¹⁷ For the prevailing account of how government policymakers can discount the interests of discrete-and-insular minorities, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

¹⁸ See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (noting that the Equal Protection Clause protects persons rather than groups) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

Supreme Court defers to the value judgments made by the political branches in the methadone case, while strictly scrutinizing the value judgments made by the political branches in affirmative action cases.¹⁹ This is true even though methadone users, who are likely to be both poor and members of racial minority groups,²⁰ would seem to present a much stronger claim to discrete-and-insular minority status than members of the white majority who are burdened by an affirmative action program. If there is any justification for this differential treatment, it must be based on the belief that there is something special about racial affirmative action classifications under the Equal Protection Clause that warrants heightened judicial scrutiny. But as Section 5 of the Fourteenth Amendment recognizes, the value judgments entailed in adopting an affirmative action program are more amenable to legislative balancing in the representative political process than to politically unaccountable judicial balancing in the guise of interpreting the words "equal protection." For better or worse, judicial review is now understood to authorize the Court to *enforce* the Equal Protection Clause. However, because of the complex and intractable policy judgments at issue, the substantive *content* of the Equal Protection Clause can defensibly be derived only from the representative political process. The Fourteenth Amendment does not itself provide any non-political definition of "equality," or any judicially manageable standards for deriving such a definition.

My claim that the Supreme Court lacks the institutional competence to formulate racial policy under the Equal Protection Clause is borne out by the history of Supreme Court adjudications in race cases. The Supreme Court has repeatedly invalidated "affirmative action" programs that the majoritarian branches of government have adopted to advance the interests of racial minorities, even though there is no apparent reason for the Court to have done so. *Dred Scott*²¹ provides the most obvious example. In an effort to provide a legislative solution to the increasingly contentious issue of slavery in new United States Territories, Congress passed the Missouri Compromise Act of 1854. The Supreme Court, however, invalidated that political compromise in *Dred Scott*, and in the process, held that blacks were

¹⁹ Compare *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 592-94 (1979) (applying minimal equal protection scrutiny to a rule prohibiting the employment of even qualified methadone users), with *Adarand*, 515 U.S. at 223-27 (applying strict equal protection scrutiny to a minority set-aside program adopted by Congress for federally-funded construction projects).

²⁰ *Beazer*, 440 U.S. at 609 n.15 (White, J., dissenting) ("Heroin addiction is a special problem of the poor, and the addict population is composed largely of racial minorities . . .").

²¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (invalidating a congressional statute prohibiting the holding of slaves in the territory of the Louisiana Purchase north of 36 deg. 30 min. north latitude).

not "citizens" within the meaning of the United States Constitution.²² By so constitutionalizing the inferior status of blacks, the Court precluded the possibility of future political solutions to the problem of slavery. Because it left opponents of slavery with no other political recourse, *Dred Scott* is now widely viewed as a disastrous decision that both precipitated the Civil War, and created the need for the Reconstruction Amendments to the Constitution.²³

If there is a lesson in *Dred Scott* about the perils inherent in the politically unaccountable judicial formulation of racial policy, the Supreme Court has not yet learned it. The Court has continued to invalidate affirmative action programs adopted by the political branches whenever those programs do not comport with the Court's own conception of sound racial policy. The Court invalidated an affirmative action program for minority medical students in its 1978 *Bakke* decision²⁴ and a municipal set-aside plan for minority contractors in its 1989 *Croson* decision.²⁵ And it applied what, prior to *Grutter*, had always been fatal strict scrutiny to a similar federal set-aside plan in its 1995 *Adarand* decision.²⁶ Moreover, in its 1993 *Shaw v. Reno* decision,²⁷ the Court applied strict scrutiny to a North Carolina majority-minority redistricting plan that had been created to comply with the federal Voting Rights Act by increasing minority political representation in Congress. The Court then went on to use *Shaw v. Reno* as a basis for invalidating a number of majority-minority redistricting plans. It invalidated a Georgia plan in its 1995 *Miller v. Johnson* decision.²⁸ It invalidated the *Shaw v. Reno* North Carolina plan after remand in its 1996 *Shaw v. Hunt* decision,²⁹ and invalidated a Texas plan in its 1996 *Bush v. Vera* decision.³⁰ The Court also invalidated a Justice Department directive to create an additional Georgia majority-minority district in its 1997 *Abrams v. Johnson* decision.³¹

Although *Brown v. Board of Education*³² is typically said to establish the Supreme Court's capacity to remedy racial oppression, even *Brown* does more to illustrate the problems entailed in Supreme

²² See *id.* at 404-27 (holding that blacks were not included in the constitutional term "citizens").

²³ See STONE ET AL., *supra* note 7, at 429-33 (discussing *Dred Scott* and its aftermath).

²⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

²⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223-27 (1995).

²⁷ *Shaw v. Reno*, 509 U.S. 630 (1993).

²⁸ *Miller v. Johnson*, 515 U.S. 900 (1995).

²⁹ *Shaw v. Hunt*, 517 U.S. 899 (1996).

³⁰ *Bush v. Vera*, 517 U.S. 952 (1996).

³¹ *Abrams v. Johnson*, 521 U.S. 74 (1997).

³² *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-96 (1954) (*Brown I*) (invalidating separate-but-equal public school segregation); see also *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*) (requiring desegregation of public schools "with all deliberate speed").

Court racial policymaking than it does to answer them. *Brown* is said to have desegregated the public schools, and to have ended the government's use of racial classifications. But *Brown* did neither. The limited school desegregation that did occur was largely the result of actions taken by the political branches.³⁵ And, as the racial profiling that has followed the September 11 terrorist attacks so clearly illustrates, *Brown* hardly ended the government's use of racial classifications.³⁴

This is not to say that the Supreme Court always rules against racial minority interests. The Court upheld voluntary affirmative action plans in its 1980 *Fullilove* decision,³⁵ and its 1990 *Metro Broadcasting* decision³⁶—although *Metro Broadcasting* was overruled by the Court five years later in *Adarand*.³⁷ The Court also rejected yet another challenge to a North Carolina majority-minority redistricting plan in its 2001 *Easley v. Cromartie* decision,³⁸ finding that the plan was motivated by political rather than racial considerations.³⁹ The problem is not that the Supreme Court always invalidates affirmative action programs. Rather, the problem is that the Court thinks it can tell the difference between an affirmative action program that is constitutional and one that is unconstitutional.

³³ See RACE AGAINST THE COURT, *supra* note 7, at 104–10 (discussing failure of *Brown* to desegregate schools or end governmental use of racial classifications).

³⁴ For examples of commentators noting the similarity between post-September 11 racial profiling and the treatment of Japanese American citizens during World War II, see *Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915, 1930–39 (2002) and Liam Braber, Note, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451 (2002). See also Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 ASIAN L.J. 195, 197–200 (2002) (discussing how to apply lessons from the Japanese internment to racial profiling post-September 11); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 33–39 (2002) (arguing that the September 11 attacks have begun to warp the balance between national security and civil liberties, as did World War II); Lori Sachs, Comment, *September 11, 2001: The Constitution During Crisis: A New Perspective*, 29 FORDHAM URB. L.J. 1715, 1728–43 (2002) (discussing the role of the Supreme Court in World War II); Huong Vu, Note, *Us Against Them: The Path to National Security is Paved by Racism*, 50 DRAKE L. REV. 661, 665–76, 691–93 (2002) (arguing that the U.S. Government and mainstream society have been willing to scapegoat racial minorities after national tragedies); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2825–30, 2836–41 (2002) (arguing that modern terrorism legislation repeats the American habit of targeting and stigmatizing immigrant groups and racial minorities).

³⁵ *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

³⁶ *Metro Broad., Inc. v. Fed. Communications Comm'n*, 497 U.S. 547 (1990).

³⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225–27 (1995) (overruling *Metro Broadcasting's* use of intermediate rather than strict scrutiny).

³⁸ *Easley v. Cromartie*, 532 U.S. 234 (2001).

³⁹ See *id.* at 257–58 (reversing the lower court's finding of racial motivation). For a fuller discussion of the Supreme Court's affirmative action decisions, see GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* (2000) [hereinafter *THE LAW OF AFFIRMATIVE ACTION*].

Any affirmative action program that the white majority voluntarily adopts through the political process should be upheld under the Constitution because there is no reason to distrust the political process with respect to benign affirmative action. But that is precisely the argument that the Supreme Court rejected in *Adarand*, holding that even benign affirmative action was subject to strict equal protection scrutiny.⁴⁰ The value judgments that are entailed in deciding whether affirmative action constitutes sound social policy are far too subtle and delicate to be entrusted to an institution whose credentials for racial prudence and sensitivity include *Dred Scott*,⁴¹ *Plessy*,⁴² and *Korematsu*.⁴³ That is a recipe for permitting the racial policy of the nation to be determined not merely by the values of nine unaccountable people in black robes, but often by the policy preferences of one Justice who happens at any particular point in time to have the swing vote on the issue of affirmative action.⁴⁴ Allowing the Supreme Court to have the final say in the formulation of the nation's affirmative action policy raises the danger that racial minority rights will continue to be sacrificed in the name of racial equality, as they have been so sacrificed during most of the nation's history.⁴⁵ Unfortunately, the Supreme Court's racial balance decision in *Grutter* illustrates this problem.

B. Racial Balance

Grutter tends to be viewed as a case that is beneficial to racial minorities because it upholds the use of racial affirmative action in an educational context, and holds that diversity can constitute a compel-

⁴⁰ *Adarand*, 515 U.S. at 223–27; see also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citing *Adarand* to support the position that benign affirmative action is subject to strict scrutiny).

⁴¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 397 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution).

⁴² *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding separate-but-equal racial segregation).

⁴³ *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding World War II military exclusion order directed at persons of Japanese ancestry).

