Affirmative Action in Education: The Trust and Honesty Perspective

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Introduction

Affirmative action is one of the most controversial topics for constitutional scholars, perhaps for American society at large as well. Education seems to be the favorite context for such discussions. The debate over whether it should be constitutionally permissible to consider race when allocating public benefits and burdens has overwhelmingly concentrated on the admissions policies of competitive public institutions, mainly universities and colleges, and to a lesser extent elementary and secondary schools.[1] On May 14, 2002, a bitterly divided Sixth Circuit, sitting *en banc*, upheld the University of Michigan Law School's race-conscious admissions policy aimed at furthering diversity in the student body,[2] thus renewing the affirmative action debate. On December 2, 2002, the United States Supreme Court granted *certiorari* to review the Sixth Circuit's decision.[3] Moreover, in a rare procedural move, the Court granted review of a District Court decision on the constitutionality of the University of Michigan's undergraduate admissions program still pending before the Sixth Circuit.[4] Oral argument for both these cases took place on April 1, 2003 and the Supreme Court's decisions are expected by the end of the Court's 2002-2003 term.

Despite the abundance and diversity of views expressed in the literature, the discussion on affirmative action has three characteristics that render it constitutionally inconclusive and even misleading. First, the doctrinal analysis has overwhelmingly concentrated on the formal question of the applicable standard of review, instead of exploring the functional question of the circumstances under which race-conscious policies pass constitutional muster.[5] Second, when the courts do proceed past the applicable standard of review, several arguments that are being

1. The legal standards that apply to race-conscious policies initiated by private entities parallel those of public institutions, provided that these private entities receive federal financial assistance and thus come within the scope of Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000 d-1. *See* Regents of Univ. of California v. Bakke, 438 U.S. 265, 287, 328 (1978), where five Justices (Justices Powell, Brennan, White, Marshall and Blackmun) held that racial discrimination that would violate the Constitution's Equal Protection Clause also violates Title VI of the Civil Rights Act; however, for reasons that remain largely unexplored, the overwhelming majority of the judicial battles on affirmative action in education targets race-conscious policies adopted by public institutions.

2. Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002).

3. 71 U.S.L.W. 3387 (No. 02-241).

4. Gratz v. Bollinger, 277 F. 3d. 803 (6th Cir. 2001), *cert. granted*, 71 U.S.L.W. 3387 (U.S. Dec. 02, 2002) (No. 02-516).

5. *See also* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997) (suggesting that part of the problem with affirmative action doctrine is its effort "to pack far too much" into a determination of the appropriate standard of review).

set forth actually focus on whether affirmative action reflects a wise public policy instead of its constitutionality. Third, because the values of the proponents and opponents of affirmative action frequently conflict, the whole discussion is extremely polarized.[6] While opponents argue that any consideration of race as a goal is inherently odious, proponents insist that this exact consideration is necessary to eliminate the system of racial oppression that perpetuates the effects of past racial discrimination.

This focus of the debate has provided little help in determining the extent to which race-conscious policies in the allocation of educational benefits are constitutionally permissible. The Supreme Court settled the question of the applicable standard of review in *City of Richmond v. Croson* and *Adarand Constructors v. Pena*, handed down respectively in 1989 and 1995, in favor of strict scrutiny.[7] However, this determination by itself does not provide material guidance as to the mode of application of strict scrutiny. To be sure, the applicability of strict scrutiny indicates the Court's conviction that policies which include the consideration of race are statistically less probable to be upheld than policies that are subject to a looser standard of judicial review. Beyond statistics, however, the Supreme Court offers no substantive guidance as to the circumstances under which a race-conscious policy or practice passes constitutional muster, unless the standard of strict scrutiny is mechanically correlated with invalidation as the judicial outcome. This last option, though, was unequivocally rejected in *Adarand*, in which at least six Justices dispelled the notion that strict scrutiny is "strict in theory, but fatal in fact."[8]

Furthermore, the arguments that both proponents and opponents of affirmative action set forth at the application stage of strict scrutiny lack constitutional foundation. For instance, neither the original

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6. *Cf.* Mark R. Killenbeck, *Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CALIF. L. REV. 1299, 1339 (1999) (noting that in most instances in the affirmative action debate "each side seems to be talking past the other").

7. City of Richmond v. J.A. Croson, 488 U.S. 469, 494 (1989) (plurality opinion) (subjecting all state and local race-based classifications to strict scrutiny, regardless of the race of those burdened or benefited by a particular classification); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to all racial classifications imposed by federal, state, or local governmental actors).

8. *Adarand*, 515 U.S. at 237. This portion of Justice O'Connor's plurality opinion was joined by three other Justices (Chief Justice Rehnquist, Justices Kennedy and Thomas). It was not joined by Justice Scalia as it was inconsistent with his views, as expressed in his concurring opinion; *see id.* at 239. Arguably, it was not joined wholeheartedly by Justice Thomas, given his concurrence in Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (seeming to approve the fatal results traditionally associated with strict scrutiny), decided the same day. However, it is the opinion of the Court, as the dissenting Justices took at least an equally broad view as to the permissibility of race-conscious policies to benefit minority groups. *See Adarand*, 515 U.S at 243 (Stevens, J., dissenting); *id.* at 265-66 (Souter, J., dissenting); *see also* Missouri v. Jenkins, 515 U.S. at 112 (O'Connor, J., concurring) ("It is not true that strict scrutiny is strict in theory, but fatal in fact") (internal quotation marks omitted); *cf. Bakke*, 438 U.S. at 361-62 (opinion of Brennan, White, Marshall, Blackmun, JJ.) ("Our review should be strict—not 'strict' in theory and fatal in fact," where the label of "strict, but not fatal scrutiny" is used for the standard of review usually employed for purposes of intermediate scrutiny).

understanding nor the moral reading of the Constitution can offer a constitutionally conclusive answer to the question whether the benefits of educational diversity, including a racial component, are important enough to justify a race-conscious admissions policy.[9] Opponents of affirmative action usually acknowledge the importance of educational or racial diversity, but argue that the courts should not deem the benefits of diversity a compelling state interest.[10] Implicit in this distinction between diversity as an important goal, but not a compelling interest is an assessment of the degree to which a diversity-oriented race-conscious admissions policy is a wise or expedient public policy. However, an assessment of the policy's wisdom says nothing about its constitutionality.[11] The Court does not make the distinction between wisdom and constitutionality of a policy explicit in most cases dealing with race-based classifications.[12] Nevertheless, *Adarand*'s abandonment of the mechanical correlation of standards of review with judicial outcomes highlights the importance of the distinction in affirmative action as well. Affirmative action policies are not always unconstitutional, since strict scrutiny is not fatal in fact; even when constitutionally permissible, affirmative action is not constitutionally required.[13] When within constitutional boundaries then, the decision as

9. *See infra* notes 119-32 and accompanying text.

10. *Cf. e.g.*, Grutter v. Bollinger, 137 F.Supp. 2d 821, 850 (E.D. Mich. 2001) (acknowledging that racial diversity in the law school population may provide important and laudable educational and societal benefits but insisting nonetheless that "the attainment of a racially diverse class is not a compelling state interest"); Terrance Sandalow, *Identity and Equality: Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1907 (1999) (suggesting that racial and ethnic diversity in the student body may make a useful contribution to education but is not indispensable to it); *see also Brief for the United States as amicus curiae supporting petitioner*, *available at* www.cir-usa.org/legal_docs/michigan_amici_US_gratz.pdf (last visited, Apr. 2, 2003) (including the amicus curiae brief filed by the United States to the Supreme Court in the *Gratz* case against the University of Mchigan race-conscious admissions policies that acknowledges that the goals of educational openness, accessibility and diversity are "important and laudable").

11. *Cf., e.g.*, Ohio v. Akron Center for Reprod. Health, 497 U.S. 502, 521 n.1 (1990) (Stevens, J., concurring) ("It is perhaps trite for a judge to reiterate the familiar proposition that an opinion about the facial constitutionality of a statute says nothing about the judge's views concerning the wisdom or unwisdom of the measure.")

12. *But cf. Adarand*, 515 U.S. at 247 n.5 (Stevens, J., dissenting) (distinguishing between "question[ing] the wisdom of affirmative action programs" and "equat[ing] the many well meaning and intelligent lawmakers and their constituents. . .who have supported affirmative action. . ., to segregationists and bigots"); *see also* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 160-61 (1996) (distinguishing in the affirmative action context between arguments that are set forth before Congress and state and city legislatures, and arguments of constitutional principle); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 3 (2002) (challenging the wisdom of affirmative action, but not its constitutionality).

13. *Cf. Bakke*, 438 U.S. at 379 (opinion of Brennan, White, Marshall, Blackmun, JJ.) ("[any State] is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program"); *see also* Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1129-30 (1997) (arguing that a university's decision to curtail or abandon race-based affirmative action would be taken 'in spite of,' and not 'because of' its impact on historically disadvantaged nonwhite groups); *but cf.* Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 298 (1997) ("programs that survive the demanding Supreme Court standards will

to whether an institution should adopt an affirmative action policy rests on an assessment of arguments as a matter of wise public policy.

While the values that permeate the analysis of proponents and opponents of affirmative action conflict, they all are intuitively powerful. The proponents of affirmative action validly argue that the lingering effects of racial discrimination remain pervasive in modern American society. Against this background, the mere formal recognition of equality will only continue to perpetuate the present effects of racial discrimination.[14] Opponents of affirmative action provide an equally compelling argument that it is difficult to square the consideration of an immutable characteristic, like race, in decisions that allocate critical benefits, with individual merit as traditionally conceived.[15] Furthermore, the imposition of burdens on members of the white majority for acts of discrimination in the past seems at odds with fundamental concepts of personal responsibility.[16] The choice among these conflicting paradigms is an extremely hard one, though parties in the debate do not often understand this.[17]

The affirmative action controversy thus has fallen into a conundrum: the Supreme Court's determination of strict scrutiny as the appropriate standard of review is inconclusive as to how this standard should be applied. Even under strict but not fatal scrutiny, a principled distinction between cases where a policy passes and fails strict scrutiny is necessary. The tools commonly used in construing the Constitution, however, are ill-suited for this distinction.

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necessarily be so essential to the elimination of ongoing discrimination that it may well violate the Equal Protection Clause for the government to prohibit them").

14. *See, e.g., Bakke*, 438 U.S. at 396 (opinion of Marshall, J.) ("In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order"); *id* at 407 (opinion of Blackmun, J.) ("In order to get beyond racism, we must first take account of race. There is no other way").

15. *Id.* at 299 (opinion of Powell, J.); *id.* at 319 n.53 ("An underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual"); *cf.* Metro Broadcasting v. F.C.C. et al., 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) ("Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups . . . may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit"); *see also* Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990) (criticizing race-conscious policies as inconsistent with the liberal, individualistic conception of equal protection); *but see* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (arguing that the entire theory of the Equal Protection Clause that examines the acceptability of legal classifications is inherently group-based); DWORKIN, *supra* note 12, at 158-59 (suggesting that almost all legislation treats people as members of groups).

16. *See, e.g., Adarand*, 515 U.S. at 239 (Scalia, J., concurring) ("[u]nder our Constitution there can be no such thing as either a creditor or a debtor race"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282 n.8 (1986) (plurality opinion) ("The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups").

17. *Cf.* CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES (1996), at xiv (citing as the "most important conclusion" of his discussion on affirmative action, that "when you think carefully about hard choices, they turn out to be very hard indeed"); Schuck, *supra* note 12, at 91 (suggesting that arguments about preferences on both sides of the debate are neither compelling nor conclusive).

Against this background, the approach this article adopts differs from modes of analysis commonly used. The goal in the following pages will be to describe a framework that, while not insulated from substantive assessments, relies on principles that may claim a broad consensus as to their desirability and importance and play an integral role in constitutional jurisprudence. The correct application of such principles can resolve the affirmative action deadlock, or so I argue. The first of these principles is trust; the term "trust" is used here to denote a qualified judgment that is distinguished from both deference to the decisions of another institutional entity and an abstract distrust of government as an across-the-board justification of judicial activism.[18] The concept of trust, thus defined, determines the extent and intensity of judicial review with respect to different institutions. The application of this principle to affirmative action in educational settings results in the conclusion that educational institutions that make decisions of educational policy are entitled to a heightened degree of trust for institutional, doctrinal, and practical reasons. As a result, courts should *presumptively* trust these institutions to make educational decisions without external interference, even in the context of strict but not fatal scrutiny, as long as educational institutions have acted within the scope of trust.

Trust, however, is meaningless without honesty, on the part of both educational institutions and the courts. Thus, the second important principle is honesty, in the sense of a general preference for policies and practices that focus on substance, compared with the external perception of this substance. As far as educational institutions are concerned, honesty dispels the critical significance attached to the mere fact that the public understands the content and purpose of a policy. This point is especially important in determining whether educational institutions should consider so-called "race-neutral alternatives" before implementing explicitly race-conscious policies. Similarly, as far as the courts are concerned, the honesty analysis attempts to address acute social problems on their own terms, without finding refuge in a jurisprudence of ignorance of these problems and thus effectively encouraging educational institutions to adopt a dishonest stance.

The analysis is divided into six parts. Part I briefly presents the Supreme Court affirmative action doctrine, the implementation of this doctrine by the lower courts in educational contexts, and the overwhelming endorsement of affirmative action by the educational institutions. Part II demonstrates why the conclusion the Supreme Court reached in *Croson* and *Adarand* as to the appropriate standard of review in all racial classifications may reflect a new era in equal protection

18. *Cf.* Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 958-59 (2001) (using the term "trust" to denote judicial deference to university faculties and administrators).

analysis in which the determination of standards of review serves as the starting point, rather than the conclusion, of doctrinal analysis. Part III argues that the traditional schemes of constitutional interpretation are inadequate to proceed equal protection analysis for affirmative action policies beyond that starting point to the stage of application of the standards that *Adarand* emphasized. By contrast, this article endorses an analysis based on institutional trustworthiness. According to this approach, the intensity of judicial review depends on the degree of trust to which each institution is entitled. Part IV describes honesty as a necessary precondition of trust. Honesty, for purposes of this article, reflects a general preference towards focusing on the substance of problems, as opposed to their external perception. Part V applies considerations of trust and honesty to the specific factors that the courts consider in the course of strict scrutiny of affirmative action policies. Finally, Part VI summarizes the conclusions of the foregoing analysis and explores its potential to materialize.

I. Setting the Stage

In recent times, the Supreme Court has met race-conscious policies and practices with increasing skepticism. At the same time, educational institutions have not only continued to employ positive measures to increase minority representation in the student body, but they have also demonstrated persistent support for affirmative action on multiple occasions. The following part describes this apparent conflict.

A. The Increasing Skepticism

Modern Supreme Court affirmative action doctrine encompasses two elements: First, race-based classifications are subject to strict scrutiny, namely they must be narrowly tailored to further a compelling governmental interest.[19] No distinction in the standard of review is made between "benign" and "invidious" classifications.[20] However, a distinction in the application of this standard seems to exist at least in effect.[21] In applying strict scrutiny, the Court in the post-*Brown v. Board of Education*[22] era has struck down any racial classification that appealed

19. *See Adarand*, 515 U.S. at 227.

20. *See id.* at 224 (subjecting any racial classification to "the strictest judicial scrutiny").

21. *Id.* at 275 (Ginsburg, J., dissenting) (pointing out that while the majority "strongly suggests" that strict scrutiny is indeed fatal for classifications burdening racial minorities, "for a classification made to hasten the day when we are just one race", it dispels the notion that strict scrutiny is fatal in fact) (internal quotation marks omitted); *id.* at 243 n.1 (Stevens, J., dissenting) (noting that the Court suggests that "strict scrutiny" means something "less strict" with respect to benign racial classifications).

22. 347 U.S. 483 (1954).

to the traditional notion of "inferiority" of racial minorities or a variation thereof.[23] On the contrary, although the Supreme Court has been skeptical towards "benign" racial classifications, the Court has upheld such classifications even under strict scrutiny.[24] Moreover, the Court has emphasized that such classifications may be upheld,[25] as strict scrutiny should not be deemed, as has been usually considered in the past,[26] "fatal in fact."[27] Strict scrutiny applies currently to federal, state, and local policies.[28] By contrast, on previous occasions the Court, either by applying intermediate scrutiny[29] or without explicitly relying on any traditional standard of review,[30] had demonstrated special deference to federal affirmative action policies.[31]

Second, given the Court's attempt to dispel the correlation of strict scrutiny with fatal results with regard to affirmative action policies, considerable uncertainty exists as to how the courts should apply strict scrutiny. The *compelling interest* prong of strict scrutiny examines the goals of a race-conscious policy. Nearly general consensus[32] exists that there is a compelling interest in remedying the effects of past

23. Indeed, the only cases where race-based classifications have been upheld despite the model of strict-as-fatal-scrutiny were two pre-*Brown* cases, *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944), where extraordinary circumstances applied, relating to what was understood as appropriate deference to the decisions of the military authorities.