⁴⁴ Many contemporary Supreme Court affirmative action cases have been 5–4 decisions, with Justice O'Connor acting as the swing vote. See THE LAW OF AFFIRMATIVE ACTION, *supra* note 39, at 159–61 (discussing affirmative action voting blocs on the Supreme Court). Indeed, the reason that the Supreme Court ultimately upheld the affirmative action program at issue in *Grutter* was that Justice O'Connor, for the first time, switched sides and voted in favor of upholding a racial affirmative action program on the merits. *Grutter*, 539 U.S. at 306; see also THE LAW OF AFFIRMATIVE ACTION, *supra* note 39, at 160 n.57 (enumerating the affirmative action voting record of Justice O'Connor).

⁴⁵ For an extended argument that the social function of the Supreme Court has historically been to subordinate the interests of racial minorities to the interests of the white majority see RACE AGAINST THE COURT, *supra* note 7.

ling state interest for purposes of strict scrutiny.⁴⁶ However, *Grutter* is likely to do more harm than good for minority interests, because it emphatically insists that the pursuit of racial balance as part of an affirmative action program is “patently unconstitutional.”⁴⁷ By outlawing the pursuit of racial balance in the name of colorblind race neutrality, *Grutter* prohibits the only remedy that is likely to be effective in combating contemporary racial discrimination.

Grutter evidences a clear Supreme Court preference for race-neutral over race-conscious efforts to ameliorate the plight of racial minorities. Race-neutral affirmative action is subject to only rational basis review, but race-conscious affirmative action is subject to strict equal protection scrutiny.⁴⁸ Although the economic, political, and social disadvantages suffered by contemporary racial minorities are traceable to a long history of race-conscious discrimination, the Supreme Court believes that its asymmetrical preference for race-neutral responses to race-conscious discrimination is justified by the need to prevent future race-based discrimination.⁴⁹ As a result, the Court has largely limited the use of race-conscious remedies to those instances in which race-neutral remedies have been shown to be inadequate.⁵⁰

The Court’s preference for race-neutrality has caused it to be hostile to racial quotas and other efforts to achieve racial balance.⁵¹ The Court views the pursuit of racial balance as an effort to remedy what it terms general “societal discrimination.”⁵² According to the Court, the problem with attempting to remedy societal discrimination is that it will necessarily result in vast remedial programs that impose impermissible burdens on innocent contemporary whites, who were not themselves the perpetrators of the long history of discrimination against racial minorities.⁵³ Therefore, the Court has consistently limited the use of race-conscious affirmative action to situations in which

⁴⁶ *Grutter*, 539 U.S. at 328–33 (“Today we hold that the Law School has a compelling interest in attaining a diverse student body.”)

⁴⁷ *Id.* at 308.

⁴⁸ *See id.* at 326–27 (applying strict scrutiny to even benign affirmative action); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–27 (1995) (applying strict scrutiny to a benign affirmative action program).

⁴⁹ *See Adarand*, 515 U.S. at 227–30 (applying strict scrutiny to even benign racial classifications in order to protect the individual right to be free from racial discrimination).

⁵⁰ *See id.* at 237–38 (suggesting that strict scrutiny requires lack of race-neutral alternatives); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (rejecting affirmative action program because, inter alia, there was no evidence that the city council had considered race neutral alternatives). *But see Grutter*, 539 U.S. at 339 (stating that narrow tailoring does not necessarily require lack of race-neutral alternatives).

⁵¹ *See Grutter*, 539 U.S. at 330 (finding the pursuit of racial balance to be “patently unconstitutional”).

⁵² *See id.* at 323 (prohibiting remedies for general “societal discrimination”).

⁵³ *Id.* at 323 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978)).

narrowly-tailored remedies are used to address particularized acts of discrimination.⁵⁴

There are two problems with the Supreme Court's aversion to the pursuit of racial balance as a remedy for general societal discrimination. First, the argument is internally inconsistent in its effort to distinguish between individual and group injuries. Second, the argument is based on a faulty understanding of the nature of contemporary racial discrimination. Once those two problems are recognized, only a desire to discount the interests of racial minorities can justify continued Supreme Court hostility to the goal of achieving racial balance.

The Supreme Court's view is that racial balance remedies for general societal discrimination are unconstitutional because they impose excessive burdens on whites.⁵⁵ In its unadorned version, that argument is discriminatory on its face. For most of the nation's history, racial imbalance was perfectly constitutional when it was used to benefit whites, but racial balance is now unconstitutional when it is used to benefit racial minorities in an effort to equalize matters. The Supreme Court has attempted to sidestep this facial discrimination by embellishing its racial balance prohibition. It argues that the Equal Protection Clause protects individuals and not groups.⁵⁶ Therefore,

⁵⁴ Justice Powell articulated this position in *Bakke*, 438 U.S. at 307–10, and reasserted it in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–79 (1986) (Powell, J., plurality opinion). Led by Justice O'Connor, this view has now been adopted by a majority of the Court. See *Grutter*, 539 U.S. at 323 (citing *Bakke* as rejecting interest in remedying societal discrimination); *id.* at 330 (rejecting racial balancing as "patently unconstitutional"); see also *Metro Broad., Inc. v. Fed. Communications Comm'n.*, 497 U.S. 547, 613 (1990) (O'Connor, J., dissenting) (stating that "an interest in remedying societal discrimination cannot be considered compelling"); *Crosby*, 488 U.S. at 496–98 (O'Connor, J., plurality opinion) (stating "'societal discrimination' . . . is an inadequate basis for race-conscious classifications"); *Johnson v. Transp. Agency*, 480 U.S. 616, 647–53 (1987) (O'Connor, J., concurring in the judgment) (rejecting societal discrimination); *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring) ("[S]ocietal' discrimination, that is, discrimination not traceable to [an agency's] own actions, cannot be deemed sufficiently compelling to pass constitutional muster . . ."). In *Grutter*, a majority of the Supreme Court for the first time held that promoting prospective racial diversity in an educational context could constitute a compelling governmental interest, but the Court reaffirmed its prohibition on the use of racial balance to remedy general societal discrimination. *Grutter*, 539 U.S. at 323.

⁵⁵ See *Grutter*, 539 U.S. at 324 (citing *Bakke*, 438 U.S. at 310) (noting that remedying societal discrimination risks "placing unnecessary burdens on innocent third parties 'who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.'").

⁵⁶ See *id.* at 323 (asserting that the Equal Protection Clause safeguards individual rights rather than group rights). There has been a longstanding debate concerning whether the Equal Protection Clause is properly understood as protecting individual rights or group rights. Compare Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 48–52 (1976) (arguing that discrimination, and consequently discrimination remedies, should be viewed as individual phenomena) and Michael J. Perry, *The Principle of Equal Protection*, 32 HASTINGS L.J. 1133, 1145–48 (1981) ("[T]he group-centered conception creates [tension] with our individual-centered constitutional jurisprudence"), with

the Equal Protection Clause permits only remedies for particularized acts of discrimination, and not for the systemic societal discrimination to which racial balance remedies are directed.⁵⁷ The premise of this argument is, of course, wrong. As has been noted, the Equal Protection Clause of the Fourteenth Amendment was adopted specifically to authorize legislative remedies for discrimination against the *group* of newly freed black slaves, and legislative remedies are by their nature *group* remedies.⁵⁸

In addition to its faulty premise, the Supreme Court's racial balance prohibition is also internally inconsistent. It first assumes that the burdens imposed on whites as a result of affirmative action are individual injuries, and that they can therefore be redressed without violating the Equal Protection Clause. It then assumes that the burdens imposed on racial minorities as a result of societal discrimination are group injuries, and that they cannot therefore be redressed without violating the Equal Protection Clause. However, the two injuries are precisely the same. Both result from a determination made by a governmental institution to sacrifice the interests of one racial group in order to advance the interests of another racial group. And whatever it is about the injury to whites that makes racial balance remedies unconstitutional would certainly seem to apply to the injury to racial minorities that results from the refusal to allow racial balance remedies. The only difference between the two is the race of the group that is being harmed. And despite the Supreme Court's contrary suggestion, it simply cannot be true that the Equal Protection Clause permits the continued sacrifice of racial minority interests in order to advance the interests of whites.

Aside from being logically problematic, the Supreme Court's prohibition on the use of racial balance to remedy general societal discrimination is based on a misunderstanding of the manner in which contemporary racial discrimination operates. The Court reads the Equal Protection Clause as something that is addressed to particularized injuries resulting from identifiable acts of invidious racial discrimination. Although such particularized discrimination of course continues to exist, the truly troubling aspect of contemporary racial discrimination is statistical in nature. Justice Ginsburg's dissenting opinion in *Gratz v. Bollinger*⁵⁹—in which the Supreme Court invalidated the University of Michigan's undergraduate affirmative action

Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 J. PHIL. & PUB. AFFAIRS 107, 147-77 (1976) (arguing that discrimination, and consequently discrimination remedies, should be viewed as group phenomena).

⁵⁷ See cases cited *supra* note 54.

⁵⁸ See *supra* notes 12-14 and accompanying text (discussing the history of the Fourteenth Amendment).

⁵⁹ 539 U.S. 244 (2003).

program despite upholding Michigan Law School's affirmative action program the same day in *Grutter*⁶⁰—offers a striking statistical demonstration of the ways in which racial minorities continue to be underrepresented in the allocation of significant societal resources.⁶¹ Because the criteria that we use to distribute societal resources have been shaped by centuries of racial prejudice, it is not surprising that those criteria continue systematically to disadvantage racial minorities in ways that benefit the white majority. From standardized tests, to union memberships, to housing patterns, to voting districts, our resource allocation criteria continue to reflect the racial attitudes that have been firmly internalized by the culture at large. Moreover, the racial skews embedded in those criteria now often operate in ways that are largely unconscious.⁶² As a result, mere conscious efforts to guard against our unconscious prejudices are likely to be ineffective safeguards in most cases. All of this suggests that only dedicated efforts to achieve racial balance are likely to neutralize the culture's natural propensity to allocate resources in a racially discriminatory way. To the extent that the Supreme Court holds such racial balance efforts to be unconstitutional, the Court is reading the Constitution to *require* continued discrimination in the allocation of resources.

The Supreme Court's prohibition on racial balancing, and its concomitant indifference to general societal discrimination, seem to reflect a belief that prospective race neutrality is largely adequate to satisfy the demands of the Equal Protection Clause.⁶³ However, that belief reduces the concept of racial equality to a theoretical abstraction having very little to do with the concrete discrimination that continues to disadvantage racial minorities in everyday life. If you are not a member of a racial minority group, and you doubt the severity of the societal disadvantages that racial minorities are forced to endure in contemporary culture, ask yourself whether you would be willing to give up your white majority status and become a member of a racial minority group. Similarly, if you are inclined to oppose affirmative action because you believe that racial minorities are unfairly advantaged by racial preferences, ask yourself whether you would be

⁶⁰ 539 U.S. at 306.

⁶¹ *Gratz*, 539 U.S. at 298–300 nn.1–3 (Ginsburg, J., dissenting).

⁶² See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318–44 (1987) (arguing that much contemporary racial discrimination is unconscious).

⁶³ This view is reflected in the Supreme Court's decision to deny certiorari to review the Ninth Circuit's decision upholding California's Proposition 209, which explicitly prohibited race and gender affirmative action for the purpose of promoting prospective race and gender neutrality. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997) *cert. denied*, 522 U.S. 963 (1997) (“As a matter of ‘conventional’ equal protection analysis, there is simply no doubt that Proposition 209 is constitutional.”); see also Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997) (discussing Proposition 209 litigation further).

willing to give up your white majority status in order to take advantage of a racial affirmative action program. I predict that you would not be willing to relinquish your white majority status—precisely because you understand, with every fiber of your being, that the culture continues to discriminate against racial minorities in a myriad of subtle yet pervasive ways.

The policy issues surrounding the use of affirmative action to help eliminate the racial underclass that has always been present in the United States are obviously quite complicated. The notion that the Supreme Court could eliminate the normative complexities entailed in the affirmative action debate simply by insisting on a prospective commitment to colorblind race neutrality is at best sophomoric. Once one recognizes the problems inherent in both the Supreme Court's prohibition on racial balance and its aversion to remedies for general societal discrimination, it is difficult to find a normatively defensible justification for the Court's position. It seems obvious that the Court lacks the relative institutional competence to substitute its policy preferences for the preferences of the political branches of government when the political branches decide to adopt affirmative action programs that promote racial balance. It is almost as if the Supreme Court were intent on reprising the racial callousness of cases like *Dred Scott*,⁶⁴ *Plessy*,⁶⁵ and *Korematsu*,⁶⁶ so that it could continue to discount the interests of racial minorities for the benefit of the white majority.⁶⁷

II. CREATIVE COMPLIANCE

The meaning of an imprecise constitutional term such as "equal protection" is obviously contestable. That raises the question of how one should properly respond when one disagrees with the Supreme Court's interpretation of a constitutional provision. The position of the Supreme Court on this issue is clear. In *Cooper v. Aaron*,⁶⁸ the Court announced that *it* has the final say over the meaning of the Constitution.⁶⁹ But, since the Court's assertion is itself an interpreta-

⁶⁴ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 397 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution).

⁶⁵ See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding separate-but-equal racial segregation).

⁶⁶ See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding World War II military exclusion order directed at Japanese-American citizens).

⁶⁷ This conclusion is the primary thesis of *RACE AGAINST THE COURT*, *supra* note 7.

⁶⁸ 358 U.S. 1 (1958).

⁶⁹ *Id.* at 18 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The *Cooper* Court stated that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Cooper*, 358 U.S. at 18.

tion of the Constitution, *Cooper* simply generates a self-referential paradox that is utterly unhelpful. If one believes that the meaning of a constitutional provision is delegated by the Constitution to the political branches of government, then *Cooper* is not only wrong, but political deference to *Cooper* would itself be unconstitutional, as it would violate the doctrine of separation of powers by vesting policymaking power in the wrong branch of government. Arguably, the uncertainty that exists concerning which branch of government possesses ultimate expository power under the Constitution is a good thing. It may prompt continuous inter-branch negotiations over contentious issues of social policy in a way that facilitates proper operation of our system of checks and balances.⁷⁰ If one shares that view, one is likely to favor “creative compliance” with the Court’s prohibition on racial balancing. Creative compliance will enable the political branches to secure some of the benefits of racial balance, through the use of proxies and camouflage techniques, without directly confronting the Supreme Court’s assertion of power over the political branches through the institution of judicial review. The use of proxies and camouflage by the representative branches will also provide feedback to the Court concerning the political viability of its constitutional pronouncements, thereby enabling the Court to factor that feedback into its future constitutional expositions.

A. Proxies

The most obvious way in which the political branches of government could comply with the Supreme Court’s prohibition on racial balancing, while still seeking to secure at least some of the benefits of racial balance, is to implement affirmative action plans that use race-neutral factors as proxies for race. This strategy seems ironically appropriate because much of the contemporary racial discrimination that affirmative action is designed to counteract also operates through the use of proxies. In the past, American culture used explicit racial discrimination to exclude racial minorities from U.S. soil, from desirable education, from desirable employment, from desirable housing, and from exercising political power. Minorities were barred from immigrating to the United States⁷¹ and from holding cer-

⁷⁰ This, in part, is the thesis of a book by Louis Michael Seidman about judicial review. See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001) (arguing against any final judicial resolution of open constitutional questions).

⁷¹ See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 509–10 (2d ed. 1985) (discussing the Chinese Exclusion laws which prohibited the immigration and re-immigration of Chinese persons and included the 1902 statute which permanently banned Chinese entry).

tain jobs.⁷² Minorities were prohibited from being educated,⁷³ or were educated in segregated schools.⁷⁴ They were prohibited from living in certain neighborhoods⁷⁵ and from voting.⁷⁶ As the statistics cited in Justice Ginsburg's *Gratz* dissent illustrate, American culture still discriminates against racial minorities in many areas.⁷⁷ However, in the post civil rights era where the option of de jure racial discrimination has been restricted,⁷⁸ de facto racial discrimination tends to be implemented through the use of proxies that correlate with race. Contemporary minorities are kept out of predominantly white schools

⁷² See A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than the Free": Free Blacks in Colonial and Antebellum Virginia, 26 HARV. C.R.-C.L. L. REV. 17, 43 (1991) (discussing Virginia laws that effectively prevented blacks from practicing professions such as teaching and law by forbidding free blacks to congregate); Timothy Sandefur, *Can You Get There from Here?: How the Law Still Threatens King's Dream*, 22 LAW & INEQ. 1, 13-15 (2004) (discussing statutory and regulatory restrictions that prohibited blacks from practicing law, and from becoming plumbers and barbers).

⁷³ See, e.g., EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 561-66 (Vintage Books 1976) (1972) (discussing legal prohibitions on educating slaves as demonstrated by laws outlawing the sale of writing materials to slaves and the Catholic Church's historical denial of the scriptures to the "ignorant and impressionable").

⁷⁴ See, e.g., *Brown I*, 347 U.S. 483, 493-96 (1954) (invalidating the "separate-but-equal" doctrine used to justify segregation in public schools); see also *Brown II*, 349 U.S. 294, 301 (1955) (requiring desegregation of public schools "with all deliberate speed").

⁷⁵ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 20-23 (1948) (reversing state court enforcement of racially restrictive covenant in the sale of residential real property); *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (reversing state court enforcement of laws requiring residential racial segregation).

⁷⁶ For example, the Fifteenth Amendment to the United States Constitution was adopted in 1870 to eliminate the widespread disenfranchisement of blacks that existed prior to the Civil War. See U.S. CONST. amend. XV (holding that the right to vote cannot be abridged on account of race). Even after adoption of the Fifteenth Amendment, however, blacks were effectively disenfranchised in many states by devices such as poll taxes, literacy tests, and voting districts which diluted minority voting strength. The Voting Rights Act of 1965 was intended to address this de facto disenfranchisement. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838-53 (1992) (discussing the purposes and history of the Voting Rights Act, and attempts over the years to thwart these purposes).

⁷⁷ See *Gratz v. Bollinger*, 539 U.S. 244, 298-302 (2003) (Ginsburg, J., dissenting) (discussing statistical disadvantages that continue to be suffered by racial minorities in areas including education, employment, and housing); see also *Miller v. Johnson*, 515 U.S. 900, 938 (1995) (Ginsburg, J., dissenting) (noting that Georgia did not send a post-Reconstruction black to Congress until 1972, seven years after the enactment of the Voting Rights Act of 1965); *Shaw v. Reno*, 509 U.S. 630, 676 (1993) (Blackmun, J., dissenting) (emphasizing that prior to a redistricting plan adopted in response to the 1990 Census, North Carolina had not sent a black representative to Congress since the Reconstruction).

⁷⁸ In overruling the separate-but-equal regime of *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Brown I* is typically understood to have prohibited most governmental uses of racial classifications. See *Brown I*, 347 U.S. at 493-96 (invalidating the "separate-but-equal" doctrine in public schools). However, the race-based actions that have been taken in the government's post-September 11 war on terrorism illustrate that some racial classifications are still permitted. See *supra* note 34 (citing articles that discuss similarities between present race-based security measures and race-based Japanese internment during World War II).

through the use of district lines and standardized test scores.⁷⁹ Minorities are kept out of predominantly white jobs through the use of standardized test scores and subjective employment standards.⁸⁰ Minorities are kept out of predominantly white neighborhoods through the use of zoning restrictions.⁸¹ Finally, minorities are kept out of predominantly white legislatures through the use of gerrymandered voting districts.⁸² Accordingly, the use of racial proxies to remedy racial imbalance that itself results from the use of racial proxies seems congruent enough to constitute a form of poetic justice.