24. *Cf. Adarand*, 515 U.S. at 237 (plurality opinion) ("As recently as 1987 every Justice of this Court agreed that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy.") (*quoting* United States v. Paradise, 480 U.S. at 167) (plurality opinion of Brennan, J., *id.* at 190, Stevens, J., concurring in the judgment, *id.* at 196, O'Connor, J., dissenting); *see also Bakke*, 438 U.S. 265 (opinion of Powell, J.) (upholding under certain circumstances race-conscious admissions policies, although suggesting that the applicable standard of review is strict scrutiny).

25. *See Adarand*, 515 U.S. at 230 ("[strict scrutiny] says nothing about the ultimate validity of any particular law"); *id.* at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it"); *Croson*, 488 U.S. at 509 ("In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion").

26. *See* Gerald Gunther, *Foreword: The Supreme Court, 1971 Term: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

27. *Adarand*, 515 U.S. at 237.

28. *Id.* at 227.

29. *See Metro Broadcasting*, 497 U.S. at 564-65, *overruled* with *Adarand*, 515 U.S. at 227.

30. *See Fullilove*, 448 U.S. at 491; *but cf. Adarand*, 515 U.S. at 235 ("to the extent (if any) that *Fullilove* held racial classifications to be subject to a less rigorous standard, it is no longer controlling").

31. *See Bakke*, 438 U.S. at 302 (emphasizing "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures"); *Croson*, 488 U.S. at 521-23 (Scalia, J., concurring in part and concurring in the judgment) (suggesting that a distinction between federal and state or local race-based action "rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory").

32. *But cf. Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) ("[G]overnment can never have a 'compelling interest' on the basis of race in order to 'make up' for past racial discrimination").

discrimination,[33] provided that this discrimination does not stem from the society at large, but from an identified governmental unit.[34] Justice Powell's opinion in *Bakke*, the only Supreme Court case to date that referred to race-conscious policies in the allocation of educational benefits, also recognized a compelling interest in the educational diversity of the student body[35] on academic freedom grounds. Whether educational diversity is a compelling state interest is currently uncertain[36] as the Courts of Appeals have rendered conflicting decisions.[37] A similar uncertainty exists as to whether any other governmental interests can be deemed compelling enough to justify the use of race-based classifications. While the Fifth Circuit has held that remedying present effects of past discrimination is the sole compelling interest for purposes of strict scrutiny,[38] most courts have acknowledged that non-remedial interests can also be compelling.[39]

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33. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 167-171 (1987) (plurality opinion of Brennan, J.); *id.* at 196 (O'Connor, J., dissenting).

34. *See, e.g.*, *Wygant*, 476 U.S. at 274-76 (plurality opinion) (rejecting societal discrimination as an "insufficient and overexpansive" basis for a race-conscious remedy).

35. *See Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.) ("[the attainment of a diverse student body] clearly is a constitutionally permissible goal for an institution of higher education"]; *cf. Metro Broadcasting*, 497 U.S. at 567 (applying the looser standard of intermediate scrutiny and leaving it unclear whether the same result would survive under strict scrutiny, as "the interest in enhancing broadcast diversity is *at the very least*, an important governmental objective," emphasis added).

36. *Compare Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) (noting that "a state interest in the promotion of racial diversity has been found sufficiently compelling, at least in the context of higher education, to support the use of racial considerations," citing *Bakke*, 438 U.S. at 311-15) (internal quotation marks omitted), *with Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting) (suggesting that "[m]odern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of racial discrimination), *and Croson*, 488 U.S. at 493-4 (plurality opinion of O'Connor, J.) ("Unless they are strictly reserved for remedial settings [classifications based on race] may in fact promote notions of racial inferiority and lead to politics of racial hostility," but citing approvingly immediately after this extract, as well as in numerous other occasions, Justice Powell's *Bakke* opinion).

37. *Compare* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (arguing that educational diversity is not a compelling interest as Justice Powell's *Bakke* opinion garnered only his own vote, while subsequent Supreme Court case law has recognized only remedial interests as compelling), *with* Smith v. Univ. of Washington Law Sch., 233 F.3d. 1188 (9th Cir. 2000), *and* Grutter v. Bollinger 288 F.3d 732, 738-744 (6th Cir. 2002) (diversity is a compelling interest, as Justice Powell's *Bakke* opinion is a binding precedent that has not been overruled by later Supreme Court case law). On other occasions, lower courts have assumed without holding that diversity is a compelling interest and have proceeded to strike down race-conscious admissions policies on narrow tailoring grounds. *See* Johnson v. Board of Regents of the University of Georgia, 263 F.3d 1234, 1244-45 (11th Cir. 2001) (suggesting that "well-settled principles of judicial restraint" caution against deciding whether or when student body diversity in university admissions may be a compelling interest); *see also* Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) (same for the race-conscious admissions policy to the Boston Latin School); Tuttle v. Arlington County School Board, 195 F.3d 698, 704-05 (4th Cir. 1999) (admission to an alternative kindergarten); Eisenberg v. Montgomery County Public Schools, 197 F.3d 123, 130-31 (4th Cir. 1999) (transfer to a magnet school).

38. *See Hopwood*, 78 F.3d at 944 (suggesting that under modern Supreme Court doctrine "there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs").

39. *See, e.g.*, Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996) ("A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him"); *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) ("Certainly nothing the Court

The *narrow tailoring* prong of strict scrutiny reviews the means employed to promote a race-conscious goal and aims at ensuring that a race-conscious policy fits the professed goal as closely as possible. For purposes of this analysis, the Court has articulated with more precision the important factors in assessing race-conscious policies in the public contracts and public employment contexts. In these settings, the Supreme Court has considered factors such as the prior use of race-neutral means,[40] the flexibility of race-conscious policies,[41] their duration,[42] the relationship of numerical goals to qualified minority enterprises[43] or the relevant labor market,[44] as well as the burden the relief entails for third parties.[45]

Although these factors have proved critical to the way lower courts have applied the narrow tailoring prong of strict scrutiny in educational settings,[46] the Supreme Court's explicit guidance is limited to Justice Powell's *Bakke* analysis. This analysis rests on a double distinction: First, there is a distinction between educational and racial diversity. In this sense, race should be only a single, even if important, element in a broad array of characteristics contributing to a diverse student body.[47] Second, there is a distinction between the use of race as a "plus" and as a "quota."[48] Accordingly, educational institutions can consider racial identity only as a "plus" factor in the context of an individualized assessment of all applicants that can tip the balance in favor of a

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has said today necessarily forecloses the possibility that the Court will find other governmental interests. . .to be sufficiently important or compelling to sustain the use of affirmative action policies") (internal quotation marks omitted); *see also* Hunter ex rel. Brandt v. Regents of the Univ. of California, 190 F.3d. 1061, 1063-65 (9th Cir. 1999) (recognizing a compelling interest in promoting educational research); Brewer v. West Irondequoit Central Sch. Dist., 212 F.3d. 738, 745-747 (2nd Cir. 2000) (same for the interest in reducing racial isolation that results from de facto segregation).

40. *Croson*, 488 U.S. at 507; *Adarand*, 515 U.S. at 237-38; *cf. Paradise*, 480 U.S. at 171-77 (plurality opinion) (examining the necessity of the race-conscious relief and the efficacy of alternative remedies).

41. *Fullilove*, 448 U.S. at 487-88 (plurality opinion); *Paradise*, 480 U.S. at 178-79 (plurality opinion); *id.* at 187 (Powell, J., concurring).

42. *Fullilove*, 448 U.S. at 513; *Adarand*, 515 U.S. at 238; *Paradise*, 480 U.S. at 179-182 (plurality opinion); *id.* at 187 (Powell, J., concurring).

43. *Croson*, 488 U.S. at 501-03.

44. *Paradise*, 480 U.S. at 179-82 (plurality opinion); *id.* at 187 (Powell, J., concurring); *id.* at 198-99 (O'Connor, J, dissenting).

45. *See Paradise*, 480 U.S. at 182-83 (plurality opinion); *id.* at 187 (Powell, J., concurring); *see also Wygant*, 476 U.S. at 283 (plurality opinion) (distinguishing between layoffs and hiring goals on the grounds that "while hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives").

46. *See, e.g.*, *Johnson*, 263 F.3d at 1253-54; *see also Podberesky v. Kirwan*, 38 F.3d 147, 158-59 (4th Cir. 1994) (considering as an indication that a black-only scholarship program was not narrowly tailored, the limitation of its scope to "high achiever African American students," as well as its application to non-state residents).

47. *Bakke*, 438 U.S. at 315; *see also Johnson*, 263 F.3d at 1253-54 (suggesting that racial diversity "is not the only component" of a diverse student body).

48. For the difference between using race as a "plus" factor and as a "quota" see *Bakke*, 438 U.S. at 316-17.

particular applicant; by contrast, race cannot give rise to a rigid "quota" in favor of minority applicants.

Thus, in terms of determining the applicable doctrinal standard, the Supreme Court has been increasingly skeptical about affirmative action, applying strict scrutiny across-the-board. Yet, whether the Court's skepticism about affirmative action extends to the way strict scrutiny is applied is unclear. As a result, the question as to whether strict scrutiny in affirmative action cases has proved fatal in fact cannot be answered coherently,[49] at least in educational settings.[50]

B. The Persisting Support

Against this background, competitive educational institutions overwhelmingly demonstrate a noteworthy commitment towards considering race when allocating educational benefits. Given judicial skepticism, the decision to pursue a race-conscious admissions policy puts schools at risk of being sued for violating the Constitution. To avert potential suits, or even to comply with judicial decisions that strike down race-conscious policies, some institutions try to adjust the mechanics of their policies by attempting to fit the admissions policy within the framework articulated by Justice Powell in *Bakke*. Other institutions abandon the explicit consideration of race in favor of attributes generally viewed as adequate proxies for race. Such attributes include, for example, demonstrating that a student has attended a high school that is significantly underrepresented in the student body,[51] or has overcome barriers to her educational potential that are correlated with

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49. *See also* Laura C. Scanlan, Hopwood v. Texas: *A Backward Look at Affirmative Action in Education*, 71 N.Y.U.L. REV. 1580, 1589-90 (1996) (suggesting that whether strict scrutiny is truly fatal in fact "remains unclear").

50. Commentators disagree on whether the application of strict scrutiny in other contexts has proved "fatal in fact." For an example of how strict scrutiny would apply in the public employment context, see John Cocchi Day, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CALIF. L. REV. 59, 80 (2001) (arguing that despite the application of strict scrutiny race-conscious affirmative action remains in "a constitutionally viable position in federal jurisprudence"). In the context of public contracts, *compare* Docia Rudley & Donna Hubbard, *What a Difference a Decade Makes: Judicial Response to State and Local Minority Business Set Asides Ten Years After* City of Richmond v. J.A.Croson, 25 S. ILL. U. L.J. 39, 91 (2000) (suggesting that strict scrutiny has come to mean "strict in theory but fatal in fact"), *with* George R.La Noue, *The Impact of* Croson *on Equal Protection Law and Policy*, 61 ALB. L. REV. 1, 36 (1997) (noting that seven years after *Croson*, "MBE programs have been struck down in only a handful of the jurisdictions where they existed"). In race-conscious redistricting contexts, see Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. AND MARY L. REV. 1569, 1573 (2002) (arguing that the race-conscious redistricting cases suggest that "strict scrutiny may be strict in theory, but rather pliable in practice").

51. In this vein, after the Fifth Circuit's decision in *Hopwood v. Texas* that struck down an explicitly race-conscious admissions policy, Texas implemented a policy that guarantees students admission to the University of Texas if they graduate in the top 10% of their high school class; *see* TEX. EDUC. CODE. ANN. section 51.803(a).

socioeconomic status.[52] On other occasions, educational institutions may insist on adopting programs that contradict fundamental principles articulated even in judicial opinions that uphold some forms of affirmative action, such as Justice Powell's *Bakke* opinion.[53] In all these cases, educational institutions seek to increase minority representation in the student body despite judicial skepticism of affirmative action.[54]

Moreover, the educational community has played a significant role in endorsing race-conscious policies publicly, focusing considerably on the educational importance of diversity in the student body.[55] Part of these efforts is devoted to protecting affirmative action in the courts. Thus, the American Council on Education (ACE), which represents all sectors of American higher education and has approximately 1,800 members, including the majority of colleges and universities in the country, submitted an *amicus curiae* brief to the Supreme Court to support the University of Michigan's affirmative action programs,

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52. This may be, for instance, the goal of the University of California (UC) admissions policy that evaluates all applicants "using multiple measures of achievement and promise while considering the context in which each student has demonstrated academic accomplishment"; this policy is *available at* www.ucop.edu/regents/policies/compreview.html (last visited, Apr. 26, 2002). On November 2001, the UC Board of Regents eliminated a requirement that each campus accept between 50 and 75% of students based only on grades, test scores and course work, asking admissions officials to consider not only academics but extracurricular activities and life challenges for *all* applicants. Opponents of affirmative action criticized this move as an attempt to get around the state Constitution's ban on affirmative action. *See, e.g.*, Linda Chavez, *Calif. Still Uses Outlawed Policy*, CHICAGO SUN-TIMES, Aug. 10, 2002, at 15; Rebecca Trounson, *Fairness of UC Policy Is Debated; Regents: Connerly questions new use of personal factors in admissions reviews, wants an audit*, L.A. TIMES, Sep. 20, 2002, at 10. The admissions data have not confirmed these concerns. *See* Tanya Schevitz, *Academic standards unchanged under new UC admissions policy; Report also finds little change in ethnic makeup*, S.F. CHRONICLE, Nov. 7, 2002, at A 21 (reporting little change in the racial and ethnic makeup of the UC entering class). Regardless of the effects of this last modification, however, the consideration of "multiple measures of achievement and promise" as a general matter might well be traced, at least partly to the goal of ensuring adequate minority representation in the student body.

53. *Cf., e.g.*, Gabriel J. Chin, *in Symposium: Rethinking Racial Divides- Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195, 199-205 (1998) (noting that the Texas scheme struck down in *Hopwood* was "obviously flawed from the beginning," given even Justice Powell's opinion in *Bakke*).

54. *See also* Lino A. Graglia, *Podberesky, Hopwood, and Adarand: Implications for the Future of Race-Based Programs*, 16 N. ILL. U. L. REV. 287, 291 (1996) (predicting that "as long as schools are permitted to use race at all, they will find ways to make race determinative, because there is no other way to admit large numbers of blacks," although falling short from considering *why* schools want "to admit large numbers of blacks"); *cf.* Patrick Healy, *Affirmative Action is found strong at colleges in N.E.*, BOSTON GLOBE, Oct. 16, 2001, at A1 (reporting that most New England colleges use affirmative action to guarantee that enough minority students enroll).

55. *See, e.g., Johnson*, 263 F.3d at 1244 (emphasizing that the University of Georgia does not identify remedying past discrimination as the compelling interest justifying its admissions policy, but rather it has repeatedly disavowed that interest); *see also* WILLIAM G.BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 283 (1998) (asserting that the authors of this study, former Presidents at Princeton and Harvard, "do [not] include [themselves] among those who support race-sensitive admissions as compensation for a legacy of racial discrimination"); Jeffrey S. Lehman, *Learning From Diversity*, N.Y.TIMES, May 16, 2002, at A25 (emphasizing that the University of Michigan Law School's race-conscious admissions policy was not designed "to compensate for segregation and discrimination in American society, past or present.")

emphasizing the educational benefits of diversity in the student body.[56] The American Educational Research Association, the Association of American Colleges and Universities and the American Association of Higher Education, as well as almost all leading Universities in this country submitted similar briefs.[57] Even in contexts other than litigation, educational leaders have demonstrated on numerous occasions their continuous commitment to the notion that educational diversity, including an important racial component, fosters the goals of the educational institutions.[58] The unequivocal support of affirmative action is not confined to the educational community narrowly defined, but encompasses a wide range of actors in the professional world.[59]

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56. *American Council on Education Files Amicus Brief with Supreme Court in Support of the University of Michigan*, www.acenet.edu/news/press_release/2003/02february/Mich.html (last visited Apr. 1, 2003) (suggesting that the government has a compelling interest in the quality of higher education, and by extension, diversity).