Due to a history of pervasive discrimination against racial minorities, racial minorities are an economically disadvantaged class.⁸³ That means that economic disadvantage can now often be used as a proxy for race in affirmative action programs. Although affirmative action initiatives based on economic disadvantage will be facially neutral, they will still have a disproportionately beneficial impact on racial minorities because racial minorities are overrepresented among those who suffer economic disadvantage. The Supreme Court is likely to view economic affirmative action as constitutionally permissible precisely because it appears to be facially neutral.⁸⁴

⁷⁹ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 366–71 (2003) (Thomas, J., dissenting) (arguing that law schools could increase diversity by abandoning racially-correlated selection criteria such as the LSAT); *Milliken v. Bradley*, 418 U.S. 717, 732–36, 744–47 (1974) (refusing to allow interdistrict judicial remedies for school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

⁸⁰ See *Gratz*, 539 U.S. at 298–302 (Ginsburg, J., dissenting) (discussing statistical disadvantages that continue to be suffered by racial minorities in terms of employment); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) (explaining why percentile disparities in employment do not necessarily make out a prima facie case of discrimination and adopting stringent standards under Title VII for proof of discrimination); *Washington v. Davis*, 426 U.S. 229, 238–48 (1976) (holding that any racially disparate impact resulting from the use of standardized tests in the employment context does not violate the Equal Protection Clause in the absence of intentional discrimination).

⁸¹ See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–71 (1977) (rejecting claim that residential zoning restriction was racially discriminatory without any proof that discriminatory purpose was a motivating factor); *Warth v. Seldin*, 422 U.S. 490, 498–508 (1975) (holding that the petitioners did not have standing to challenge zoning ordinance as racially discriminatory without additional evidence of personal impact caused by the ordinance).

⁸² See, e.g., *Miller v. Johnson*, 515 U.S. 900, 938 (1995) (Ginsburg, J., dissenting) (noting that Georgia did not send a post-Reconstruction black to Congress until 1972, seven years after the enactment of the Voting Rights Act of 1965); *Shaw v. Reno*, 509 U.S. 630, 676 (1993) (Blackmun, J., dissenting) (emphasizing that prior to a redistricting plan adopted in response to the 1990 Census, North Carolina had not sent a black representative to Congress since the Reconstruction).

⁸³ See *Gratz*, 539 U.S. at 298–302 (Ginsburg, J., dissenting) (discussing statistical disadvantages that continue to be suffered by racial minorities in terms of wealth and income).

⁸⁴ Indeed, the Court at times seems to invite the use of economic affirmative action. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212–13, 223–24 (1995) (upholding affirmative action for contractors who are socially and economically disadvantaged, but applying strict scrutiny to statutory presumption that racial minorities are so disadvantaged).

In a strict doctrinal sense, the use of economic disadvantage as a proxy for racial disadvantage should not work. The Supreme Court's decision in *Washington v. Davis*⁸⁵ seems clearly to focus on discriminatory *intent* as the factor that establishes an equal protection violation.⁸⁶ As a result, the intent to promote racial balance through the use of a racial proxy would initially seem to be identical to—and just as unconstitutional as—the intent to pursue racial balance explicitly. However, if the Supreme Court were to delve that deeply into the intent of executive or legislative policymakers, even when those policymakers used classifications that were race-neutral on their face, the Court would be analytically required to delve just as deeply into the intent lying beneath all of the facially neutral classifications that American culture presently uses to disadvantage racial minorities with respect to education, employment, housing, and political power.⁸⁷ And that, of course, is something that the Court seems unwilling to do because of its disruptive effect on the current allocation of resources.⁸⁸

It is also possible to design affirmative action programs that promote racial balance by using proxies that have a higher correlation with race than does mere economic disadvantage. For example, things like demonstrated ability to overcome hardship and demonstrated commitment to social justice might be useful proxies for race, if one believes that racial minorities are particularly likely to possess those qualities. The racial correlation of such proxies can be further increased by focusing on factors such as the use of English as a second language, or membership in a family having an incarcerated parent.⁸⁹ Once again, those sorts of proxies are likely to be useful in

⁸⁵ 426 U.S. 229 (1976).

⁸⁶ See *id.* at 238–48 (holding that programs based on disadvantage, not race, are subject to relaxed judicial scrutiny, as opposed to racial classifications which mandate strict judicial scrutiny directed at governmental intent).

⁸⁷ It is, of course, possible that the Court would find the presence of unconstitutional intent in a facially neutral affirmative action program, but not in a facially neutral classification that was intended to promote societal discrimination—even though the two were analytically analogous. Such a tacit distinction may have been what actually motivated the Court's decision in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), where the Court distinguished between unconstitutional actuating intent and constitutionally permissible incidental intent. See *id.* at 278–80 (distinguishing between discriminatory purpose and mere awareness of racially disparate impact). Although *Feeney* involved allegations of gender discrimination, its elaboration of the intent requirement is equally applicable to cases of racial discrimination. See *id.* at 272–73 (discussing racial discrimination as prototype).

⁸⁸ See, e.g., *id.* at 278–80 (upholding arguably discriminatory intent that was found to be merely incidental).

⁸⁹ See, e.g., Kim Ford-Mazuri, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2332–37 (2000) (stating that some schools promote diversity by considering essays in which applicants discuss past difficulties and hardships that tend to affect racial minorities).

advancing racial balance objectives because they correlate highly with race. The correlation can be increased even more by focusing on factors such as an individual's experience with overt racial discrimination; an individual's ability to offer perspectives that are typically missing from predominantly white institutions; and the likelihood that an individual will provide resources to minority communities.⁹⁰ As the racial proxy becomes more transparent, however, the Supreme Court may be more likely to view its use as an unconstitutional effort to promote racial balance.⁹¹

One racial proxy that has ironically gained popularity even among moderate conservatives is the class rank proxy. Rather than relying on overt racial affirmative action in educational contexts, class rank plans automatically admit to state colleges any high school student who graduates in the top X percent of his or her class. The specified percentages tend to range from the top 4% to the top 20% of graduating classes.⁹² To the extent that class rank and X-percent proxies are appealing, it is because they are facially neutral. However, such programs can promote racial balance only in states where high schools are racially segregated to begin with.⁹³

One of the most noticeable recent uses of racial proxies has been in the context of voter redistricting. After the 1990 Census created new congressional seats in states whose past voting discrimination made them subject to the remedial provisions of the Voting Rights Act, the Supreme Court began a campaign to oversee the racial politics of congressional redistricting. In *Shaw v. Reno*,⁹⁴ the Court held that the intentional creation of voting districts in which a majority of the voters were racial minorities was unconstitutional.⁹⁵ Racial majority-minority voting districts are a useful way of promoting racial bal-

⁹⁰ See, e.g., Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & LAW 1, 7–10 (2001) (arguing that admissions preferences should be granted on the basis of such factors).

⁹¹ Cf. *Gomillion v. Lightfoot*, 364 U.S. 339, 341–42 (1960) (refusing to dismiss a constitutional challenge to a new facially-neutral voting district for the City of Tuskegee, Alabama, where the shape of the district had been changed from a square to “a strangely irregular twenty-eight-sided figure” that excluded virtually all black voters); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (invalidating a conviction for violating a facially-neutral ordinance that required laundries to be housed in stone or brick buildings, where virtually all who were denied exemptions were Chinese).

⁹² See Roithmayr, *supra* note 90, at 10–14 (discussing class rank programs and their mixed success in aiding racial minorities).

⁹³ See *id.* at 13 (discussing dependence of class rank plans on segregated nature of high schools).

⁹⁴ 509 U.S. 630 (1993).

⁹⁵ See *id.* at 641–49 (applying strict scrutiny to voting district whose shape was so bizarre that it could only be explained by racial motivation); see also *Miller v. Johnson*, 515 U.S. 900, 916–17 (1995) (applying strict scrutiny to voting districts where race was a “predominant factor” in drawing district lines).

ance because they increase the amount of representation that racial minorities are able to secure in Congress. When minority voters are concentrated in minority dominated voting districts, they have a greater chance of electing a representative who is responsive to their interests than when minority voters are dispersed throughout white dominated voting districts.

After having had to resolve a series of cases during the 1990s in which the Court had to decide whether race had been given too much weight in drawing district lines, the Court ultimately signaled a retreat from this unwieldy issue. In *Easley v. Cromartie*,⁹⁶ the Court upheld a gerrymandered voting district with a high concentration of minority voters on the ground that race had not been used for its own sake, but rather had been used as a proxy for political party affiliation.⁹⁷ Accordingly, the Supreme Court now seems to have endorsed the constitutionality of at least this proxy for racial balance, and it has done so despite the relative transparency of the proxy.

Proxies can mitigate the harshness of the Supreme Court's prohibition on racial balancing. However, they still permit the Supreme Court to have the final say over the constitutionality of racial policies that the representative branches seek to implement through use of a proxy. That suggests that the more effective a racial proxy is in promoting meaningful racial balance, the more likely the Supreme Court is to invalidate it as a veiled attempt to sidestep the Court's own racial policy preferences. Perhaps more surreptitious measures are therefore appropriate.

B. Camouflage

A second way in which the political branches could try to dilute the force of the Supreme Court's prohibition on racial balancing is by attempting to camouflage whatever racial balance policies they choose to adopt. *Grutter* contains the Court's most recent articulation of its longstanding view that the pursuit of racial balance is constitutionally impermissible.⁹⁸ However, *Grutter* itself can be read to support the proposition that well-camouflaged racial balancing is constitutionally permissible. When *Grutter* is compared to *Gratz*,⁹⁹ it appears that the Court chose to uphold the affirmative action program that was more closely connected to racial balance, and to invalidate the

⁹⁶ 532 U.S. 234 (2001).

⁹⁷ See *id.* at 257–58 (permitting political party affiliation to be used as a proxy for race in the redistricting context).

⁹⁸ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (rejecting racial balancing as “patently unconstitutional”).

⁹⁹ See *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating the racial affirmative action program at the University of Michigan College of Literature, Science and Arts).

program that was less likely to advance that goal. This suggests that the Supreme Court may ultimately be more interested in form than in substance with respect to the issue of racial balance.

Grutter upheld the constitutionality of the University of Michigan Law School's affirmative action program.¹⁰⁰ The Court held that the Law School had a compelling interest in diversity, which was sufficient to survive the strict equal protection scrutiny that applied to the school's use of a racial preference for minority students in the admissions process.¹⁰¹ The Court also held that the use of a racial "plus" factor, rather than a numerical quota, was a narrowly tailored way to advance the school's interest in diversity, and that it satisfied the equal protection demand that each applicant be given particularized consideration.¹⁰² The Court stressed that such a holistic consideration helped ensure that each applicant would be treated as an individual rather than merely as a member of a racial group.¹⁰³

On the same day that *Grutter* was decided, the Supreme Court's decision in *Gratz* invalidated the University of Michigan's undergraduate affirmative action program.¹⁰⁴ Although the goal of increasing student diversity remained compelling,¹⁰⁵ the undergraduate affirmative action program was too mechanical to satisfy the narrow tailoring requirement of the Equal Protection Clause.¹⁰⁶ Because the undergraduate program automatically awarded a large fixed number of points to each minority applicant, it had "the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant."¹⁰⁷ The failure to use a more particularized selection process, therefore, made the undergraduate program unconstitutional.¹⁰⁸

Despite the holistic and particularized consideration that the Supreme Court found to be constitutionally essential in *Grutter*, the Law School affirmative action program that the *Grutter* Court upheld appears to have been implemented in a way that was designed to promote racial balance. As Chief Justice Rehnquist convincingly demonstrated in his *Grutter* dissent, the percentages of various racial minority groups admitted under the Law School program closely reflected

¹⁰⁰ See *Grutter*, 539 U.S. at 326–40 (upholding a law school affirmative action program that gave holistic and individualized consideration to applicants).

¹⁰¹ *Id.* at 328–29.

¹⁰² *Id.* at 333–41.

¹⁰³ *Id.* at 337.

¹⁰⁴ *Gratz*, 539 U.S. at 275–76.

¹⁰⁵ *Id.* at 268.

¹⁰⁶ *Id.* at 270–74.

¹⁰⁷ *Id.* at 272 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)) (ellipsis in original).

¹⁰⁸ *Gratz*, 539 U.S. at 271–72.

the percentages of those same minority groups in the overall Law School applicant pool.¹⁰⁹ A majority of the admitted minority students were black; half of that number were Latino; and one-sixth of that initial number were indigenous Indians. The Law School defended its program on the ground that it sought to ensure the admission of a “critical mass” of students from each relevant minority group, thereby enabling a meaningful exchange of ideas and perspectives among students. However, the low number of Indian students admitted under the program was much too small to constitute a critical mass. That further supported the conclusion that racial balance was the actual motive of the Law School program.¹¹⁰

Although the undergraduate program was invalidated in *Gratz* on the grounds that it mechanically awarded a fixed number of points to each underrepresented minority applicant,¹¹¹ there is nothing inherent in the award of a *fixed* number of points that would necessarily reflect racial balance. Indeed, if the school were primarily interested in racial balance, it might well prefer a program that awarded a *variable* number of points to racial minority group applicants. A variable point program would enable the school to regulate the number of points awarded for membership in various minority groups in a way that enabled the school to achieve more directly whatever racial balance it desired.

What emerges from a comparison of *Grutter* and *Gratz* is the possibility that an appropriate degree of camouflage will permit the pursuit of racial balance. The arguments made by Chief Justice Rehnquist in his *Grutter* dissent were cogent enough that the *Grutter* majority could not have simply overlooked them. Rather, the majority must have concluded that the Law School program deserved to be upheld *despite* that danger that it was motivated by a desire to promote racial balance. Perhaps, the Court preferred the *Grutter* program to the *Gratz* program because the fixed numerical bonus in *Gratz* simply *looked* more like a racial quota than the nominally more particularized racial “plus” in the *Grutter* holistic program. If that is true, the Supreme Court may be more concerned with the appearance of affirmative action programs than with their actual effect. As long as a program appears to be more consistent with liberal conceptions of individual merit than with group-based conceptions of racial balance, the Court may be willing to uphold the program.

¹⁰⁹ *Grutter v. Bollinger*, 539 U.S. 306, 381–85 (2003) (Rehnquist, C.J., dissenting).

¹¹⁰ *Id.*; see also *id.* at 346–47 (Scalia, J., concurring in part and dissenting in part) (arguing that the Michigan Law School admissions program was really designed to achieve racial balance); *id.* at 389 (Kennedy, J., dissenting) (explaining that “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.”).

¹¹¹ *Gratz*, 539 U.S. at 271–72.

The Court's treatment of the racial redistricting cases supports the theory that form can be more important than substance in the equal protection context. As has been noted, after invalidating a number of majority-minority voting districts during the 1990s on the grounds that they were predominantly motivated by racial considerations, the Court upheld what appears to be an analytically indistinguishable majority-minority district on the grounds that it was motivated primarily by political rather than racial considerations.¹¹² To the extent that the Court was willing to relax its opposition to majority-minority voting districts because it came to view the policy issues that were involved as essentially political in nature, the Court might be willing to do the same thing with respect to racial balance. Because a decision by the political branches to pursue racial balance is also essentially political in nature, the Court might drop its opposition to such racial balance if it finds enough camouflage to permit it to do so.

There is an interesting irony in the suggestion that racial balance might become constitutionally permissible if it is adequately hidden from view. In order to ensure that an affirmative action program is not viewed as a program that is facially about racial balance, the program will have to be implemented in a way that ensures that racial correlations do not become too high. If a program continually admitted percentages of racial minorities that correlated with the percentages of racial minorities in the relevant population, the program would be easily recognized as a veiled racial balance program. Rather than use fixed racial quotas, therefore, a program will have to use floating quotas to ensure that the relevant minority percentages change periodically.

The need for such floating quotas is ironic for two reasons. First, the use of a floating quota would require even *more* consideration of racial factors than a straight-forward racial balance program. The program administrators would not only have to ascertain the relevant racial percentages, as they would with a racial balance program, but they would then have to monitor the program's performance to make sure that different racial percentages were produced by the program. Second, such floating quotas might have to be used even under a nondiscriminatory program that gave no special consideration to race at all. In the absence of societal discrimination, one would expect a nondiscriminatory selection program to reflect the racial minority percentages that exist in the population at large. If it did not, that would suggest the presence of discrimination somewhere in the system—either in the choice or the application of selection criteria. In a truly nondiscriminatory program, underrepresentation of racial mi-

¹¹² See *supra*, text accompanying notes 27–39, 94–97 (discussing gerrymandering and voting district construction in the context of race).

norities would be expected only if one believed that racial minorities were somehow inherently inferior to whites in their ability to satisfy neutral selection criteria. However, since a truly nondiscriminatory selection program would have the outward appearance of a racial balance program, the results of even a nondiscriminatory program would have to be adjusted to avoid the appearance of racial balance. Simply stating that argument suggests that there is something seriously wrong with the Supreme Court's aversion to racial balance.

Proxies and camouflage might successfully permit the political branches of government to realize some of the benefits of racial balance. However, they would not do much to address the more fundamental separation of powers problems that result from having the politically unaccountable Supreme Court formulate racial policy for the nation. In order to address that problem, more direct measures may be preferable.

III. JUDICIAL REVIEW

The problem with *Grutter* is not simply that it holds the pursuit of racial balance to be unconstitutional. What is fundamentally more troubling is the claim that judicial review authorizes the Supreme Court to neutralize political solutions to the persistent problem of racial discrimination in the United States. I use the term "neutralize" because the Court claims to be advancing the cause of race neutrality when it chooses to override racial balance efforts that are adopted by the representative branches. But as Part II of this Article sought to demonstrate,¹¹³ the concept of neutrality that is used by the Supreme Court has come to mean merely the continued sacrifice of racial minority interests in order to advance the interests of the white majority. Regardless of how one feels about the concept of judicial review in the abstract, this use of judicial review in the context of affirmative action seems both invidious and indefensible. The problem that needs to be neutralized is not the effort that the political branches make to promote racial balance, but rather the conception of judicial review that the Supreme Court invokes to override such efforts. Fortunately, there are political strategies that the representative branches of government can use to resist the Court's discriminatory understanding of neutrality. Some strategies can be used in an effort to persuade the Court to reconsider its own understanding of judicial review. Other strategies can be used to subvert more directly the Court's usurpation of racial policymaking power.

¹¹³ See *supra* Part II (discussing ways in which the Supreme Court has, in the name of equal protection, systematically favored the interests of the white majority over the interests of racial minorities).