57. *See Brief of the American Educational Research Association, et al. as Amici Curiae in Support of Respondents*, at www.civilrightsproject.harvard.edu/policy/legal_docs/Gratz0203.pdf (last visited Apr. 1, 2003) (including the brief for the *Gratz* case) and *Brief of the American Educational Research Association, et al. as Amici Curiae in Support of Respondents*, at www.civilrightsproject.harvard.edu/policy/legal_docs/Grutter0203.pdf (last visited Apr. 1, 2003) (including the similar brief for the *Grutter* case); *see also Harvard Files Amicus Brief On the Consideration of Race in Admissions Decisions*, at www.news.harvard.edu/gazette/daily/0302/17-amicus.html (last visited Apr. 1, 2003) (reporting that Harvard University, together with Yale University, Princeton University, Dartmouth College, Brown University, the University of Pennsylvania, the University of Chicago, and Duke University filed a brief in support of the consideration of race in admissions); *MIT, Stanford, DuPont, IBM, NAS, NAE, NACME Ask Supreme Court to Allow Race as a Factor in U.Michigan Admissions Case*, at www.umich.edu/~urel/admissions/statements/amici/MIT-release.doc (last visited Apr. 1, 2003); *Carnegie Mellon University Files Friend of Court Brief on Behalf of Affirmative Action, University of Michigan*, at www.umich.edu/~urel/admissions/statements/amici/CarnegieMellon-release.doc (last visited Apr. 1, 2003).

58. *See, e.g.*, Mary Sue Coleman, *No Time for Colorblindness*, WASH. POST, Dec. 15, 2002, at B7 (suggesting that "other methods do not allow [universities] to recruit a diverse student body while maintaining consistently high academic standards"); Derek Bok, *Why Diversity Matters*, BOSTON GLOBE, Dec. 11, 2002, at A23 (pointing out that "colleges and universities need to assemble diverse student bodies, and race-sensitive admissions are essential to that end"); B. Joseph White, *U-M's Push For Diversity Serves all, From Students to Businesses*, DETROIT FREE PRESS, Feb. 1, 2002, *available at* www.umich.edu/~urel/admissions/statements/white.html (last visited Apr. 1, 2003) (endorsing affirmative action as "the most effective tool we have for assembling a diverse human group when it comes to race"); Neil L. Rudenstine, *Why a Diverse Student Body Is So Important*, THE CHRONICLE OF HIGHER ED., Apr. 19, 1996, at B1 ("A diverse educational environment challenges [students] to explore ideas and arguments at a deeper level -to see issues from various sides, to rethink their own premises, to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with other views"); American Council on Education et al., *On the Importance of Diversity in Higher Education*, in THE CHRONICLE OF HIGHER ED., Feb. 13, 1998; *available at* www.umich.edu/~urel/admissions/statements/statemnt.html (last visited Apr. 1, 2003) (concluding that "the diversity we seek, and the future of the nation, do require that colleges and universities continue to be able to reach out and make a conscious effort to build healthy and diverse learning environments appropriate for their missions. The success of higher education and the strength of our democracy depend on it").

59. Sixty renowned corporations filed their own brief to the Supreme Court in the Michigan cases in support of the consideration of race in admissions. A link to a summary of this brief can be found in www.umich.edu/~urel/admissions/statements (last visited Apr. 1, 2003). Microsoft explained its participation in the amicus brief filing, asserting: "By upholding the university's ability to include race and other factors in the admissions process, the courts will preserve Microsoft's ability — and that of other companies — to recruit the diverse work force necessary for success in

Perhaps more influential among these efforts has been a comprehensive empirical study published by William Bowen and Derek Bok, the former Presidents of Princeton and Harvard Universities respectively. Bowen and Bok analyzed retrospectively the experience of thirty years of affirmative action in competitive higher educational institutions with respect to factors such as graduation rates, satisfaction levels, graduate study and professional development of students.[60] They concluded that "academically selective colleges and universities have been highly successful in using race-sensitive admissions policies to advance educational goals important to them and societal goals important to everyone."[61] The extent to which we can rely on social science research is limited.[62] Moreover, the Bowen and Bok study includes features that are alarming, mainly in regard to the performance of minority students in competitive institutions.[63] However, the conclusion of this research overwhelmingly supports the belief that affirmative action has beneficial effects for minority and non-minority students alike, as well as for the educational institutions overall. In a similar vein, in the elementary and secondary school context, empirical research reveals the benefits of school integration in terms of student learning and peer

today's global marketplace." *See Statement From Microsoft in Support of the University of Michigan's Supreme Court Affirmative Action Case*, at www.microsoft.com/presspass/press/2003/feb03/02-17UofMichStatementPR.asp (last visited Apr. 1, 2003). Twenty nine former top-ranking officers and civilian leaders of the Army, Navy, Air Force and Marine Corps filed a brief to the Supreme Court as well, suggesting that the outcome in the Michigan cases will impact the diversity of America's officer corps and, in turn, the military's ability to fulfill its principle mission – to protect national security–. A link to the pertinent press release is available at www.umich.edu/~urel/admissions/statements (last visited Apr. 1, 2003). For a notable justification of the position of employers in favor of affirmative action on the basis of efficiency, rather than equity, see Michael Selmi, *Testing for Equality: Merit, Efficiency and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1308 (1995) (suggesting that it will often be in a firm's interest to engage in voluntary affirmative action as a means towards increasing its productivity).

60. BOWEN & BOK, *supra* note 55.

61. BOWEN & BOK, *supra* note 55, at 290; *see also* GARY ORFIELD with MICHAL KURLAENDER (ed.), DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (2001) (introducing social science evidence showing that diversity of students can and usually does produce a broader educational experience); UNIVERSITY OF MICHIGAN (ed.), THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION, *at* www.umich.edu/~urel/admissions/legal/expert (last visited Dec. 21, 2002) (compiling expert reports concluding that "students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills"); *but cf.* Thomas E. Wood & Malcolm J. Sherman, *Is Campus Racial Diversity Correlated With Educational Benefits?*, *at* www.nas.org/reports/umich_diversity/umich_uncorrelate.pdf (last visited Dec. 21, 2002) (suggesting that statistical data do not support the educational value of diversity).

62. *Cf.* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 388 (2000) (emphasizing that a statistical survey cannot be "a laboratory experiment").

63. *See* BOWEN & BOK, *supra* note 55, at 72 (reporting that the average rank of all black students matriculated in 1989 in competitive institutions was at the 23rd percentile of the class, while the average Hispanic student ranked in the 36th percentile, and the average white student ranked in the 53rd percentile). As these data refer to the average rank of all black students and not only those students that were admitted as a result of a race-conscious admissions policy, the overall performance of this latter group of students is "virtually certain to have been substantially worse." *See* Sandalow, *supra* note 10, at 1887.

interaction, inculcating values essential to democracy, and furthering educational aspirations.[64] These findings provide further evidence of the value of diversity in the student body.

In sum, courts have been highly skeptical about affirmative action programs. By contrast, educational institutions, despite the possibility that lawsuits may be filed against them alleging a constitutional violation, may try to alter the mechanics of their policies, but overwhelmingly insist on the goal of increasing minority representation in the student body. What is more, educational institutions actively participate in the legal and political battle for the preservation of affirmative action.

II. *Adarand* as the Beginning of a New Era in Equal Protection Jurisprudence

The Supreme Court's decision in *Adarand Constructors v. Pena* sent an ambiguous message for the future of equal protection jurisprudence. While holding that strict scrutiny applies to any race-based classification at the federal, state or local level,[65] the Court at the same time dispelled the notion that strict scrutiny is strict in theory, but fatal in fact.[66] There is a variety of possible readings of this holding. Indeed, one way to understand *Adarand* is that strict scrutiny will prove fatal and the Court's dicta to the contrary should be considered only as an attempt to divert attention away from the fact that the *Adarand* ruling explicitly overruled or critically undermined the sole two previous Supreme Court's rulings on federal affirmative action programs.[67] In light of this history (and against the background of the Court's recent detailed analysis of the merits of adhering to *stare decisis* in constitutional adjudication),[68] the merely rhetorical rejection of the mechanical correlation of strict scrutiny with fatal results should not hold any material significance. Another possible reading of *Adarand* is presented in the following sections as both doctrinally consistent with the Court's holding and its main assumptions and normatively more

64. *See, e.g.*, The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge MA, School District, A report by The Civil Rights Project, Harvard University, January 2002 *available at* www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.php (last visited Dec. 20, 2002); *see also* John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 788-91 (1996) (citing studies reporting improvement in academic achievement among both white and minority students in a diverse environment); SUSAN E. EATON, THE OTHER BOSTON BUSING STORY (2001) (suggesting that long-term gains outweighed the costs of METCO, America's longest-running voluntary school desegregation program, that promoted school integration in the metropolitan Boston area).

65. *Adarand*, 515 U.S. at 227.

66. *See supra* note 8.

67. *See supra* notes 29-30 and accompanying text.

68. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854-869 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

desirable. According to this reading, *Adarand* challenges more explicitly than any other case in the past,[69] the dominant pattern in equal protection analysis. After describing this pattern and elaborating on its limits, this part examines *Adarand*'s implications for a different model, one in which standards of review serve only as a starting point towards a principled, but also context-sensitive approach to equal protection.

A. The Dominant Pattern and its Limits

The dominant equal protection pattern is rather simple and well-established as a matter of principle. At the one end of the spectrum, courts apply the extremely deferential rational basis scrutiny to the bulk of classifications of social and economic policy. Accordingly, a court will uphold any conceivable classification as long as it is rationally related to a legitimate governmental objective.[70] At the other end of the spectrum, when the government employs a suspect classification, such as race or ethnic origin,[71] the courts will apply strict scrutiny and strike down the classification unless it is narrowly tailored to further a compelling governmental interest (which is almost never the case). Finally, classifications based on gender or illegitimacy, are subject to intermediate scrutiny and will be upheld only if they are substantially related to an important governmental objective.[72] Under this pattern, the mechanical correlation between the standard of review and the resulting application concludes judicial analysis at least with respect to strict scrutiny and rational basis scrutiny. Classifications that are subject to strict scrutiny are invalidated, no matter how they specifically operate. Similarly, no further analysis is necessary when rational basis scrutiny applies. As long as the standard is set, the case is decided.

This scheme seems to have significant advantages for two reasons. First, at first glance it promotes certainty and predictability. In a sense, this standards-based approach leads to more predictable decisions as it is

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69. It should be noted however that the Court in the past has also alluded to a similar desire to abandon the standard-focused equal protection analysis, although less explicitly than in *Adarand*, without substantial effects in the long-term. *See, e.g.*, Kenneth L. Karst & Harold M. Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R. - C. L. L. REV. 7, 24 (1979) (noting that "*Bakke* itself may be the end of the line for two-tier, or even three-tier, analysis as the key to equal protection decisions").

70. *See, e.g.*, F.C.C. v. Beach Communications Inc., 508 U.S. 307, 313 (1993) (suggesting that classifications in areas of social and economic policy should be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"); *see also* United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174-77 (1980), *quoting* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 ("if the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality").

71. As a general matter, state classifications on the basis of alienage fall also within this category. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

72. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (gender); Clark v. Jeter, 486 U.S. 456 (1988) (illegitimacy).

certainly easier to distinguish among cases drawing upon the suspect, quasi-suspect, or non-suspect classificatory device used, than to employ complex multifaceted analysis to decide whether a particular race-based classification should be upheld or a measure of economic policy struck down.

Second, the mechanical correlation of standards of review with their application may be seen as satisfying a concern with the limits of the judicial role in implementing abstract constitutional provisions, such as the Equal Protection and Due Process Clauses. This concern has been triggered by historical reasons. Against the specter of the *Lochner* era,[73] the post-New Deal Supreme Court adopted a stance of increased judicial deference as a matter of principle that aimed at preventing the problems associated with this specter. Deference though could not exist across the board. Apart from the case of constitutional provisions with an explicit textual foundation for close review, race-based classifications offered the more obvious example of the need for heightened judicial scrutiny. In this vein, Justice Stone, writing for the Court in *United States v. Carolene Products*, contemplated in 1938 what has been called "the most celebrated footnote in constitutional law,"[74] typifying the need for heightened scrutiny in cases where the protection of "discrete and insular" minorities is at stake.[75] The impact of the *Carolene Products* footnote was profound. Racial minorities quintessentially met the discreteness and insularity requirements; classifications that burdened them were thus subject to strict scrutiny. Used to prevent *Lochner*-like transgressions, strict scrutiny though almost always meant fatal results. Judicial discretion was limited since the use of a race-based classification would quasi-automatically lead to its invalidation.

Thus, the almost mechanical correlation in equal protection doctrine of standards of review with their application seemed to promote certainty and predictability, and at the same time comport with a notion of judicial self-restraint, a source of concern against the backdrop of the *Lochner* era. The standard of review was easily defined and then directly translated into a particular judicial outcome. If this was (or is) still the case, *Adarand* concludes the constitutional discourse on affirmative action. Since strict scrutiny applies, its application is straightforward and amounts to no less than fatal results.

The judicial application of this dominant pattern during the past decades, however, has demonstrated its limits. Certainty, predictability and judicial self-restraint have been achieved from a *statistical* standpoint. The courts have struck down the vast majority of suspect

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73. Lochner v. New York, 198 U.S. 45 (1905), reflects in American constitutional history an era of expansive judicial intervention, primarily expressed by striking down social and economic legislation as inconsistent with the due process clause or as exceeding the limits of congressional power under the Commerce Clause.

74. Justice Lewis Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982).

75. 304 U.S. 144, 153 n.4 (1938).

classifications and have upheld the vast majority of non-suspect classifications. Yet, from a *material* standpoint, the record is much less satisfactory. However, it is the material standpoint that predominantly matters in terms of certainty, predictability or limits on judicial discretion. What matters in a particular case is not whether a particular outcome is *statistically* more or less likely on the basis of the classificatory device that was used. Rather, what matters is whether a particular outcome can be predicted on the basis of *principled* analysis with a relatively high degree of accuracy.

This gap between the statistical and the material dimensions in evaluating the extent to which the traditional equal protection pattern served its goals was not logically unavoidable. It emerged because the Justices, on certain occasions, believed that the absolute adherence to mechanical application of the standards would produce unacceptably unfair results and thus they deemed it necessary to break this pattern. These occasions reflect two main themes.

First, in a (limited, but existing) set of cases that did not implicate a suspect classification, the Supreme Court purported to apply rational basis review in a way utterly remote to the proposition that it is constitutionally sufficient if a "reasonably conceivable state of facts" provides a rational basis for the classification.[76] For instance, in *United States Department of Agriculture v. Moreno*,[77] the Court struck down a provision of the Food Stamp Act that excluded any household with an individual who is unrelated to any other member of the household from applying for food stamps, attributing the Act to a bare desire to harm hippies, a politically unpopular group at the time. The Court held that such a desire does not amount to a legitimate governmental interest,[78] although, in terms of Justice Rehnquist, it was "not unreasonable for Congress to conclude that the basic unit which it was willing to support with food stamps is some variation of the family as we know it."[79]

Similarly, in *Cleburne v. Cleburne Living Center*, the Court struck down an ordinance providing a permit requirement for the operation of a group home for the mentally retarded, applying rational basis review.[80] While the Court struck down this requirement because it rested on "an irrational prejudice against the mentally retarded,"[81] it was Justice Marshall who pointed out in dissent that the ordinance "surely would be valid under the traditional rational-basis test. . . under which reform may take one step at a time, addressing itself to the phase of the problem which seems more acute to the legislative mind."[82]

76. F.C.C. v. Beach Communications Inc., 508 U.S. at 313.
77. 413 U.S. 528 (1973).
78. *Id.* at 534.
79. *Id.* at 546 (Rehnquist, J., dissenting).
80. 473 U.S. 432 (1985).
81. *Id.* at 450.
82. *Id.* at 456 (Marshall, J., concurring in part and dissenting in the part).