A. Persuasion

The Supreme Court, of course, responds to politics. It was long ago observed that the Supreme Court follows the election returns,¹¹⁴ and the Court's 5-4 decision in *Bush v. Gore*¹¹⁵ has often been cited as a recent reminder that Supreme Court political preferences can influence constitutional adjudications in dispositive ways.¹¹⁶ It has even been suggested that the Court's somewhat surprising decision to uphold the affirmative action program at issue in *Grutter* was heavily influenced by the amicus briefs that the business community, the military, and educational leaders filed in the case.¹¹⁷ Accordingly, it makes sense to ask whether there are political actions that can be taken by the representative branches that might help "convince" the Court to rethink the intrusiveness with which it exercises judicial review in the context of affirmative action.

One thing that might prompt the Supreme Court to reevaluate its current conception of judicial review in the affirmative action context is vocal opposition from the political branches. Historically, several United States Presidents have been noteworthy for insisting that the political branches have as much right as the Supreme Court to interpret the Constitution. Thomas Jefferson forcefully asserted that the doctrine of separation of powers did not authorize the Supreme Court to impose its understanding of the Constitution on the President because each branch of government had an equal right to interpret the Constitution as it applied within that branch's own sphere of authority.¹¹⁸ Andrew Jackson vetoed a bill to recharter the Bank of the United States with a veto message stating that he believed that the Bank was unconstitutional, notwithstanding the Supreme Court's de-

¹¹⁴ See FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901) ("[N]o matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns.").

¹¹⁵ 531 U.S. 98 (2000) (determining the manner in which Florida votes should be counted in the 2000 presidential election).

¹¹⁶ See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1407 (2001) ("It is no secret that the Supreme Court's decision in *Bush v. Gore* has shaken the faith of many legal academics in the Supreme Court and in the system of judicial review.").

¹¹⁷ See, e.g., Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 117 (2003) (describing *Grutter* and *Gratz* as "the latest and perhaps most significant evidence that race-based affirmative action was at risk until the business community, the military brass, and educational leaders rallied in its defense"). I view the decision as somewhat surprising because it is the first time that Justice O'Connor—who cast the decisive vote in favor of upholding the plan at issue—has ever voted to uphold a racial affirmative action plan on the merits. See *Grutter v. Bollinger*, 539 U.S. 306, 311-44 (2003) (majority opinion of O'Connor, J.); THE LAW OF AFFIRMATIVE ACTION, *supra* note 39, at 160 n.57 (enumerating the affirmative action voting record of Justice O'Connor).

¹¹⁸ See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 19-20 (14th ed. 2001) (discussing Thomas Jefferson's issuance of pardons for convictions under the Sedition Act of 1798 even though the courts thought the Act to be constitutional).

cision in *McCulloch v. Maryland*¹¹⁹ upholding the constitutionality of the Bank.¹²⁰ President Franklin D. Roosevelt even drafted a speech to justify his decision to defy an adverse Supreme Court ruling in the *Gold Clause Cases*¹²¹ if the Court ultimately chose to invalidate the government's abrogation of gold clauses in federal obligations. The speech was never delivered, however, because the Court's ruling agreed with the President's reading of the Constitution.¹²² All of these presidential arguments were rooted in the separation-of-powers-based belief that the Court could not properly interfere with the actions of a coordinate branch of government when the coordinate branch was operating within a sphere of power that had been constitutionally delegated to the political branch rather than to the Court. In that regard, those presidential assertions of autonomous constitutional interpretation are directly relevant to the claim that the Supreme Court lacks the authority to interfere with the exercise of any affirmative action policymaking power that the Constitution has delegated to the political branches.

Perhaps the best known example of apparent Supreme Court deference to political pressure stems from President Franklin D. Roosevelt's Court-packing plan. Roosevelt threatened to increase the number of Justices on the Supreme Court in the hope that the plan would reduce the Supreme Court's opposition to his New Deal efforts to pull the nation out of the Depression.¹²³ By focusing the nation's Depression-related frustrations on the Supreme Court, Roosevelt was able to offer the public a cause for the nation's continued economic problems.¹²⁴ In addition, by characterizing his plan as a proposal for structural reform directed at older Justices likely to pose a threat to judicial efficiency, Roosevelt was able to concentrate political pressure on the Justices whose attachment to older economic theories made them most antagonistic to his New Deal agenda.¹²⁵ The ultimate success of the Court-packing plan suggests that the Supreme Court may respond to political pressure when the pressure is pervasive, intense, and threatens a prospective dilution of the Court's prestige and policymaking power. Interestingly, in support of his plan,

¹¹⁹ 17 U.S. (4 Wheat.) 316 (1819).

¹²⁰ See SULLIVAN & GUNTHER, *supra* note 118, at 20–21 (discussing Andrew Jackson's veto message on the bill to recharter the Bank of United States).

¹²¹ See *Perry v. United States*, 294 U.S. 330 (1935) (permitting the government to abrogate the gold clauses in federal obligations).

¹²² See SULLIVAN & GUNTHER, *supra* note 118, at 22 (referencing Franklin D. Roosevelt's proposed gold clause speech).

¹²³ See *id.* at 135–37 (discussing Roosevelt's Court-packing plan).

¹²⁴ See *id.* at 136 (discussing Roosevelt's effort to blame the Supreme Court for delays in economic recovery following the Great Depression).

¹²⁵ See *id.* (discussing Roosevelt's belief that the Supreme Court needed younger blood).

President Roosevelt employed rhetoric that emphasized the importance of preventing the Supreme Court from behaving in an unconstitutional manner:

[W]e have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it.¹²⁶

A President committed to racial equality could make a series of analogous political speeches that would rebuke the Supreme Court for impeding the nation's progress toward racial equality through the Court's overly intrusive judicial review of affirmative action plans.¹²⁷ These speeches could emphasize the relative institutional advantages that the political branches have over the Court in the formulation of racial policy, especially in light of Section 5 of the Fourteenth Amendment,¹²⁸ but the real point of the speeches would be to send a political, rather than a doctrinal, message to the Court. The effectiveness of these speeches could be enhanced by echoing three features of President Roosevelt's Court-packing plan. First, the President could blame the Supreme Court for the nation's persistent racial problems, emphasizing—with appropriate references to *Dred Scott*—that the political branches were trying their best to solve the problem of racial inequality only to have their efforts stymied by a Court that was pursuing an outmoded conception of equality in which whites always end up being more equal than racial minorities. Second, the President could characterize his initiative as a structural reform that was intended to reestablish separation-of-powers boundaries by confining the Court to adjudicatory rather than policymaking activities. Third, the President could highlight the fact that the same four or five Justices voting as a conservative bloc are the ones who always vote against affirmative action and racial balance, thereby highlighting the political, rather than constitutional, nature of the Court's opposition to majoritarian remedies for racial discrimination. Even a conservative President with no particular commitment to racial equality should favor sending a strong political admonition to the Court,

¹²⁶ See *id.* (quoting President Roosevelt's March 9, 1937 radio address to the nation in which he called for alterations to the Court).

¹²⁷ In the past, I have criticized President Clinton for his failure to initiate political actions, such as those proposed here, to recapture racial policymaking power from the Supreme Court. See Girardeau A. Spann, *Writing Off Race*, 63 LAW & CONTEMP. PROBS. 467, 469 (2000), available at <http://www.law.duke.edu/journals/63LCPSpann> ("What President Clinton has failed to do is to assert the full scope of his constitutional authority to formulate race relations policy for the nation that elected him to be its political leader.") (last visited Sept. 28, 2004).

¹²⁸ See *supra* Part I.A (discussing the relative institutional competence of the Court and the political branches).

because conservatives typically claim that they favor judicial restraint and disfavor judicial policymaking under the guise of constitutional interpretation¹²⁹—which is precisely what the Supreme Court does when it invalidates an affirmative action program that has been adopted by the political branches.

The President and members of Congress could supplement this political message to the Court in a number of more concrete ways. A belief in deferential judicial review for benign affirmative action could be made a political litmus test for the appointment and confirmation of new federal judges, in much the same way that one's position on abortion is often used as a litmus test for judicial appointments.¹³⁰ In addition, Senators could use their filibuster power to help ensure that federal judges would not be appointed if they opposed deference to the political branches on the issue of affirmative action.¹³¹

Pursuant to the Article III power of Congress to regulate the jurisdiction of the federal courts,¹³² the President and members of Congress could propose legislation that would strip the Supreme Court and lower federal courts of their jurisdiction to review affirmative action programs that were adopted by the representative branches of government. Politically motivated legislation restricting federal court jurisdiction has been introduced in the past with respect to a variety of controversial issues.¹³³ Although the constitutionality of such legis-

¹²⁹ For example, in his 2004 State of the Union message, President George W. Bush chastised activist courts for reading state constitutions to require recognition of same-sex marriages, and raised the specter of a federal constitutional amendment to reverse those activist decisions. See *State of Gay Unions*, WASH. POST, Jan. 26, 2004, at A18 (quoting Bush as saying, "Activist judges . . . have begun redefining marriage by court order, without regard for the will of the people and their elected representatives If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people *would* be the constitutional process.") (emphasis in original). Bush later went on to endorse the passage of a constitutional amendment prohibiting same-sex marriage. See Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage: President Says States Could Rule on Civil Unions*, WASH. POST, Feb. 25, 2004, at A1 (quoting Bush as saying, "[a]fter more than two centuries of American jurisprudence, and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization.").

¹³⁰ See Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 300 (2004) (citing the abortion litmus test for federal judges).

¹³¹ See Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 524–29 (2004) (discussing the recent filibuster use by Senate Democrats to defeat politically undesirable Republican nominees to the federal judiciary, largely because of the perceived opposition of those nominees to civil rights).

¹³² See U.S. CONST. art. III, §§ 1–2 (granting Congress the power to create inferior federal courts and to regulate the appellate jurisdiction of the Supreme Court, respectively).

¹³³ See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 319–26 (5th ed. 2003) (discussing proposed jurisdiction-stripping legislation concerning controversial issues such as busing, school prayer, and abortion).

lation may in some circumstances be uncertain,¹³⁴ the point of introducing jurisdiction-stripping legislation in the affirmative action context would be more for its political effect than to secure its actual adoption.

More forcefully, the President and members of Congress could propose constitutional amendments that would not only permit the pursuit of racial balance in the context of affirmative action, but would also regulate or eliminate judicial review of majoritarian affirmative action.¹³⁵ Such an amendment would presumably eliminate any constitutional difficulties presented by jurisdiction-stripping legislation, but again, the primary motive of introducing such proposed amendments would be to exert political leverage on the Court. Finally, the President and members of Congress could propose bills of impeachment directed at Supreme Court Justices who failed to respond to more subtle political messages and continued to violate separation-of-powers principles by overriding majoritarian affirmative action programs.¹³⁶ The impeachment of President Clinton establishes that such politically motivated use of the impeachment process can occur even for less lofty purposes.¹³⁷

There are a number of ways in which the political branches can send political messages to the Supreme Court in the hope of having the Court relax its intrusion into the politically accountable process of racial policymaking. I suspect that the Court is likely to be responsive to a set of forcefully conveyed political messages, just as it appears to have been responsive to such messages in the context of the New Deal Court-packing plan. However, if the Court does not respond to political pressure, more subversive actions are possible.

B. Subversion

The Supreme Court can properly expect only the degree of deference to which it is legitimately entitled. When the Court exceeds the scope of its own constitutional power by usurping policymaking power from the representative branches, the system of checks and balances requires that the representative branches resist the Court's ultra vires actions to the extent that the Constitution gives the political branches the power to do so. If the representative branches can-

¹³⁴ See *id.* (discussing the constitutionality of jurisdiction-stripping legislation).

¹³⁵ See U.S. CONST. art. V (establishing the process for amending the Constitution).

¹³⁶ See Christopher L. Eisgruber & Lawrence G. Sager, *Impeachment and Constitutional Structure*, 5 WIDENER L. SYMP. J. 249, 256-58 (2000) (discussing the politically motivated impeachment efforts directed at Supreme Court Chief Justice Earl Warren and Supreme Court Associate Justice William O. Douglas).

¹³⁷ See *id.* (discussing the politically motivated impeachment effort directed at President Bill Clinton).

not find ways to persuade the Supreme Court to adopt a more deferential approach to judicial review in the context of affirmative action, the representative branches should find ways to subvert the Court's efforts to upset the constitutional balance of powers.

The idea that subversion can be a legitimate response to an illegitimate legal order is not a new one.¹³⁸ However, the idea has been given new vitality by Professor Paul Butler. Butler has argued, for example, that jury nullification can constitute an appropriate response by racial minority jurors to the forms of racial discrimination that are built into the criminal justice system.¹³⁹ He has also argued that it is praiseworthy for judges to circumvent a law that they believe to be immoral.¹⁴⁰ Butler is careful to limit his support of subversion to questions of morality, as opposed to mere political disagreements.¹⁴¹ I am advocating subversion by the political branches, directed at the manner in which the Supreme Court has exercised judicial review under the Equal Protection Clause, because I believe the Supreme Court's actions to be unconstitutional, illegitimate, and immoral. I believe this because the Supreme Court's racial jurisprudence has a proven propensity to promote racial injustice.¹⁴²

Political subversion of Supreme Court decisions can be effective, as the aftermath of the *Brown* decisions demonstrates.¹⁴³ The massive resistance that followed the Supreme Court's desegregation decision was successful in delaying any meaningful desegregation of southern schools for a decade.¹⁴⁴ Presumably, that is because the Court so

¹³⁸ The founding of the United States was premised on the belief that subversion is a legitimate response to an illegitimate legal order. See JOHN R. VILE, *A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS* 6 (3d ed. 2001) (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), declaring that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.").

¹³⁹ Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 678 (1995).

¹⁴⁰ See Paul Butler, *Subversive Judges* (Oct. 24, 2003) (unpublished manuscript delivered at Georgetown-Sloan Interdisciplinary Workshop, on file with author).

¹⁴¹ See, e.g., *id.* at 13 n.36 (stating that "disagreement with the law on public policy grounds—as opposed to moral grounds—does not justify subversion").

¹⁴² See generally RACE AGAINST THE COURT, *supra* note 7, at 85–169 (discussing the ways in which the Supreme Court has historically sacrificed racial minority interests to advance the interests of the white majority).

¹⁴³ *Brown I*, 347 U.S. 483, 493–96 (1954) (invalidating the separate-but-equal doctrine in public schools); see also *Brown II*, 349 U.S. 294, 299 (1955) requiring desegregation of public schools "with all deliberate speed.").

¹⁴⁴ See STONE ET AL., *supra* note 7, at 456–60 (discussing the Supreme Court's response to massive southern resistance following the *Brown* decisions). Although I have suggested that the Supreme Court responds to political pressure, both *Brown I* and *II* and *Cooper v. Aaron*, 358 U.S. 1, 18–21 (1958) (insisting on desegregation of Central High School in Little Rock, Arkansas despite massive resistance), are often cited to illustrate the Supreme Court's capacity for judicial

feared the political backlash that followed the issuance of *Brown I*,¹⁴⁵ that it felt compelled to retreat to the “all deliberate speed” formula of *Brown II*.¹⁴⁶ This was a means of delaying implementation of the Court’s desegregation requirement.¹⁴⁷ Moreover, the year after *Brown I* was decided, the post-*Brown* threat of massive southern resistance caused the United States Supreme Court to back down from a political confrontation with the Virginia Supreme Court over the issue of miscegenation. In its infamous *Naim v. Naim*¹⁴⁸ decisions, the Court refused to invalidate a Virginia miscegenation statute that had been defiantly upheld by the Virginia Supreme Court, even though *Brown I* seemed to have made miscegenation laws clearly unconstitutional.¹⁴⁹ Perhaps similar massive resistance to the Supreme Court’s intrusive judicial review of affirmative action would be similarly successful in marginalizing Supreme Court efforts to override the affirmative action policies adopted by the representative branches. And, of course, there is something appealingly symmetrical about using the a technique to promote racial equality that is the same as the technique

independence. However, that characterization is inaccurate. *Cooper* constituted the only effort by the Supreme Court to enforce the desegregation mandate of the *Brown* decisions prior to 1963. Moreover, the bulk of southern school desegregation that followed resulted not from Supreme Court decisions, but from the political actions of Congress in passing the Civil Rights Act of 1964, and the political actions of the Department of Health, Education, and Welfare in enforcing that Act. STONE ET AL., *supra* note 7, at 457–58.

¹⁴⁵ 347 U.S. 483 (1954).

¹⁴⁶ See *Brown II*, 349 U.S. at 301 (requiring the district courts to take actions towards desegregation “with all deliberate speed.”).

¹⁴⁷ See STONE ET AL., *supra* note 7, at 455–60 (discussing the Supreme Court’s delay in implementing its *Brown* desegregation requirement).

¹⁴⁸ 350 U.S. 985 (1956) (per curiam); 350 U.S. 891 (1955) (per curiam).

¹⁴⁹ In *Naim v. Naim*, 350 U.S. 985 (1956) (per curiam), and 350 U.S. 891 (1955) (per curiam), the United States Supreme Court was asked to hold unconstitutional a Virginia miscegenation statute that had been upheld by the Virginia Supreme Court of Appeals. The United States Supreme Court vacated the Virginia decision and remanded for clarification of the record. 350 U.S. at 891. The Virginia Supreme Court of Appeals, however, merely reaffirmed its earlier decision and refused to clarify the record. *Naim v. Naim*, 90 S.E.2d 849, 850 (1956) (per curiam). Nevertheless, the United States Supreme Court declined to recall or amend the mandate, finding that the constitutional question had not been “properly presented.” This allowed the Virginia court’s decision to remain in effect. 350 U.S. at 985. Because the neutrality principle that had been announced in *Brown I* seemed to make the Virginia miscegenation statute unconstitutional, and because the Supreme Court’s failure to resolve *Naim* on the merits also seemed to violate a federal statute giving the Supreme Court mandatory jurisdiction over the case, the Supreme Court’s actions in *Naim v. Naim* have been vigorously criticized. See, e.g., Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964) (noting that “there are very few dismissals similarly indefensible in law.”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (noting that dismissal of the miscegenation case was “wholly without basis in the law.”). The Supreme Court ultimately invalidated the Virginia miscegenation statute eleven years later in *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967), when only 16 states still had miscegenation statutes on the books. *Id.* at 6.

previously used by southern segregationists to promote racial discrimination.

The political branches can subvert the Supreme Court's illegitimate exercise of judicial review in the context of affirmative action by aggressively utilizing the full scope of the power that the Constitution grants to the political branches. I have suggested that the political branches could introduce jurisdiction-stripping legislation, constitutional amendments, and bills of impeachment in an effort to pressure the Supreme Court into changing its conception of appropriate judicial review. But the political branches need not stop at the mere introduction of such measures. If the Supreme Court does not respond to political pressure, the political branches also have the constitutional authority to implement those remedies. Congress could actually *pass* jurisdiction-stripping legislation that insulated affirmative action from judicial review. The states could actually *amend* the Constitution in a way that made affirmative action unambiguously constitutional. And recalcitrant Justices could actually be *removed from office* by impeachment.

There is little doubt that the political branches have the explicit authority to take such actions. However, it is equally clear that the use of such extreme measures as an antidote to Supreme Court appropriations of legislative or executive policymaking power seems inconsistent with existing conventions about the proper use of those constitutional powers. But existing constitutional conventions can be changed.