More recently, in *Romer v. Evans*,[83] the Court struck down a state constitutional amendment that prohibited granting "protected status" to individuals based on homosexual, lesbian or bisexual orientation. The Court attributed to the amendment, as was the case in *Moreno*, "a bare desire to harm a politically unpopular group."[84] It was Justice Scalia's turn to assert in dissent that the amendment was "an entirely reasonable provision. . .not only an appropriate means to [a] legitimate end, but a means that Americans had employed before."[85] In these cases, the traditional equal protection paradigm supported deference, but conflicted with the Justices' sense of fairness. The judicial outcome sacrificed predictability and self-restraint for fairness. The goals of the dominant pattern then were not served.

Second, on other occasions, the Court more expressly altered the dominant equal protection paradigm to accommodate fairness. More specifically, the Court gradually expanded the scope of application of strict scrutiny beyond suspect classifications, to a complimentary category of policies and practices that impinge upon a "fundamental right." The quintessential fundamental right under this doctrine became the right to vote,[86] while the right to travel,[87] and a limited right of access to the courts[88] were also accorded "fundamental" status. The Supreme Court has not consistently developed any set of criteria to determine what amounts to a "fundamental right," which is critical if its goals are predictability and judicial self-restraint. By contrast, only rarely has the Court attempted to define the "fundamental rights" concept and when it has done so, this has not ended ambiguity and uncertainty. In this sense, *San Antonio Independent School District v. Rodriguez*,[89] decided in 1973, rejected the fundamental nature of the right to public education, asserting that fundamental rights are only those that are *implicitly or explicitly* guaranteed by the Constitution.[90]

However, what was explicitly protected did not need the "fundamental right" designation. More tellingly, neither was the judicial outcome predictable, nor judicial discretion checked when the courts were free to determine which rights are implicit in the Constitution. Perhaps the most striking manifestation of the emerging conundrum was the contrast between the *Rodriguez* decision, which applied rational basis review,[91] and *Plyler v. Doe*, handed down in 1982, which struck down

83. 517 U.S. 620 (1993).
84. *Id.* at 634-35.
85. *Id.* at 653 (Scalia, J., dissenting).
86. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Kramer v. Union Free Sch. Dist. No.15, 395 U.S. 621 (1969).
87. *See, e.g.*, Saenz v. Roe, 526 U.S. 489 (1999); Shapiro v. Thompson, 394 U.S. 618 (1969).
88. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); M.L.B. v. S.L.J., 519 U.S. 102 (1996).
89. 411 U.S. 1.
90. *Id.* at 33-34.
91. *Id.*

the denial of public education to the children of illegal aliens and invoked to this effect the importance of education.[92] The Court struck down the law despite Chief Justice Burger's argument in dissent that "it simply is not irrational for a State to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the State and this country is illegal."[93]

In terms of statistical analysis then, a race-based classification under the traditional equal protection paradigm more likely would be struck down, while a classification of social or economic policy would be upheld. Materially though, this dominant pattern offered only an illusion of predictability and check on judicial discretion.[94] What is more, because of the statistical force of this illusion, aberrations were usually seen as anomalies, which were not worth any significant concern in terms of the continuing validity of the dominant paradigm.

B. *Adarand* and its Implications

Adarand may be seen as offering a different perspective with far-reaching implications for the equal protection doctrine. While insisting on articulating standards of review, Justice O'Connor, acting for the Court, explicitly dispelled their necessary correlation with the outcome of a particular case.[95] Further, Justice O'Connor explained that the very purpose of strict scrutiny is by "carefully examining the interest asserted by the government in support of a racial classification and the evidence offered to show that the classification is needed. . .precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking."[96] Thus, under no condition is the outcome of the application of strict scrutiny predetermined as the result of the enunciation of the standard. Not every consideration of race is morally repugnant and as such constitutionally impermissible. Rather, even under strict scrutiny, a distinction is needed between legitimate and illegitimate governmental decision-making. Predictability and a check on judicial discretion cannot be (ostensibly) ensured as a result of the mechanical application of the standards. By contrast, predictability and judicial discretion must be (actually) ensured by applying complicated factual patterns to standards of review in a principled way. In this sense,

92. 457 U.S. 202 (1982).

93. *Id.* at 250 (Burger, C.J., dissenting).

94. *See also* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 242-43 (2002) (noting that explicitly acknowledging only three levels of scrutiny while in fact adopting a myriad of different formulations of review to respond to the nuances of individual situations, promotes neither certainty nor predictability in the law).

95. *See supra* note 8.

96. *Adarand*, 515 U.S. at 228.

the Court recognizes that the result it reached in *Adarand* is only the initial stage in the implementation of the Equal Protection Clause. Commentators' attention in the post-*Adarand* era then should not concentrate on standards of review, which is the case, for example, when proponents of affirmative action try to limit the scope of application of strict scrutiny.[97] Rather, constitutional analysis should focus on the largely unsettled issue of the application of strict scrutiny.[98] Beyond standards, it remains necessary for the courts to develop principles, so that strict scrutiny does not become fertile ground for outcomes determined on an *ad hoc* basis. At the same time, these principles should leave the field open for adaptation to the needs of a particular situation.

Adarand's approach was neither the only possible concession of the failure of the classic equal protection model, nor the most explicit. Other approaches to the same effect could include the application of a flexible standard of review across the board with inescapable differences in the way this standard is applied in particular cases,[99] the accommodation of the differences among contexts through the adoption of a plurality of distinct standards instead of the three-tiered structure,[100] or even the abandonment of standards in favor of a "sliding scale" approach that accords critical weight to the constitutional and societal importance of the interests adversely affected and the invidiousness of

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97. *See, e.g.*, Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admissions Process*, 77 N.C.L. REV. 1479, 1502 (1999) (arguing that diversity-oriented race-conscious policies are not "racial classifications" and thus, are not subject to strict scrutiny under *Adarand*); *see also* Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1413 (suggesting that strict scrutiny does not apply in cases of "non-preferential" affirmative action, such as recruitment efforts to broaden the pool of applicants, because in such cases "no one person can claim injury").

98. The Supreme Court's recent jurisprudence on race-conscious redistricting is ambivalent as to whether it shares *Adarand*'s focus on the implementation of the standards of review: on the one hand, strict scrutiny does not apply to any case of race-conscious redistricting, but only if race was the predominant factor in the redistricting decision, in the sense that race subordinated traditional districting principles. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 916 (1995); *see also* Easley v. Cromartie, 532 U.S. 234, 257-58 (2001) (stating that strict scrutiny does not apply when the predominant motivation in drawing the district boundaries was political and not racial). Under *Adarand* and previous case law though, "smoking out" illegitimate purposes is exactly the function of strict scrutiny; by moving this function to the stage of determining the applicable standard, the Court seems to implicate that whatever passes the strict scrutiny threshold cannot be constitutional. On the other hand though, in applying strict scrutiny, the redistricting cases acknowledge that states can assume that compliance with the Voting Rights Act is a compelling interest for purposes of strict scrutiny. *See* Bush v. Vera, 517 U.S. 952, 992 (1996) (O'Connor, concurring); *id.* at 1033 (Stevens, J., dissenting); *id.* at 1065 (Souter, J., dissenting). In this sense, the redistricting cases follow *Adarand*'s path by focusing on the implementation of standards rather than their definition and by dispelling the mechanical correlation of standards of review with judicial outcomes.

99. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens J., concurring) (suggesting the application of rational basis scrutiny, but construing rationality review as including "a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class"); *see also* Cedric Merlin Powell, *Blinded by Color: New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 268 (1997) (urging the adoption of intermediate scrutiny).

100. *See* R. Randall Kelso, *supra* note 94 (suggesting the explicit enunciation of seven standards of review).

the basis of the particular classification.[101] Justice O'Connor's choice to insist instead on the three-tiered structure, but to dispel the mechanical results associated with this structure may reflect the Court's concern with the manipulability of more flexible or complicated approaches.[102] By endorsing an approach under which standards of review do not completely lose their importance, Justice O'Connor emphasized the need for predictability and judicial self-restraint, which would seem difficult to secure if standards were missing. However, as we have seen, these standards alleviate such concerns only statistically. Our duty then is to work with the standards as starting points in an effort to develop a principled, flexible, and fair framework of applying strict scrutiny in affirmative action cases. To this endeavor this article now turns.

III. Trust as a Critical Factor in the Affirmative Action Analysis

This article argues that institutional, doctrinal, and practical reasons prompt us to recognize that educational institutions are entitled to a heightened degree of trust insofar as they make decisions of educational policy. Therefore, these decisions should be *presumptively* respected, even when taking race into account in the context of strict, though not fatal, scrutiny. Section III.A describes the importance of trust as a general proposition of judicial review especially in equal protection analysis, while section III.B applies this approach to the educational context.

A. The Trust Requirement in General

The starting point for examining the critical importance of considerations of trust when applying strict scrutiny relates to the function of strict scrutiny in "smoking-out" illegitimate purposes. After describing this function, this section critically examines substantive and institutional approaches for determining whether an illegitimate purpose has triggered a race-conscious policy. Finding the existing schemes

101. This approach has been suggested in Justice Marshall's dissenting opinions in *San Antonio v. Rodriguez*, 411 U.S. 1, 98-99 (1973); *Furman v. Georgia*, 408 U.S. 238, 330 (1972); *Dandridge v. Williams*, 397 U.S. 471, 519-521; *see also Plyler*, 457 U.S. at 231; *cf.* DWORKIN, *supra* note 62, at 413-414 (endorsing such an approach despite the fact that it might provide less predictability, as "any initial loss of predictability would be more than outweighed by the more accurate discrimination between valuable and invidious policies that greater flexibility would allow").

102. The example of the Equal Protection Clause of the Alaska Constitution, as interpreted by the Alaska Supreme Court, is instructive in this regard. Concerns similar to those pointed out in the text against the dominant pattern of federal equal protection analysis have led the Alaska Supreme Court to adopt a flexible analysis in interpreting the Alaskan Constitution's Equal Protection Clause by adopting multiple levels of review tailored to the law at issue. As a result, considerable criticism emerged that the Alaska Supreme Court decisions are simply ad-hoc judgments. *See, e.g.*, Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 253-278 (1998).

inconclusive, this article argues for an alternative approach based on an assessment of institutional trustworthiness. Trustworthiness is determined on the basis of a composite scheme. First, institutional, doctrinal, and practical parameters are assessed for purposes of identifying whether the basis for the recognition of a presumption of trust exists. If such a presumption does indeed exist, a second stage follows in which the specifics of a particular policy or practice may result in the rebuttal of the presumption.

1. *The Role of Strict Scrutiny*

Only rarely will a law explicitly state an illegitimate purpose, such as perpetuating notions of inferiority of any racial group. The usual pattern that triggers equal protection analysis, is that of a law that states a legitimate purpose as its goal, but uses classifications that cause judicial suspicion as to the genuineness of this purpose. The use of race-based classifications is predominantly suspect, in the sense that it is considered statistically very likely that a law-making institution, though ostensibly furthering a legitimate consideration, has actually been prompted by an unconstitutional purpose, and thus the asserted goal is very likely to be insincere. As a result, the use of strict scrutiny is appropriate to explore whether an unconstitutional purpose has actually triggered a race-based classification.[103] Justice O'Connor, writing for the Court in *Croson*, elaborated on this function of strict scrutiny, noting that

> absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to smoke out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.[104]

Thus, strict scrutiny is necessary to distinguish among purposes because "the mere recitation of a benign or legitimate purpose for a racial

103. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980) (characterizing strict scrutiny as "a way of 'flushing out' unconstitutional motivation"); DWORKIN, *supra* note 62, at 411 (suggesting that the 14th Amendment requires from the courts to judge "not merely the consequences of legislation for different groups, but the motive behind that legislation").

104. *Croson*, 488 U.S. at 493 (internal quotation marks omitted).

classification"[105] is entitled to little or no weight in constitutional analysis.[106]

Justice O'Connor, however, seems to imply in *Adarand* that race-based classifications inflict injury regardless of their purpose.[107] With support from this opinion, it has been argued that the purpose of strict scrutiny in the post-*Adarand* era has changed. Under this new approach, instead of being a device that smokes out illegitimate purposes, strict scrutiny is now a "cost-benefit justificatory test" that serves to determine whether constitutionally harmful laws are justified by sufficiently important benefits that a less constitutionally costly law could not have achieved.[108] Indeed, dicta of Justice O'Connor's opinion in *Adarand* seem inconsistent with the "smoking out" approach to strict scrutiny she endorsed in *Croson*, although this same approach is cited approvingly in *Adarand*. More specifically, in *Adarand* Justice O'Connor quoted her opinion in *Croson* to describe the "smoking out" concept of strict scrutiny, adding that "we adhere to that view today, despite the surface appeal of holding 'benign' racial classifications to a lower standard."[109] In the same vein, Justice O'Connor cited Justice Powell's opinion in *Bakke* for the proposition that "it may not always be clear that a so-called preference is in fact benign."[110] Directly thereafter though, Justice O'Connor cited a law review article for the proposition that "*more than good motives* should be required when government seeks to allocate its resources by way of an explicit racial classification system."[111] Still, in *Bush v. Vera*, a redistricting case decided after *Adarand*, Justice O'Connor's plurality opinion reemphasized the "smoking out" nature of strict scrutiny, stating that strict scrutiny aims at determining whether

105. *Id.* at 490.

106. *But see* Rubenfeld, *supra* note 5, at 443-44 (arguing that "the appropriate standard of equal protection review in any given context must *follow from a prior determination* of the legitimacy of the relevant state interests," emphasis added). This view, however, seems to reflect the traditional concept that strict scrutiny is fatal in fact, which *Adarand* dispels. According to this approach, only impermissible governmental purposes pass the threshold requirement for the application of strict scrutiny. By contrast, when the purpose of governmental action is legitimate, as in the case of providing assistance to minorities, there is no reason to apply strict scrutiny and bring about fatal results; *see id.* at 443 ("if affirmative action's avowed race-conscious purpose is permissible, then in the absence of reason to believe that a given program actually served other unconstitutional purposes, no heightened scrutiny would apply. There would be nothing to smoke out"). Under this approach then, when strict scrutiny applies, the governmental interest in a race-based classification is illegitimate and thus strict scrutiny fails (at least unless unique circumstances justify a different conclusion). If on the contrary, the governmental interest is legitimate, there is no scope for the application of strict scrutiny. In short, as long as strict scrutiny applies, results are overwhelmingly fatal.

107. "[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. . . . The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury." 515 U.S. at 229-30.

108. Rubenfeld, *supra* note 5, at 436-443.

109. *Adarand*, 515 U.S. at 226.

110. *Id.*

111. *Id.* (emphasis added), quoting Drew S. Days, III , *Fullilove*, 96 YALE L.J. 453, 485 (1987).

racial classifications are in fact benign.[112] At first blush, O'Connor's opinions seem incoherent. On the one hand, she argues that strict scrutiny is necessary to detect illegitimate purposes. On the other hand, she adds that even under a legitimate motive, an explicit racial classification might be unconstitutional. To reconcile this language, it is necessary to explore the broader issue of the extent to which we could or should rely on the determination of true legislative purpose in constitutional analysis.

It is often woefully difficult to define with accuracy the true motivation that lies behind a legislative or administrative enactment, if there is one such "true motivation."[113] The law-making process typically encompasses a range of distinct interests and considerations that lead to the same result. Identifying the dominant motivation that triggers a specific course of action is elusive, because decision-making, even on the individual basis, is a complicated and multifaceted endeavor.[114] The Supreme Court is therefore reluctant to rely on the legislature's motivation to strike down an otherwise constitutional statute.[115] Nevertheless, the Court seems to recognize a semantic distinction between "motive" or "motivation" and "intent" or "purpose." Impermissible legislative *motive* or *motivation* cannot trigger a constitutional violation, but an impermissible legislative *intent* or *purpose* can. Thus, discriminatory purpose or intent is a prerequisite for an equal protection violation under the rule established in *Washington v. Davis*,[116] while the *Lemon v. Kurtzman* test frequently invoked in Establishment Clause jurisprudence examines whether a policy or practice has a secular purpose.[117] It might have been preferable if this distinction was articulated more explicitly without merely relying on the difference that exists between the terms *motive* or *motivation* on the one hand and *intent* or *purpose* on the other. Still, however, the distinction is sound because it incorporates in constitutional analysis the "smoking out" function of strict scrutiny, while paying appropriate attention to the fact that a "true motivation" might not exist or might not be verifiable. Thus, speculation about legislative motives is irrelevant in constitutional

112. 517 U.S. 952, 984 (1996).