Professor Mark Tushnet describes a political phenomenon that he calls *constitutional hardball*, in which political players seek to combine rhetoric and action in ways that alter pre-existing understandings of the constitutional order.¹⁵⁰ Tushnet offers three examples. The first is the aggressive use of the filibuster by Senate Democrats to block the confirmation of George W. Bush's more conservative judicial nominees, and the Republican rejoinder that such use of the filibuster has interfered with the President's constitutional power to make judicial appointments. The second example is the effort by Republican majorities in Colorado and Texas to redraw voting district lines in ways that would perpetuate Republican control of the legislature, and the ensuing decision of Texas Democrats to resist that effort by absenting themselves from both the legislature, *and the State of Texas*, in order to ensure the absence of a legislative quorum. The third example is the Republican impeachment of President Clinton in the House of Representatives despite the absence of a reasonable likelihood that a Senate conviction would follow. All of these actions

¹⁵⁰ Tushnet, *supra* note 131. See generally MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 1-8 (2003) (describing Tushnet's concept of a new constitutional order).

were authorized by the letter of the Constitution, but all seemed to violate pre-existing conventions about what sorts of actions were constitutionally appropriate under what circumstances.

Nevertheless, the political players in each instance were willing to risk violating existing constitutional norms because they believed the stakes of the underlying political debate to be very high, and because they wished to establish a new constitutional order.¹⁵¹ In the context of affirmative action, the political branches could—with great ceremony—use the jurisdiction-stripping power, the amendment power, and the impeachment power in an unconventional manner precisely to establish a new constitutional understanding about the proper allocation of racial policymaking power between the political branches and the Supreme Court.

There is another way to play *constitutional hardball* in the context of affirmative action. The representative branches could adopt an aggressive interpretation of the Article III restrictions on the scope of federal judicial power that were created by the Supreme Court itself. Article III limits the judicial power to “[c]ases” and “[c]ontroversies.”¹⁵² Under the prevailing model of federal adjudication that emanates from John Marshall’s opinion in *Marbury v. Madison*,¹⁵³ that restriction has come to mean that the federal courts—including the Supreme Court—are limited to retrospectively resolving concrete disputes between adversary parties, and are not institutionally competent to render advisory opinions that are prospective or legislative in nature.¹⁵⁴ In reality, it has always been so common for the Supreme Court to issue opinions designed to have a prospective effect on the resolution of controversial policy issues that its resolution of the dispute between the particular parties is typically viewed as incidental at best.¹⁵⁵

However, the political branches have the power to create a new constitutional order in which the *Marbury*-based separation-of-powers limitation on federal court jurisdiction is actually taken seriously. The political branches could treat Supreme Court adjudications as binding on the parties before the Court, but not as creating prospec-

¹⁵¹ See *id.* at 8–13 (outlining the challenges that politicians must overcome to establish a new constitutional regime).

¹⁵² U.S. CONST. art. III, § 1.

¹⁵³ 5 U.S. (1 Cranch) 137, 174–80 (1803) (setting the foundation for judicial review).

¹⁵⁴ See FALLON ET AL., *supra* note 133, at 67–90 (discussing how the case or controversy requirement is traceable to the model of adjudication advanced by Chief Justice Marshall in *Marbury*).

¹⁵⁵ For example, it is difficult to imagine that *Brown I*, 347 U.S. 483 (1954), was really about whether Linda Brown could attend an integrated school. Similarly, it is difficult to imagine that *Marbury* itself was really about whether William Marbury could get an official piece of paper naming him a justice of the peace. Both cases were obviously intended to establish broad, prospective principles of law relating to racial segregation and judicial review, respectively.

tive legislative-type rules of constitutional law. In the new constitutional order, Supreme Court precedents would be narrowly construed so that they did not control future cases involving different parties and different fact situations.

Ironically, this approach would have the effect of making Supreme Court opinions advisory to the political bodies. Supreme Court opinions would resolve the particular disputes that were before the Court, but they would have a prospective effect on legislative and executive policymakers only to the extent that those policymakers found the Supreme Court opinions persuasive enough to incorporate into their own policymaking actions.¹⁵⁶

The new understanding of judicial review that I am advocating is not unprecedented. I think it is what Thomas Jefferson and Andrew Jackson had in mind when they argued that Supreme Court adjudications were not binding on the political branches of government when the political branches were acting within their own spheres of constitutional authority.¹⁵⁷ Moreover, my view is simply an extension of the view expressed by Abraham Lincoln in the aftermath of *Dred Scott*. Lincoln insisted that Supreme Court precedents should be read as binding in the cases from which they emanated, but should not be viewed as establishing political rules to govern the coordinate branches or the voters. For Lincoln, political resistance to a Supreme Court rule that the voters or the political branches viewed as erroneous was important as a means for the getting the Supreme Court to reverse its disfavored rule.¹⁵⁸

And, of course, there is always the option of outright defiance. In response to a Supreme Court decision concerning Indian sovereignty with which President Andrew Jackson strongly disagreed, Jackson is reputed to have said: "John Marshall has made his decision. Now let him enforce it."¹⁵⁹ As has been noted, President Franklin D. Roosevelt was also prepared to defy an adverse Supreme Court decision in

¹⁵⁶ This is ironic because the gist of the *Marbury* model of adjudication is that Article III courts do *not* have the authority to issue advisory opinions. See FALLON ET AL., *supra* note 133, at 78–85 (discussing advisory opinions).

¹⁵⁷ See *supra* text accompanying notes 118–20 (describing the views of Thomas Jefferson and Andrew Jackson on the deference owed to Supreme Court adjudications).

¹⁵⁸ See SULLIVAN & GUNTHER, *supra* note 118, at 21 (discussing the views of Abraham Lincoln on the deference owed to Supreme Court adjudications).

¹⁵⁹ See *id.* at 23 (discussing Andrew Jackson's reaction to the Supreme Court decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)). In fact, the pertinent litigation was abandoned before a confrontation between Jackson and the Court came to a head. See SULLIVAN & GUNTHER, *supra* note 118, at 23 ("[T]he litigation was abandoned before any call for presidential assistance arose."); see also Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969) (discussing Indian cases that created tension between Jackson and the Supreme Court); RICHARD H. CHUSED, *CASES, MATERIALS, AND PROBLEMS IN PROPERTY* 20–35 (1999) (describing the Indian cases and Jackson's response).

the *Gold Clause Cases* if the need to do so had arisen.¹⁶⁰ And the Virginia Supreme Court did successfully defy the United States Supreme Court in the *Naim v. Naim* litigation, when the United States Supreme Court chose to back down rather than confront the Virginia Supreme Court over the issue of miscegenation.¹⁶¹ If all else fails, simple defiance might be the most appropriate response to continued Supreme Court efforts to override racial policy determinations made by the representative branches. After all, we did fight a Civil War in response to *Dred Scott*.¹⁶²

CONCLUSION

I have argued that the Supreme Court lacks the relative institutional competence under our constitutional system of separated governmental powers to substitute its policy preferences for the policy determinations made by the politically accountable branches of government concerning how best to implement the equal protection guarantee of the Fourteenth Amendment. I have also argued that the Supreme Court's long history of sacrificing racial minority interests for the benefit of the white majority disqualifies the Court both from exercising intrusive judicial review over majoritarian affirmative action programs adopted to benefit racial minorities, and from reading the Constitution to preclude the representative branches from pursuing racial balance remedies for the persistent problem of racial discrimination. I have, therefore, urged the political branches to sidestep the Supreme Court's troublesome affirmative action decisions to the extent that they are able to do so through the use of proxies and camouflage techniques. If such creative compliance efforts prove unsuccessful, I have encouraged the political branches to utilize the full scope of their constitutional powers to persuade the Supreme Court to reconsider its present conception of judicial review in the affirmative action context. If persuasion fails, I have argued that the political branches have a constitutional obligation to exercise their constitutional powers in ways that will subvert the Court's usurpation of racial policymaking power, even if such subversion ultimately comes to encompass outright defiance of Supreme Court decisions. To the extent that my position strikes you as extreme, please consider that to be a measure of how strongly I feel about an issue that I consider to be more moral than doctrinal.

¹⁶⁰ See *supra* text accompanying notes 121–22 (discussing speech prepared by Franklin D. Roosevelt to defy the Supreme Court ruling in *Perry v. United States*, 294 U.S. 330 (1935), if an adverse decision had been handed down).

¹⁶¹ See *supra* note 149 (describing the *Naim v. Naim* litigation).

¹⁶² See *supra* text accompanying notes 21–23 (discussing *Dred Scott* and the Civil War).

I anticipate that my subversive advocacy will be met with the charge that I am essentially promoting lawlessness. I suspect that I will be accused of impatiently placing my parochial short-term interest in racial equality ahead of the nation's more important long-term goal of maintaining a stable form of government in which the Supreme Court retains the legitimacy needed to operate as the primary guardian of our individual rights. And I imagine that I will ultimately be charged with naïveté for my belief that the majoritarian political process could ultimately end up being more protective of racial minority rights than the Supreme Court is likely to be.

My response to the charge of lawlessness is that I am trying to remedy what I perceive to be the lawlessness of the present regime, in which the Supreme Court has been permitted to exceed the scope of its constitutional authority in ways that repeatedly harm the interests of racial minorities. My response to the charge of impatient parochialism is that I can conceive of few principles as universal as the equality principle that prohibits invidious discrimination, and that racial minorities have waited long enough for that principle to be honored in the United States. My response to the charge of naïveté is that I am not so much naïve as hopeful. My hope is that the majoritarian political branches, supported by the majoritarian electorate, will do more to promote the cause of racial equality if they are no longer constrained by the discriminatory proclivities that have been exhibited by the Supreme Court throughout its history. How far the culture will go is likely to be a direct function of how much the culture cares about racial justice. I may ultimately turn out to be wrong in placing my hope in the process of representative democracy. But, for the moment at least, it seems better than the alternative.