113. *Cf.* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 32 (1997) (arguing that "with respect to 99.99% of the issues of construction reaching the courts, there is no legislative intent").

114. *Cf.* John Hart Ely, *The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 611-12 (1998) (arguing that dominant purpose tests are incoherent and giving as an example the multiple motivations that affect a student's decision where to go to law school).

115. *See* United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive"); Erie v. Pap's A.M., 529 U.S. 277, 292 (2000) (same).

116. 436 U.S. 229 (1976).

117. 403 U.S. 602, 612-613 (1971); *see, e.g.*, Zelman v. Simmons-Harris, 122 S.Ct. 2460, 2465 (2002) (suggesting that the Establishment Clause prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion).

analysis. An arguably permissible motive cannot heal what otherwise amounts to a constitutional violation. By the same token, a possibly impermissible motive cannot by itself trigger a constitutional violation. By contrast, legislative intent or purpose is important because it can be verified on the basis of objective elements, mainly the way a particular policy or practice has been structured. In short, what is constitutionally important is the intent of the law as objectively defined, not the motive of the legislature.[118]

This discussion offers a response to Justice O'Connor's ambivalence, demonstrated in her opinion in *Adarand*. On the one hand, strict scrutiny aims at "smoking out" impermissible purposes. On the other hand, "more than good motives should be required" exactly because it is so difficult to define with accuracy what these motives are and whether they are actually good. Objective elements then operate as a proxy for good motives. Thus, *Adarand* has not changed the function of strict scrutiny; rather, it simply reflects the notion that impermissible purposes should be predominantly identified with regard to the objective elements of a policy, rather than mere speculations about the drafters' subjective motivations.

2. *Substantive and Institutional Approaches*

After having concluded that strict scrutiny aims at "smoking out" illegitimate purposes even in the post-*Adarand* era, this subsection examines whether substantive and institutional approaches of constitutional interpretation, such as the original understanding, the moral reading of the Constitution, and the process-based theories of judicial review, can provide any meaningful guidance for the application of strict scrutiny.

B. The Inconclusiveness of Substantive Approaches: Original Understanding and Moral Reading of the Constitution

A purely substantive approach to "smoking out" purposes would examine independently whether each particular purpose for a race-conscious policy is legitimate and compelling, regardless of the institution that is pursuing it. Such an approach may focus either on the original understanding of the Constitution, specifically the constitutional text and structure, which is enhanced by our understanding of the

118. *See also* Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 n.24 (1979) ("Proof of discriminatory intent must necessarily usually rely on objective factors"); *cf.* Washington v. Davis, 436 U.S. at 253 (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor").

Framers' intent or on the moral values embedded in the Constitution. In any event, the application of this approach in the affirmative action context proves inconclusive.

More specifically, the text, history, and structure of the Constitution that shape its original understanding constitute the appropriate and exclusive interpretive tools at least for Justices who most intensely oppose affirmative action.[119] However, the Constitution's text and history do not result in conclusions as to the constitutionality of affirmative action.[120] The thirty-ninth and the fortieth Congresses, which framed and led the movement to ratify the Fourteenth Amendment, not only adopted a series of formally race-neutral social welfare programs, whose benefits were mainly directed to blacks,[121] but most importantly[122] passed several statutes explicitly considering race in the allotment of funds.[123] Nonetheless, critics might argue that the Framers of the Fourteenth Amendment were not aware of affirmative action policies in the modern context and thus cannot be deemed to have expressed a view approving their constitutionality. The enactment of explicitly race-conscious policies by the thirty-ninth and the fortieth Congress, however, demonstrates that an exclusive interpretive focus on the original understanding of the Constitution would be an insufficient basis for striking down modern affirmative action policies.

Moreover, in terms of moral values incorporated in the Constitution, any analysis is equally inconclusive. The two sides in the affirmative action debate stand at complete opposite departure points. Opponents of affirmative action typically talk in terms of a color-blind Constitution,[124] citing Justice Harlan's dissent in *Plessy v. Ferguson*,[125]

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119. *Cf.* Scalia, *supra* note 113, at 38 ("what I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text").

120. *Cf. Brown*, 347 U.S. at 489 (characterizing the discussion on the circumstances surrounding the adoption of the 14th Amendment inconclusive as to the constitutionality of racial segregation); *see also* Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1188-89 (1996) (deeming the textual arguments on affirmative action "laughably inadequate" and noting that the history of the 14th Amendment "tends to suggest that affirmative action policies were regarded as legitimate"); John Hart Ely, *The Supreme Court 1977 Term: Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 42 (1978) (noting that "there simply does not exist an unambiguous American tradition on the question whether racial majorities can act to aid minorities, and one can make it seem there is only by quoting out of context").

121. *Cf.* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754-784 (1985) (reporting the legislative history of Reconstruction measures, mainly the Freedman's Bureau Acts, that established facially neutral programs that were viewed by supporters and opponents as aiming generally, if not exclusively, at assisting blacks).

122. Schnapper, *supra* note 121, at 775, 778-780; Rubenfeld, *supra* note 5, at 429-32.

123. *See* Act of July 28, 1866, ch. 296, 14 Stat. 310, 317 (appropriating money for the relief of destitute colored women and children); Resolution of Mar. 16, 1867, No 4, 15 Stat. 20 (funds for the relief of destitute colored persons in the District of Columbia); Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 528; Act of Mar.3, 1869, ch. 122, 15 Stat. 301, 302; Resolution of June 15, 1866, No 46, 14 Stat. 357, 358-9 (appropriations to the colored soldiers and sailors of the Union Army).

124. *See, e.g., Fullilove*, 448 U.S. at 522-23 (Stewart, J., dissenting); *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment); *Metro Broadcasting*, 497 U.S. at 631-38 (Kennedy, J., dissenting); *see also* Eugene Volokh, *Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV.

as well as Martin Luther King, Jr.'s statements that are construed as supporting a color-blind vision.[126] On the other hand, proponents of race-conscious policies adopt a dramatically different stance, arguing that the Fourteenth Amendment aims at the elimination of racial subjugation, a goal that embraces the use of race-based considerations.[127] The choice between these two approaches presupposes a specific choice of substantive values.

Indeed, if one wants to be consistent in the framework one articulates, the only options available seem to be the absolute ones, suggesting either that the Constitution *prohibits*, or that it *permits* the consideration of race across-the-board. However, no *constitutional* argument counsels for either approach, and a dispassionate observer can see that a significant moral cost is associated with each. Either in confining equality to a meaningless formality against the background of widespread lingering effects of official discrimination, or in imposing burdens on third parties that bear no personal responsibility for discriminatory polices and practices, there is a significant moral cost that needs to be addressed. Which choice of values would a moral reading of the Constitution require in this regard?[128] Considerations of collective self-interest or naked policy preferences set aside, a choice cannot easily be made. Any attempt to find refuge for the hard choice between color-blindness and the elimination of racial subjugation in paradigmatic

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2059, 2076 (1996) (condemning "the use of race as a proxy" even when this is "rational and unbigoted").

125. 163 U.S. 537, 559 (Harlan, J., dissenting) ("Our constitution is color-blind").

126. *See, e.g.*, Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 173 (1994), (*quoting* Martin Luther King, Jr., I Have a Dream, *in* I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD, 101, 104 (James M. Washington ed., 1986) ("I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.")).

127. *See, e.g,* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 155-182 (2001) (suggesting that an important equality principle stems from opposition to caste in the sense that no law or practice should contribute to the maintenance of second-class citizenship or lower caste status, defined in terms of a highly visible and morally irrelevant characteristic, like race); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (arguing that courts should analyze equal protection cases from "an anti-subordination perspective"); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 62-63 (1991) (arguing that "modern color-blind constitutionalism supports the supremacy of white interests and must therefore be regarded as racist"); Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 98 (1986) (suggesting that as long as whites displaced by affirmative action are not being "subordinated on the basis of their race," any important purpose for affirmative action should be sufficient, no matter whether it is looking backward or forward); Jerome M. Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 171 (1994) (noting that "the genuine moral goal associated with race is to end race-based oppression," and colorblindness may merely have instrumental significance towards this purpose); *see also* Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A.Croson Co., 98 YALE L.J. 1711, 1712 (1989) (arguing that "[t]he equal protection clause...was designed to combat racial subordination and ensure that no one is ever subjugated to a position of second-class citizenship simply because of racial identity").

128. *Cf.* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

constitutional cases or in vindicated dissents[129] proves equally inconclusive. While the Court has expressed a preference for color-blindness in decisions like *Brown*[130] and its progeny, as well as Justice Harlan's dissent in *Plessy*,[131] these opinions may also be understood as encompassing "a principle against caste legislation."[132]

Thus, whether we adopt an original or a moral reading of the Constitution, a substantive approach to "smoking out" purposes is nonetheless inappropriate. The courts have no constitutional basis to single out particular interests as compelling enough to pass strict scrutiny. We should examine then whether an institutional analysis may offer more meaningful assistance to identifying legitimate and compelling interests and, more generally, to applying strict scrutiny. Such an approach would focus on the institutions that pursue a particular policy or practice, and would determine the nature of the purposes on the basis of the institution that adopted them and the process through which it attempts to further them.

C. The Inconclusiveness of Institutional Approaches

Institutional approaches developed in the past provide us with only limited assistance in the application of strict scrutiny. What—rather arbitrarily—might be called the first generation of institutional understanding in law is focused on the concept of *institutional competence* and examines, whether as an abstract matter an institution might be seen as pursuing a reasonable purpose in a reasonable way. The second generation of institutional thinking includes the *process-based* theory of judicial review and marks the beginning of a gradual shift from the abstract focus on reasonableness towards a more concrete analysis of trustworthiness. While this second generation limits the inquiry on trustworthiness at the level of the statistically most probable, this article suggests that we move on to a third generation of institutional analysis, that attempts to assess institutional trustworthiness at the concrete level of a particular institutional entity.

1. *First Generation of Institutional Analysis: The Concept of Institutional Competence*

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129. *See, e.g.*, Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1170 (1995) (arguing that the judiciary gives interpretive content to a constitutional provision by deriving principles and rules of application capturing the provision's paradigm cases that "mediate between the generality of the text and the concrete cases that come to court").

130. 347 U.S. 483 (1954).

131. 163 U.S. at 559.

132. *See* Rubenfeld, *supra* note 5, at 461 (noting that Justice Harlan's statement of constitutional colorblindness in his dissenting opinion in *Plessy* itself explained the imperative of eliminating race classifications in terms of a principle against caste legislation).

The concept of institutional competence was developed by the legal process scholars who used it as the basis of distributing legal tasks among various legal actors.[133] To determine institutional competence in statutory interpretation, legal process scholars emphasized that in construing statutes, the courts "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[134] Legal process analysis thus suggested a highly deferential pattern of judicial role that was limited to cases where the legislature did not pursue a reasonable purpose in a reasonable way.

Legal process materials shed little insight on constitutional issues. Constitutional issues though in the wake of *Brown v. Board of Education* best revealed the limitations of the legal process philosophy.[135] Consistency with *Brown* is usually seen as a threshold requirement that any approach to constitutional interpretation must meet before becoming part of legal debate.[136] Applied in constitutional analysis though, the pattern embraced by the legal process scholars seemed at odds with the Supreme Court's evolving equal protection jurisprudence in the wake of *Brown* and its progeny. Against this background, the reactions of the legal process scholars varied. What seems certain, however, is that either because the scope of application of the legal process materials was limited to statutory interpretation,[137] (and their authors realized that much of these materials would have to be rethought and not just "updated" to take into account the sea change that was occurring in constitutional law)[138] or because the legal process analysis as articulated at the time could not justify *Brown* on the basis of neutral principles,[139] *Brown* could not be explained in legal process terms as these terms were understood at the time. Legal process thinking treated the decision reached by the most competent institution as optimal. Courts were considered optimal only to the extent that the institution that was competent in the first place had not

133. HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND THE APPLICATION OF LAW (1994) (eds. William N. Eskridge, Jr. & Philip P. Frickley, 1994).

134. *Id.* at 1378.

135. *See* William N. Eskridge, Jr. & Philip P. Frickley, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2049 (1993).

136. *Cf., e.g.*, Cass Sunstein, *In Defense of Liberal Education*, 43 J. LEGAL EDUC. 22, 26 (1993) ("an approach to constitutional interpretation is unacceptable if it entails the incorrectness of *Brown of Board of Education*")

137. *See* Norman Dorsen, *In Memoriam: Albert M. Sachs*, 105 HARV. L. REV. 11, 13-14, (1991) (defending Hart and Sacks for ignoring the Warren Court's constitutional decisions on the ground that the "Legal Process" was a statutory rather than a constitutional law text).

138. *See* Eskridge & Frickley, *supra* note 135, at 2049 n.113.

139. *Cf.* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (arguing that assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination, but one of freedom of association and challenging the school segregation cases for lack of basis in neutral principles for holding that the Constitution demands that the freedom of association denied by segregation should prevail over the respective freedom of non-association).

pursued a reasonable purpose in a reasonable way. However, even beyond this test of reasonableness, institutions generally understood as competent cannot always be trusted to actually pursue the goals that they declare. Because of the complexities of social reality, it is meaningless to allocate roles among different decision-making bodies on the basis of an abstract conclusion on reasonableness. In this sense, this first generation of institutional thinking as extended (perhaps artificially) to constitutional analysis focused only on abstract concepts of institutional competence. Institutional competence, thus defined, was inadequate in addressing the complexities and uniqueness of each particular case that could not always fit under the rubric of an abstract paradigm.

2. *Second Generation of Institutional Analysis: Process-based Theories of Judicial Review*

While constitutional analysis was for whatever reasons marginal for legal process scholars, what might be termed the second generation of institutional analysis was articulated in the specific context of constitutional law. Institutional analysis here includes predominantly the process-based theory of judicial review, rooted in footnote four of *Carolene Products* and developed most prominently by Professor John Hart Ely.[140] In one sense, this theory advances the analysis of the first generation, making explicit in the constitutional law context what the legal process scholars had developed for statutory interpretation; that is, the focus on institutional arrangements instead of substance. In another sense, process-based analysis goes one step further towards reducing the distance between the abstract and the concrete. While legal process analysis focused on institutional competence and reasonableness in an abstract sense, the process-based theory expressly recognized the importance of trust in constitutional adjudication and suggested a judicial intervention only when "the political market is systematically malfunctioning"; that is, when "the *process* is undeserving of trust."[141]

Yet, this second generation did not go so far as to bridge the gap between the abstract and the concrete, which would require an evaluation of the existence of the appropriate trustworthiness at the concrete level of a particular program or policy as initiated by a particular institutional entity. Rather, it set out two particular kinds of cases where an institution is not trustworthy and thus heightened judicial scrutiny is warranted. Either "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out" or "though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some

140. ELY, *supra* note 103.
141. *Id.*

minority out of simple hostility or a prejudiced refusal to recognize commonalties of interest, and thereby denying that minority the protection afforded other groups by a representative system."[142] Thus, apart from attempts to choke off the channels of political change, heightened scrutiny is subject, under this approach, to at least two distinct preconditions. First, its aim must be to protect minorities. Second, these minorities must have been systematically disadvantaged. Once these preconditions are met, heightened scrutiny applies without further discussion and is usually translated into a fatal judicial outcome. Beyond that, heightened scrutiny (and correspondingly, fatal outcomes) is not warranted.

Still, however, reality is more complicated. In the first place, significant difficulties arise in defining what amounts to a minority for purposes of applying this scheme of judicial review. Majorities are usually coalitions of minorities and these coalitions may shift rather than being stable when different issues are discussed.[143] Moreover, even when a single issue is concerned, the distinction between a majority and a minority may yield different results depending on the qualifications that are used to define what constitutes a minority for purposes of a particular case.[144] Further, the focus on minority status as a necessary and sufficient precondition of distrust (apart from rights related with political participation) does not provide any principled basis for distinguishing between discrete and insular minorities that deserve heightened judicial scrutiny and the appropriate losers in the ongoing struggle for political acceptance and ascendancy.[145] Even by narrowing Ely's theory to justify heightened scrutiny only when a *racial* minority is being disadvantaged, definitional difficulties persist; indeed, such difficulties are likely to be exacerbated by the passage of time and gradual changes in the conventional racial pattern in this country.[146]

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142. *Id.*

143. *See, e.g.*, Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 694-99 (1975) (suggesting that majorities are typically coalitions of minorities which have varying interests, and thus, resolution of the affirmative action controversy depends upon which of the minorities is more successful in forging an alliance with those groups which are less immediately affected).

144. *See* Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1052-53 (1980) (criticizing Ely's theory of judicial review as inconsistent with the principle of judicial restraint since it involves arbitrariness at the stage of definition).

145. *See* Lawrence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063, 1072-77 (1980); *see also* Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 134-36 (1981) (emphasizing the need for judgments of social values in determining when the legislature's sincerely held moral beliefs that burden a minority should be accepted or rejected).

146. *See, e.g.*, Schuck, *supra* note 12, at 14-16 (noting that scientific developments, immigration rates, as well as a rise in intermarriage by all racial groups render the classification to conventional racial categories more arbitrary than ever); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 959-60 (1995) (describing recent demographic trends as threatening the political viability of race-conscious remedies).

Beyond definitional problems, a single decision burdening a minority might not be worthy of trust, even if this minority is all but systematically disadvantaged. Even if no minority is disadvantaged, there may be sufficient reasons to mistrust the decision-making institution. As the Supreme Court has put it, "because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group."[147] Moreover, small, concentrated interest groups with a high stake in the political outcomes in question may have substantially greater political influence than groups larger in number but with smaller per capita stakes; thus, it might not be unusual for minoritarian rather than majoritarian bias to be the critical determinant of political outcomes.[148]

Encroachment upon the channels of political change or minority status, coupled with systematic disadvantage, thus by no means reflect the only cases where the acts of an institutional entity may lack the appropriate trustworthiness. Race-based affirmative action is instructive in this regard.[149] Under a consistent application of the process-based theory of judicial review, race-based affirmative action should be subject to the most relaxed judicial scrutiny.[150] No minority status exists in the

147. Oncale v. Sundower Offshore Servs., Inc., 523 U.S. 75, 78 (1998), *quoting* Castaneda v. Partida, 430 U.S. 482, 499 (1977).

148. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 53-97 (1994) (describing a two-force model including instances of both majoritarian and minoritarian bias in determining whether minorities that form concentrated interests win, lose, or draw in their contests with a majority that is comprised of more numerous dispersed interests).

149. The same argument applies to gender-based discriminatory policies. *Cf.* United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) ("It is hard to consider women a 'discrete and insular minority'. . . when they constitute a majority of the electorate"). In the case of gender-based discrimination Professor Ely distinguishes between past and future discrimination, arguing that "if women don't protect themselves from sex discrimination in the future, it won't be because they can't. It will rather be because for one reason or another . . . they don't choose." *See* Ely, *supra* note 103, at 169-70. Ely reaches a different conclusion though as to most laws classifying on the basis of gender, as most of them predate even the ratification of the 19th Amendment in 1920. *Id.* at 167. It may seem reasonable to distinguish between *failing to repeal* discriminatory laws in recent years when women have (the opportunity of) political power and *enacting* such laws in the first place. However, the Supreme Court does not adopt a similar distinction. Gender-based discrimination is subject to heightened judicial scrutiny, no matter when the relevant legislation has been enacted. Moreover, with the passage of time, as the number of laws that have been enacted before women's enfranchisement and are still valid is reasonably reduced, the Supreme Court is making its standard of review of gender-based discrimination more stringent instead of more lenient. *See* Reed v. Reed, 404 U.S. 71, 92 (1971) (requiring a "reasonable, non arbitrary" classification, that has "a fair and substantial relation to the object of the [law]"); Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives"); United States v. Virginia, 518 U.S. at 531 (repeating the formulation adopted in *Craig v. Boren*, but emphasizing that an "exceedingly persuasive justification" is required).

150. *See* ELY, *supra* note 103, at 170-72 ("Whites are not going to discriminate against all whites for reasons of racial prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks or to overestimate the costs of devising a more finely tuned classification system that would extend to certain whites the advantages they are extending to blacks").

case of race-conscious policies that burden whites nor can the white majority plausibly invoke a systematic disadvantage, at least unless, in an exceptional case, the conventional roles of majority and minority have been reversed.[151] Nevertheless, even the Justices that are relatively friendly towards affirmative action agree that rational basis review is inappropriately relaxed in affirmative action.[152] This is indeed a sound approach because preventing the systematic disadvantage of minorities is not the only impermissible purpose related to the consideration of race. Using race-based classifications that appear to favor minorities or choosing a particular race-conscious regulatory scheme at least partially based on reasons such as racial politics, administrative convenience, or the perpetuation of racial stereotypes is equally impermissible for constitutional purposes as the purpose of systematically disadvantaging minorities. Under these circumstances, the assumption that the traditional pattern of racial prejudice from a dominant majority against a numerical minority encompasses all circumstances in which close scrutiny and invalidation as the judicial outcome are warranted seems misplaced. In this sense then, the process-based theory of judicial review, the use of trust language notwithstanding, remains at the abstract level and thus defies the complicated reality.[153]

3. *The Importance of Trust - Towards a Third Generation of Institutional Analysis?*

Proponents of affirmative action who recognize the possibility that impermissible purposes might enter the decision-making process of affirmative action practices and policies perceive this potential as the price we have to pay to further diversity, social justice, and stability.[154]

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151. *Cf. Croson*, 488 U.S. at 495 (plurality opinion) (suggesting that under process-based analysis, Richmond's minority set-aside program is subject to heightened scrutiny, under circumstances in which blacks are approximately 50% of the population and five of the nine seats on the city council are held by blacks).

152. *See, e.g., Bakke*, 438 U.S. at 358 (opinion of Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part) (conceding that affirmative action cases should not be analyzed "by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases").

153. At this *abstract* level it seems quite correct to argue that:

> If we live in a world that is largely free from discrimination, we do not need affirmative action. If, on the other hand, we live in a world that has not yet achieved the goal of equality, then a program which assumes that decision-makers usually make unbiased decisions based on race in unwise.

Gabriel J. Chin, *Bakke To The Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 898 (1996). The problem though is whether the analysis should remain at this abstract level of a general assumption about "decision-makers" in general, without proceeding to the concrete stage of determining whether a particular affirmative action program initiated by a particular institution should be seen as relying on unbiased decisions.

154. *See, e.g.*, DWORKIN, *supra* note 62, at 406 (while conceding that "[process-based theories of judicial review] do not wholly eliminate any conceivable possibility that illegitimate motives have

The question, though, is whether there is an alternative between the two extremes of either banning affirmative action altogether, because it could be used to conceal impermissible purposes, and always allowing it, the potential of impermissible purposes notwithstanding. Such an alternative might be to *pursue the trust analysis on the concrete level* to determine whether an impermissible purpose has triggered the specific race-conscious plan that is at stake.

Under such an approach, the focus of the equal protection inquiry is not to define whether a policy or practice burdens a discrete and insular minority, but rather to determine whether a particular institution in enacting the challenged policy or practice should be trusted. In this sense, the analysis proposed here goes one step further than what has been termed the second generation of institutional analysis. The second generation limits its analysis to what might be *statistically* more likely in terms of whether an institution is trustworthy, namely that the majority either forecloses political participation or burdens a systematically disadvantaged minority. Instead of relying on inaccurate generalizations though, it is more accurate to move the analysis to the concrete and to examine whether the particular decision-making authority, for purposes of adopting the particular program that is at stake, should be trusted.[155]

Nevertheless, while generalizations often defy and oversimplify a complicated social reality, determining whether a family of institutions is generally trustworthy is significantly easier than doing so with regard to a particular entity. Given the multitude of institutions with law-making power at federal, state and local levels, it is woefully difficult to begin from zero in order to determine whether each and every institutional entity is trustworthy. By contrast, an abstract analysis that is based on the institutional family (e.g., all state legislatures, all higher educational institutions, all independent agencies sharing certain general traits) might provide a useful foundation for this analysis, alleviating the difficulties that are associated with assessing trustworthiness at the concrete level.

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played a role," adding that "denying all universities the power to do what they can to improve diversity and social justice and stability, on the remote chance that some one or two institutions would abuse the power and escape undetected, would be like denying any use of public funds for medical research on the ground that a few researchers might be plagiarists and embezzlers").

155. While emphasizing the importance of institutional approaches in constitutional analysis, Professor Neil Komesar points to the need for comparative analysis of different institutional alternatives, including the judiciary, instead of focusing exclusively on the imperfections of a particular institution (such as the political process), as is the case with Ely's theory of judicial review. *See* KOMESAR, *supra* note 148, at 199-213. According to Komesar, "bad is often best because it is better than the available alternatives." *Id.* at 204. Nevertheless, the question of the optimal allocation of institutional responsibility does not arise in a vacuum. As a general matter, the role of judicial review in light of the constitutional separation of powers is not to allocate roles to different institutional actors by comparing their imperfections. Only when a challenge to the trustworthiness of an institutional entity arises, have the courts a role in remedying the potential constitutional defect. To the extent, if any, that at this stage courts are less trustworthy than the competent in the first place entity, judicial intervention may not be warranted. Necessarily though, the initial focus of the inquiry cannot be on such a comparative assessment, but on whether a single institution is worthy of trust.

As each case is different, this abstract analysis will not be dispositive, although it will provide more meaningful guidance than the merely statistical help that stems from the enunciation of strict scrutiny as the standard of review. This abstract analysis will offer a point of departure for concrete evaluation, by way of setting a presumption that is subject to rebuttal in a particular case. In light of these competing considerations, the approach suggested here attempts to attain two distinct goals: to reflect the nuanced reality, but also to take into consideration the need for easily determinable standards that impose meaningful limits to judicial discretion.

Courts are uniquely capable of assessing institutional trustworthiness through this composite scheme. In this context, they operate on the basis of a logical course of reasoning for which they are well-equipped and experienced. Initially, they examine whether the necessary elements for the recognition of a presumption of trustworthiness exist. If this is the case, courts move to a second stage, where this presumption is subject to rebuttal, if certain facts that challenge the institutional policy's validity are affirmatively established. At both stages, the factors that are critical either for the establishment or the rebuttal of the presumption are easily demonstrable, as they do not require any speculation as to the subjective motivations of any institutional entity. Predictability is thus enhanced. At the same time though, an approach that presumes trustworthiness pays appropriate attention to the facts of each particular case as is the mission of the courts because abstract considerations that may prompt the recognition of the initial presumption may be rebutted.

This proposed scheme recognizes the symbolic significance of strict scrutiny when race is considered in the allocation of burdens and benefits, as well as the fact that race is usually irrelevant in this process. Furthermore, it comports with the very purpose of strict scrutiny and with the suspicion with which the use of race in law-making is normally viewed. However, this approach recognizes at the same time that strict scrutiny is not fatal and that the analysis of institutional trustworthiness will define the circumstances in which, despite strict scrutiny, a regulatory scheme might pass constitutional muster. Such a scheme recognizes that a symmetry exists between "benign" and "invidious" classifications as a matter of principle, in the sense that they are both subject to the same kind of searching judicial scrutiny, not only as a matter of standard of review, but also as a matter of analytical process through which the outcome of judicial reasoning is determined. At the same time though, it acknowledges that the analysis of institutional trustworthiness will in effect result in different probabilities of invalidation of so-called "benign" and "invidious" classifications. An institution may less often be entitled to heightened trust when it sets forth a policy that burdens racial minorities. Nevertheless, this conclusion will

result from the application of the same principles and through the same line of reasoning to different facts. It will ultimately result from what has always been the function of the judiciary- the application of norms to facts. This process is by its very nature principled, but also nuanced and context-sensitive rather than rigid and absolute. Thus, analyzing institutional trustworthiness provides judicially manageable standards constituting a satisfactory alternative to the modes of constitutional interpretation that prove inconclusive with regard to affirmative action.

Trust, as meant here, should be clearly distinguished from the concepts of both *deference* to the decisions another institution reaches and *distrust* of governmental authority as across-the-board justifications of either judicial restraint or activism. On the one hand, deference is usually seen as an unqualified concept, in the sense that it represents an abstract desire that the judiciary abstain from striking down policies that have been formulated by institutions with explicit or implicit political accountability or specialized authority. The Supreme Court has adopted this understanding of deference in the context of administrative law by according considerable leeway to an agency's interpretation of a statute or its own regulations, unless a regulation is "arbitrary, capricious, or manifestly contrary to the statute."[156] By transplanting such a concept to the affirmative action context, for instance, critics have argued that the courts should treat the desirability of affirmative action as a political, rather than as a judicial, decision, as political resolution can at least claim the legitimacy accorded by the democratic process.[157] Or, it has also been argued that courts should accord deference to the decisions of educators as to whether the pursuit of a race-conscious policy is appropriate in educational settings.[158] However, when traditionally suspect classifications are used, equal protection analysis cannot be deferential.[159]

On the other hand, distrust of government is also an unqualified concept that results in active judicial intervention to strike down governmental policies and practices that may have the potential of infringing civil liberties or civil rights, regardless of whether this potential ultimately materializes. Applied in the equal protection context, a distrust-based analysis would strike down any consideration of race in governmental decision-making. Nevertheless, by dispelling the equation of strict scrutiny with fatal results, *Adarand* suggested that in

156. *See, e.g.*, Ragsdale v. Wolverine World Wide, Inc., 122 S.Ct. 1155, 1160 (2002); United States v. O'Hagan, 521 U.S. 642, 673 (1997); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

157. *See* Spann, *supra* note 13, at 273-292.

158. *See* Victor G. Rosenblum, *Surveying the Current Legal Landscape for Affirmative Action in Admissions*, 27 J.C. & U.L. 709, 722 (2001).

159. *Cf. Croson*, 488 U.S. at 501 (emphasizing that because of the history of racial classifications "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis").

the area of racial classifications, as in other constitutional domains,[160] across-the-board distrust is not justified.

Thus, judicial stance with respect to race-based classifications should not be equated with a mechanical quest for either deference or distrust. By contrast, it should reflect the outcome of a qualified judgment, in the sense that the judiciary should answer as a threshold matter, the question if and to what extent a solid foundation of trust exists. Depending on whether trust exists, courts should defer to or distrust other institutional entities. Thus, trust-based analysis qualifies the quest for deference with a moral, objectively defined element. A deferential stance would tend to uphold any decision reached by an educational institution, from student segregation of the pre-*Brown* era to rigid affirmative action quotas. By contrast, the focus on trust would prevent both these results. At the same time, contrary to a concept based on across-the-board distrust of government, the approach endorsed here recognizes the appropriate leeway that an educational institution is entitled to when formulating and implementing educational policy.

4. *Determining Institutional Trustworthiness*

The analysis of institutional trustworthiness here suggested encompasses an abstract and a concrete prong. The abstract prong will offer a presumption as to the trustworthiness of an institutional entity that will necessarily rely on the family of institutions where this entity belongs, unless the entity is by its very nature unique. The concrete prong will gauge whether this presumption should be rebutted in the particular context of the institutional entity that initiated the policy that is at stake.

For purposes of the abstract analysis, considerations of trustworthiness emerge in the first place at a purely institutional, pre-doctrinal level. Many institutions have explicit or implicit law-making authority given the governmental structure and the inherent checks and balances found in both vertical and horizontal levels of government in the United States. In this context, there are fields where each institution might be seen as more or less trustworthy. A variety of reasons contributes to this result, including, though not limited to, the explicit delegation of law-making authority to this institution by a normative

160. For instance, in the case of freedom of expression. *Cf.* Frank I. Michelman, *Property and the Politics of Distrust: Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 109 (1992) (suggesting that if first amendment doctrine is born of distrust of lawmakers, this distrust is "very strangely selective," as "actual judicial practice distrusts government picking and choosing among things private agents can discuss or views they can express," but "it does not distrust government weighing—or purporting to weigh—non-speech related goals against freedom of speech.")

authority of superior rank.[161] However, this purely institutional analysis results in conclusions that are highly subjective, and thus arbitrary. For instance, the legislature in general might be seen as trustworthy to express the preferences of the majority but not to protect the interests of minorities.[162] This might be due to hostility or tension between the interests of the majority and minorities, or merely to the majority's relative lack of empathy towards minority concerns.[163] Nevertheless, it might also be argued that a concentrated minority is ultimately more powerful than a dispersed majority at the legislative forum.[164] Further, the federal legislature might be trusted as the appropriate institution to provide solutions to problems that require national intervention. However, despite the political safeguards of federalism,[165] the legitimate interests of particular states may be overlooked during the federal law-making process. Thus, depending on different normative assumptions as well as practical evaluations, different conclusions may be reached as to whether the federal or the state legislatures possess the comparative institutional advantage with respect to the enactment of a particular policy.

More broadly, other comparisons among different institutions trigger similar uncertainties. Thus, administrative agencies might be deemed trustworthy since they have the expertise necessary to deal with specific issues. On the other hand, however, these agencies can exercise

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161. *Cf.* Mark S. Kende, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans,* 53 U. CHI. L. REV. 581, 599-600 (1986) (considering critical "whether the institution adopting the remedial plan has been given the power to enunciate the government's interests in preventing and eradicating racial discrimination," and arguing that "lack of express or direct authority suggests that the attempt to institute such a plan should be more carefully scrutinized"). Only rarely, however, will there be an express delegation of remedial authority; what is more, this delegation will necessarily come from *another* institution with its own views as to the merits of a particular policy. Thus, if we require this delegation of authority to be *too specific*, the institutional approach we follow is distorted, as the delegation of a specific authority depends on the institution that grants this delegation. Thus, if the state legislature does not expressly delegate to a state university the power to initiate a remedial policy, the decision of the university to initiate such a policy will not be trusted. In this sense, the criterion as to the appropriate intensity of judicial scrutiny stems from the acts of an entity that falls short from being institutionally optimal and results in absolute deference to the legislature (as the delegating authority). If on the other hand, the requisite delegation is *too general* (referring, say, to the formulation and implementation of educational policy), it will be meaningless.

162. *See* ELY, *supra* note 103, at 102-03; *see also* Spann, *supra* note 13, at 278-89 (arguing that when the governing rules are indeterminate, as is the case with the Equal Protection Clause, the Court is "more likely to sacrifice minority interests for the benefit of the majority than to protect minority interests from majoritarian exploitation").

163. For the distinction between "prejudice" and "relative dearth of sympathy, empathy, or concern," *see* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 96-97 (2001).

164. *See, e.g.*, Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 728 (1985) (noting that despite talk about the powerlessness of insular groups, such voting blocks have "enormous power" in American politics); *see also* KOMESAR, *supra* note 148.

165. *Cf.* Garcia v. San Antonio Metro. Transit Author., 469 U.S. 528, 552 (1985) ("State sovereign interests. . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power); *see also* JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 169-70 (1980) (suggesting that the Supreme Court should turn its attention toward issues of individual rights, as the political process provides adequate safeguards for issues associated with federalism and the separation of powers).

their powers without concern for the interests and preferences of the majority, as they are not politically accountable. By the same token, the President might be seen as trustworthy to decide flexibly how the nation should proceed in times of crisis. This is certainly not the case, however, in matters with significant technical or scientific aspects, exactly because of the President's unitary authority and thus necessarily limited expertise in depth for a variety of issues. Also, while the judiciary is potentially trustworthy, a danger exists that they may try to impose their own policy preferences, against the will of the majority.

Thus, any attempt to determine whether a presumption of trust exists on the basis of exclusively pre-doctrinal institutional considerations provides no principled basis upon which to choose among conflicting conceptions of institutional roles. By contrast, it relies on an unconstrained and utterly subjective assessment of institutional optimality. But trustworthiness, even at this stage of the analysis, that aims at laying a presumption, cannot be assessed in a constitutional vacuum. The constitutional text, history, precedents, underlying structure and values illuminate and, at the same time, constrict the analysis of trustworthiness; these factors critically affect the attempt to identify the institutional entities and the circumstances under which a presumption of trust should be recognized. In this sense, the analysis of trustworthiness endorsed here is not purely institutional, but rather emphasizes doctrinal features for purposes of determining when an institutional family should be trusted.

The focus of this mixed inquiry is on the particular way constitutional practice has incorporated the concept of institutional trustworthiness. For instance, in the equal protection context, Congress's institutional trustworthiness is greater than the states' because of the history of the Fourteenth Amendment as reflected in the enforcement power of Section V of the Amendment's text. The Court's equation of the applicable standard of scrutiny of federal and state policies could not ignore the institutional difference between Congress and state legislatures, since this difference is not grounded in an academic notion of institutional optimality, but in the very text of the Constitution.[166] Thus, although under the same label of strict scrutiny, the congressional institutional advantage necessarily affects the way courts implement this standard.[167]

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166. *See Adarand*, 515 U.S. at 227.

167. *See also* Emanuel Margolis, *Affirmative Action: Déjà Vu All Over Again?*, 27 SW. U. L. REV. 1, 43 (1997) (noting that even under strict scrutiny, "federal programs adopted by Congress—both remedial . . . as well as prophylactic . . . are entitled to special deference"); Kathryn K. Lee, *Surviving Strict Scrutiny: Upholding Federal Affirmative Action After* Adarand Constructors, Inc. v. Pena, 44 BUFF. L. REV. 929, 955 (1996) (arguing that "the future application of the same language of the strict scrutiny standard to Congressional race-conscious relief should not be as fatal as it has been at the municipal and state level"); *but see* Graig Joseph Alvarez, *Constitutional Law - Equal Protection - Affirmative Action - The Supreme Court's Continuing Journey to the Legal High Ground*, 38 S. TEX. L. REV. 225, 254 (1997) (contending that "the federal government should not be

This is equally true in other constitutional domains where doctrinal analysis plays a mediating role, confirming, but at the same time constricting and directing, an analysis of trustworthiness. Dormant Commerce Clause analysis, for instance, does not reflect an unconstrained conception of the optimal allocation of institutional authority between Congress and the states; rather, its contours are defined by existing doctrine that assesses trustworthiness in allocating authority to regulate activities that may affect interstate commerce.[168] Moreover, Chief Justice Marshall's landmark opinion in *McCulloch v. Maryland* echoes the theme of trust in its interpretation of the Constitution's "necessary and proper clause." At the same time, however, it constricts possible implications of this focus by according the institutional advantage to Congress.[169] In a similar vein, though less explicitly, Supreme Court precedents document the need to formulate decisions in terms of trust with respect to the nation's representation in foreign affairs, but at the same time constrict the options this choice would leave by emphasizing the President's institutional advantage.[170]

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considered more qualified to define racial classifications than the state governments, but *equally* qualified").

168. The Court is more explicit on that in cases of either facial discrimination or legislation that has a discriminatory purpose or effect. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (striking down a statute regulating minimum milk prices for sales by producers and prohibiting the sale in New York of milk bought out of the state at lower prices); Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (striking down a Madison ordinance prohibiting the sale of milk not processed at approved plants within five miles of Madison's central square). When the state legislature has acted with a non-discriminatory legitimate purpose with incidental effects on interstate commerce, the Court uses language of "balancing" of the competing interests; *see, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Even in these cases, though, it is forcefully argued that the Court should largely limit itself to invalidating protective tariffs and analogous barriers to the movement of goods; that is, the historic forms reflecting the purpose of advantaging in-state economic interests at the direct expense of out-of-state competitors. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); *see also* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 898 (1988) (Scalia, J., concurring in the judgment) (suggesting that a state statute is invalid under the Commerce Clause only if "it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose").

169. McCulloch v. Maryland, 17 U.S. 316, 431 (1819) (striking down state taxes on the Bank of the United States). In rejecting the argument that carrying state-imposed taxation to the excess of destruction of federal power would be an abuse, which would banish that confidence that is essential to all government, Chief Justice Marshall framed his reasoning in terms of trust, arguing that the people of any state should not be deemed willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests. By contrast, Chief Justice Marshall's analysis of institutional trustworthiness favored Congress. *See id.* ("The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.")

170. United States v. Curtiss-Wright Exp.Corp., 299 U.S. 304, 320 (1936) (describing the foreign affairs power as "the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations"); *see also* Ludecke v. Williams, 335 U.S. 160, 173 (1948) (characterizing the President as "not only the Commander in Chief [,] but also the guiding organ in the conduct of our foreign affairs" that possesses "vast powers in relation to the outside world"); Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988) (recognizing as a "generally accepted view" that "foreign policy [is] the province and responsibility of the Executive").

The abstract analysis of institutional trustworthiness may then start by identifying an unconstrained and thus subjective conception of institutional optimality. Subsequently though, this conception should be verified by looking to constitutional text, history, and underlying structure and values, as mediated by doctrine, to determine the extent to which our overall constitutional jurisprudence is prepared to trust each type of institutional family. As we will see in the case of educational institutions, on certain occasions, considerations of more practical nature may also be relevant in determining whether courts should recognize a presumption of trust. In this connection, identifying the actual goals an institutional family may be reasonably assumed as pursuing is important, in the sense that but for these goals (e.g., educational goals), the reason for the existence of this family (comprised, for instance, of all higher educational institutions) may be called into question. Because this institutional, doctrinal, and practical analysis is premised on generalities, its conclusions will not necessarily be accurate. At this point, however, the goal should not be to reach conclusions, but rather, to determine whether there is a basis for recognizing a presumption of trustworthiness.

If such a basis exists, a concrete analysis must follow that examines a particular policy or practice as formulated and implemented by a specific institutional entity. This analysis assesses whether, abstractions set aside, this entity should be trusted with respect to the particular practice under consideration; in other words, at this point the purpose of the inquiry is to determine whether the presumption of trust should be rebutted. This concrete test of trustworthiness rests on critical scrutiny of the goals that the institutional entity is actually pursuing. The genuine difficulty in determining the actual legislative purpose that was discussed earlier arises at this stage of the analysis. In addressing this difficulty, exactly because it is usually elusive accurately to determine the subjective intent of an entity, we will necessarily rely on objective elements that warrant distrust because of the existence of proxies for constitutionally impermissible intent. These elements relate to the way in which a particular policy has been structured or effectively operates.

Nevertheless, we should not offer a different degree of trust, on the basis of our agreement with particular institutional goals, from a policy perspective. Our unique consideration should be whether the actual goal that an institution is pursuing lies within its sphere of competence. Educational institutions, for instance, should be entitled to pursue only goals of an educational nature. This is necessarily a broad proposition that encompasses a wide range of conflicting goals. The existence of close cases, in which it is questionable whether a goal is indeed educational, cannot be foreclosed; in such cases, the general presumption of trust should not be considered rebutted. Thus, the judicial analysis of institutional trustworthiness does not encompass a choice among conflicting educational goals. In other words, to determine whether an

institution should be trusted, it is insignificant whether a policy is wise as a matter of educational policy, that is, whether one educational goal should be preferred over another goal of a similar nature.

The following section attempts to implement this theory in the context of affirmative action in the allocation of educational benefits.[171]

D. The Application of the Trust Analysis in the Educational Context

This section discusses the specifics of the educational context that are critical to the analysis of institutional trustworthiness. Applying the guidelines set out previously, purely institutional, doctrinal, and practical parameters are assessed for purposes of determining whether educational institutions as an institutional family may be presumed trustworthy within a particular policy realm. After concluding that such a presumption should be recognized, this article focuses on specific reasons to trust or distrust the pursuit of a particular policy by an institutional entity. This evaluation may ultimately result in the rebuttal of the presumption of trust.

1. *The Presumption of Trust*

i. The Institutional Foundation--In purely institutional terms, educational experts, as distinguished from judges, may be presumed to possess the comparative expertise to make better qualified decisions on issues of educational policy, such as admissions decisions. More broadly, educational institutions possess a comparative advantage over not only the judiciary, but also other entities, like the state and federal legislatures, which may initiate affirmative action programs in other contexts. This institutional advantage is not an advantage in interpreting the Constitution, but rather an advantage in defining educational goals and choosing the best means to further them. However, as we have seen, the very purpose of strict scrutiny as a standard of review is to distinguish the legitimate from the illegitimate use of race in governmental decision-making, according to the actual purpose of the governmental entity involved.[172] If this purpose can be classified as educational, the

171. This analysis does not purport to be dispositive as to the constitutional fate of affirmative action policies in other contexts, such as public employment and public contracts, or even other constitutional problems, such as the extent to which police should be trusted to define what constitutes a reasonable or unreasonable search or seizure under the Fourth Amendment. Such determination will require a separate analysis of the factors here outlined that is beyond the scope of this article.

172. *See supra* notes 103-06 and accompanying text.

particular form it takes, as well as the choice of the appropriate means to further it, should rest with the opinion of the educational experts.[173]

However, pre-doctrinal institutional analysis relies on an unconstrained notion of institutional optimality. As a result, it is highly subjective whether educational institutions, courts, or legislatures will be accorded the comparative institutional advantage in devising and monitoring the implementation of admissions policies that include the consideration of race. While the preceding paragraph emphasized that educational institutions are better-suited than the legislative branch to initiate affirmative action admission policies, analysis resting on different premises may reasonably result in different conclusions.[174] To avoid the manipulability inherent in any purely institutional approach, it is necessary to blend institutional theory with doctrinal analysis to determine whether a heightened degree of trust should be granted to educational decisions that consider race in allocating educational benefits.[175]

ii. The Doctrinal Foundation--Although no explicit constitutional protection of academic freedom exists, academic freedom generally reflects a concern of constitutional stature that falls within the ambit of the First Amendment, as it relates to maintaining a vibrant community of intellectual exchange.[176] Whether academic freedom rules apply to elementary and secondary schools as well is unclear.[177] In any event, as

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173. *But see* Chen, *supra* note 13, at 1146-47 (arguing that "implicit in strict judicial scrutiny...is the belief that university administrators do not know best, that judges...can legitimately and productively second-guess educational experts").

174. *See, e.g.*, Sandalow, *supra* note 143, at 699 (suggesting that the reasons supporting judicial deference to legislative judgment, primarily the legislature's increased political responsibility, do not support equal deference to the judgment of a university faculty).

175. This might not be the case when an institution allocates educational benefits in consideration of the applicants' religious beliefs, according any kind of preference to the adherents of any religious denomination or even to the simply religious over the irreligious segment of the population and vice versa, because of the Establishment Clause. *But cf.* Volokh, *supra* note 124, at 2071-72 (asking "if race-based diversity programs pass strict scrutiny [under the Equal Protection Clause], why wouldn't religion-based programs [pass strict scrutiny, under the Establishment Clause]?"). The question here however is *whether* a race-conscious or a religion-conscious admissions policy passes equal protection scrutiny. Assuming that the Equal Protection Clause does not offer us conclusive help as to any of these questions, the overall constitutional framework with respect to religion involves the need to accommodate Establishment Clause principles with no analog in the case of race.

176. *See, e.g.*, *Bakke*, 438 U.S. at 298 (opinion of Powell, J.); *see also* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us. . . . That freedom is therefore a special concern of the First Amendment"); *cf.* Sweezy v. State of New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) ("The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation").

177. For example, in Bd. of Regents of Univ. of Wisconsin v. Southworth, 529 U.S. 217, 236 (2000), Justice Souter, in a concurring opinion joined by Justices Stevens and Breyer, treated academic freedom as a broad term that is not limited to higher education settings. See *id.* at 239 n.4 (referring to the Court's higher education and higher schools jurisprudence as all reflecting academic

far as institutions of higher education are concerned, academic freedom encompasses an individual and an institutional component. On the one hand, academic freedom promotes liberty from restraints on thought, expression, and association in the academy.[178] On the other hand, it instills the belief that universities should have the freedom to make critical educational decisions autonomously.[179] "Considerations of profound importance counsel restrained judicial review" of such decisions.[180] Justice Frankfurter, in his concurring opinion in *Sweezy v. New Hampshire*, summarized the four "essential freedoms" of a university as encompassing the right "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[181]

Nevertheless, the exercise of academic freedom, like the exercise of any constitutional right, may implicate competing constitutional values. That is, with respect to the institutional component of academic freedom, university decisions even as to its "essential freedoms" are not immune from constitutional challenges, but such challenges have to be measured against an additional constitutional hurdle. This hurdle amounts to the heightened degree of trust that academic freedom concerns reflect, and overcoming it requires a demonstration that educational institutions should not be trusted in exercising their duties.

Thus, in *Widmar v. Vincent*, decided in 1981, the Supreme Court struck down a state university's refusal to provide religious groups access to university facilities as an exclusionary policy based on the content of the group's religious speech that violated the fundamental

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freedom concerns). More tellingly, in Edwards v. Aguillard, 482 U.S. 578 (1987), where the Court struck down the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act as inconsistent with the Establishment Clause, all Justices despite their disagreement on the merits, agreed that a notion of academic freedom applies in the public school setting as well, although they disagreed as to its precise reach. The majority, led by Justice Brennan, rejected the argument that the Act served academic freedom purposes because of the way in which it was designed. *Id.* at 586. Justice Powell, joined by Justice O'Connor, concurred, asserting that "of course, the 'academic freedom' of teachers to present information in public schools, and students to receive it, is broad," adding though that this freedom is "necessarily circumscribed by the Establishment Clause." *Id.* at 599. Finally, Justice Scalia, joined by Chief Justice Rehnquist, dissenting, complained that "academic freedom," in the sense the majority envisioned it, "has little scope in the structured elementary and secondary curriculums." *Id.* at 627.

178. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957) (professors' right to lecture and to associate with others are constitutionally protected freedoms that were abridged through the Attorney General's investigation ordering the professor to disclose the nature of past expressions and associations).

179. *See, e.g.*, Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision-making by the academy itself") (citations omitted); *cf.* DWORKIN, *supra* note 62, at 402 (suggesting that academic freedom means, among other things, that "each institution is free, within broad limits, to set goals for itself and to define the academic strategies, including admissions strategies, that it believes most appropriate to those goals").

180. *Ewing*, 474 U.S. at 225-26.

181. 354 U.S. at 250.

principle that state regulation of speech be content neutral.[182] However, the Court took pains to emphasize the consistency of its holding with considerations of academic freedom, stating that it did not question the right of the University "to make academic judgments as to how best to allocate scarce resources" including "determin[ing] for itself on academic grounds who may . . . be admitted to study."[183] Indeed, responding to concerns expressed in Justice Stevens's concurrence that the terminology adopted might "undermine the academic freedom of public universities,"[184] Justice Powell, writing for the Court, dismissed this concern emphasizing that the holding was limited to the context of a public forum created by the University itself.[185]

Moreover, in *University of Wisconsin v. Southworth*, decided in 2000, the Supreme Court upheld as a general matter mandatory student fees imposed by the University of Wisconsin for the support of student organizations.[186] The Court upheld the constitutionality of the fees, despite student protests on First Amendment grounds and a unanimous decision to the contrary by the Seventh Circuit.[187] In the words of Justice Kennedy, writing for the Court, "the University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends."[188] The Court cited one caveat to this power, "a requirement of viewpoint neutrality in the allocation of funding support."[189] In other words, the University is entitled to determine its educational mission and to conclude that part of this mission is to facilitate diverse discussions among students. Assessing the educational significance of this decision is beyond the judicial competence. As a general matter, a university can be trusted to decide on its own. There is, however, a limit to this power: depending on the way an institution has structured its particular policy, trust in a concrete case may not be justified. This will be the case when a university violates the requirement of viewpoint neutrality. Given the structure of the policy as objectively defined, a high probability exists that the university's purpose of facilitating discussions of diverse nature is not genuine. By violating the viewpoint neutrality requirement, an

182. Widmar v. Vincent, 454 U.S. 263 (1981).
183. *Id.* at 276 (citations omitted).
184. *Id.* at 277-78.
185. *Id.* at 277 n.20.
186. 529 U.S. 217.
187. Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998).
188. *Southworth*, 529 U.S. at 233.
189. *Id.*. *See also* Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819 (1995) (striking down the state university's exclusion of a student publication from subsidies through student activities fund on the basis of the publication's religious affiliation, because the exclusion constituted viewpoint discrimination).

institution indicates its tendency to exclude certain views from the permissible scope of debate.

Widmar v. Vincent and *University of Wisconsin v. Southworth* are especially important not only because they reflect the Supreme Court's continuous commitment to institutional academic freedom, but also because they indicate that this concept overrides conflicting First Amendment interests of individuals, as long as the educational institution is deemed trustworthy.[190] Conversely, competing First Amendment values trump the institution's academic freedom insofar as the educational institution, given the way it has structured the program or policy that is at stake in a particular case, is not worthy of heightened trust.[191]

Nevertheless, critics might argue that the constitutional importance of academic freedom is largely diminished when an educational institution uses suspect or quasi-suspect classifications. According to this argument, although academic freedom is an important constitutional value, it still cannot justify the use of race or gender in allocating burdens or benefits.

Existing doctrine, however, does not make any such distinction. When race or gender is at stake, academic freedom remains a predominant value, as long as special reasons to distrust the educational institution do not appear and unless a policy or practice results in injury to academic freedom that is remote, attenuated, or merely speculative.[192] *Virginia v. United States*, decided by the Supreme Court in 1996,[193] is illustrative in this regard. Although *Virginia* deals with gender-based discrimination, it is interesting for race-based classifications as well, especially because the Court's majority expressed a tendency to heighten the applicable scrutiny for gender-based classifications beyond intermediate and towards strict scrutiny.[194] Virginia argued that its

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190. *Cf.* Piarowski v. Illinois Cmty. Coll. Dist. 515, 759 F.2d 625 (7th Cir. 1985) (resolving tension between a professor's and a college's academic freedom by upholding the relocation of the professor's sexually explicit art work that was likely to offend potential applicants to the college); Edwards v. California Univ., 156 F.3d 488, 491-92 (3rd Cir. 1998) (finding that a professor does not have a constitutional right to choose curriculum materials in contravention of a university's dictates); Brown v. Armenti, 247 F.3d 69, 75 (3rd Cir. 2001) (ruling that the university, not the professor, has the academic freedom to assign a grade); *see also* Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (suggesting broadly that "to the extent the Constitution recognizes any right of academic freedom above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors") (internal quotation marks omitted).

191. *See also* Hardy v. Jefferson Cmty. Coll., 260 F.3d 671 (6th Cir. 2001) (finding that a professor's rights to free speech and academic freedom outweigh a college's interest in limiting the discussion of offensive language in class when this discussion is germane to the classroom subject matter and advances an academic message).

192. *Cf. Univ. of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 199-201 (1990) (upholding Equal Employment Opportunity Commission subpoena ordering disclosure of peer review materials in tenure discrimination cases despite potential incidental effect on the university's academic freedom).

193. 518 U.S. 515.

194. *Id.* at 533 (emphasizing that the proffered justification must be "exceedingly persuasive"); *id.* at 573 (Scalia, J., dissenting) (suggesting that only the exceedingly persuasive justification phrase, and not the standard elaboration of intermediate scrutiny, can lead to the

Military Institute's (VMI) single-sex admissions policy furthered diversity among public educational institutions.[195] Under the approach suggested here, this claim should be trusted, unless the way Virginia's policy was structured indicated that the asserted goal of diversity was not genuine. The Court's opinion fits within this framework. The Court struck down VMI's single-sex admissions policy, holding that it did not aim genuinely at furthering diversity. The Court emphasized that it did not dispute that diversity among public educational institutions can serve the public good.[196] But the Court determined that Virginia had not shown that "VMI was established, or ha[d] been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities."[197] Rather, the diversity rationale was merely a post-hoc rationalization invented in response to litigation for actions in fact differently grounded.[198] Quite explicitly, the Court distinguished this case from a general challenge of diversity in educational opportunities as an appropriate governmental pursuit. In response to amici's concern to the contrary, the Court asserted that "we do not question the State's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized as unique, an opportunity available only at Virginia's premier military institute."[199] Despite Justice Scalia's dissent to the contrary,[200] the Court's decision in *Virginia* has thus a narrow reach that includes only cases in which the asserted educational interest that results in a distinction based on gender is counterfeit. Admittedly, if this is the case, there is no scope for trust.

Similar considerations apply when race is at stake.[201] Justice Powell's opinion in *Bakke* suggests that he would presumptively respect the decisions of an educational institution even if these decisions *explicitly* took race into consideration. More specifically, Justice Powell distinguished in *Bakke* the policy of the University of California (UC) at Davis Medical School that insulated minority applicants from broader competition for sixteen out of one hundred slots in the entering class[202] from the "Harvard Plan," in effect at Harvard College. Harvard's plan

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majority's conclusion that Virginia Military Institute's single-sex composition is unconstitutional); *cf.* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 73 (1996) (noting that *Virginia* "heightens the level of scrutiny and brings it closer to . . . strict scrutiny").

195. *Virginia*, 518 U.S. at 525.

196. *Id.* at 535.

197. *Id.*

198. *See id.* at 533, 535-36.

199. *Id.* at 534 n.7 (internal quotation marks omitted).

200. *Id.* at 595 ("Under the constitutional principles announced and applied today, single-sex public education is unconstitutional").

201. *But see* Killenbeck, *supra* note 6, at 1334 (arguing that "cases raising the specter of race provide an exception to this general rule [of respect towards decisions of educational authorities]").

202. *Bakke*, 438 U.S. at 279.

considered race as a "plus" in the individualized assessment of all applicants.[203] As Justice Powell concluded,

> [A] court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases.[204]

Justice Powell's reference to a "facially nondiscriminatory admissions policy"[205] may create the impression that he endorsed a race-neutral policy that averted any explicit reference to race. Given the context of the comparison between Davis' quota and the Harvard plan, however, the difference was not in explicitness. Rather, Justice Powell distinguished between the two policies, because, given the structure of the admissions programs, he trusted the Harvard officials were capable of achieving their educational goals, but he did not trust the Davis officials. The quota scheme Davis had adopted was so rigid that the educational goals of the institution could not be seen as being pursued with the appropriate flexibility. Significantly, for current purposes, Justice Powell presumed "the good faith" of the educational institutions in the course of applying strict scrutiny,[206] a standard which at least at the time of *Bakke* was seen as fatal.[207] Dealing with two conflicting presumptions, Justice Powell recognized that the (substantive) presumption from academic freedom should override the (statistical) presumption from strict scrutiny. Given the facts in *Bakke,* however, he reached a contrary conclusion, despite the general prevalence of the presumption of good faith, because this good faith or trust (in the terminology used in this article) was rebutted by the rigidity of the Davis quota.

As stated, whether, and to what extent, academic freedom can be applied to elementary and secondary schools as well remains unclear.[208] Nevertheless, even beyond the academic freedom label, Supreme Court doctrine generally admits that school authorities possess a significant degree of autonomy in reaching decisions of educational policy. Constitutional constraints do apply but are minimal compared with other settings. Despite the existence of a presumption of trust then, the particular way these institutions have structured their policies results in the rebuttal of this presumption.

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203. *Id.* at 314.
204. *Id.* at 318-19.
205. *Id.*
206. *Id.* at 299 (opinion of Powell, J.) (suggesting that any race-based classification should be precisely tailored to serve a compelling governmental interest).
207. *See supra* note 26.
208. *See supra* note 177 and accompanying text.

To be sure, students do not relinquish their constitutional rights at the schoolhouse gate, unless the exercise of these rights materially and substantially interferes with school work or discipline.[209] Nevertheless, as the Court pointed out in *Bethel School District v. Fraser*, the rights of students in the public school setting are not coextensive with the rights of adults in other settings. Thus, restrictions of student speech, otherwise constitutionally prohibited, have passed constitutional muster when this speech is delivered in the public school setting.[210] Moreover, the Court has upheld the exercise of editorial control over student speech in school-sponsored expressive activities. In *Hazelwood School District v. Kuhlmeier*, the Court found that a school has a right to control activities that "students, parents and members of the public might reasonably perceive to bear the imprimatur of the school," to the extent that this control is reasonably related to legitimate pedagogical concerns.[211] In both *Fraser* and *Kuhlmeier*, therefore, what was critical was the preservation of the necessary autonomy of the school authorities in controlling either the messages that constituted school-sponsored speech or the content of speech delivered from a student in a school setting. Courts were to trust school authorities with these decisions. Significantly, in these cases, other concerns of constitutional stature relating to the free speech rights of the individual students were not considered powerful enough to overturn the necessary preservation of the autonomy of school authorities.

This picture does not seem to change when race comes into play. Indeed, two distinct eras of school desegregation jurisprudence can be explained on the basis of trust considerations. On the one hand, the active judicial involvement in remedying school segregation during the 1970s reflects an era in which a presumption of trust was not warranted. Against the background of officially sanctioned segregation, school authorities could not be presumed trustworthy by merely declaring an intent to comply with the desegregation mandate. By contrast, affirmative steps were required that eliminated racial discrimination "root and branch"[212] and "promise[d] realistically to work now."[213] Moreover, as the educational authorities were not presumed trustworthy, the Court recognized "a presumption against schools that [were] substantially disproportionate in their racial composition," although conceding that "the existence of some small number of one-race . . . schools within a district is not in and of itself the mark of a system that

209. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

210. Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (holding that school district acted within its permissible authority in imposing sanctions to student in response to offensively lewd speech, which had no claim to First Amendment protection under school disciplinary rule).

211. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding that high school principal's decision to excise two pages from student newspaper, on ground that articles unfairly impinged on privacy rights, did not violate students' speech rights).

212. Green v. County Sch. Bd., 391 U.S. 430, 438 (1968).

213. *Id.* at 439.

still practices segregation by law."[214] The Supreme Court acknowledged that school authorities have, as a general matter, broad discretionary powers to formulate and implement educational policy.[215] Nevertheless, "in default by the school authorities of their obligation to proffer acceptable remedies," the Supreme Court accorded district courts "broad power to fashion a remedy that will assure a unitary school system."[216] In other words, against the historical background of racial discrimination in education, school authorities could not be trusted on the basis of a presumption. Rather, courts should trust them only if they developed acceptable remedies for school segregation on a case-by-case basis.

On the other hand, the Supreme Court's recent desegregation jurisprudence has suggested that pervasive distrust is not justified anymore. While not explicitly referring to a presumption of trust, the Court emphasizes the importance of returning the operations and control of schools to local authorities as "essential to restore [the schools'] true accountability in our governmental system."[217] In assessing whether a desegregation decree should be dissolved, the courts assess whether the school authorities are trustworthy by examining "whether the Board ha[s] complied in good faith with this decree since it was entered."[218] Apart from good-faith compliance, the courts also examine "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable."[219] However, the assessment of the trustworthiness of the educational authorities, rather than the actual elimination of vestiges of past discrimination, plays the predominant role in determining whether judicial supervision should continue. Thus, the district court has the discretion to order an incremental or partial withdrawal of its supervision and control even before full compliance with the desegregation decree has been achieved in every area of school operations,[220] as long as objective elements point to the conclusion that school authorities should be trusted. This partial withdrawal is possible when the school district has fully complied with the decree in respect to those aspects of the system where supervision is to be withdrawn and the school district has demonstrated its good-faith commitment to those provisions of the law and the Constitution that were the predicate for judicial intervention.[221] By contrast, partial withdrawal is not possible if retention of judicial

214. Swann v. Charlotte-Mecklenburg Bd. of Educ., 401 U.S. 1, 26 (1971).

215. *Cf. id.* at 16 (noting that school authorities "might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole"); *see also* McDaniel v. Barresi, 402 U.S. 39, 42 (1971) (characterizing race-conscious student assignment as an "exercise of [state school authorities'] discretionary powers to assign students within their school systems").

216. *Swann*, 402 U.S. at 16.

217. Freeman v. Pits, 503 U.S. 467, 489-90 (1992).

218. Oklahoma City Bd. of Educ. v. Dowell, 498 U.S. 237, 249 (1991).

219. *Id.*

220. *Freeman*, 503 U.S. at 489-90.

221. *Id.* at 491.

control is necessary to achieve compliance with the decree in other facets of the school system.[222] Thus, actual compliance with the desegregation decree is required only to the extent that it is necessary to provide a basis for the good-faith, or trustworthiness of educational authorities. As long as a solid foundation for trust exists (on the basis of partial compliance and overall good-faith), full actual compliance with the decree is not required. The aspects the Court scrutinizes thus are closely related to an analysis of the trustworthiness of the educational authorities to reach decisions about educational policy without judicial interference. Although the mechanics of the scheme adopted in desegregation cases do not exactly parallel the approach endorsed here, it seems therefore that the Supreme Court's desegregation jurisprudence in both the 1970s and the 1990s can be explained to a significant degree on the basis of the trust paradigm.

iii. The Importance of History in Assessing Trustworthiness--The desegregation cases are instructive in another regard as well because they indicate the importance of history in analyzing institutional trustworthiness. This approach would be impermissibly narrow and formal if it was limited to an assessment of expertise or doctrine without considering the ways in which different institutions have performed their roles historically. In this sense, a history of intentional discrimination against an identifiable group informs both the institutional and doctrinal prongs of the analysis. This is equally true in the case of a consistent lack of empathy towards the concerns of a group, such as when an institution repeatedly fails to consider striking racial disparities in the implementation of a policy.[223]

This historical assessment of race-based decision-making in education may be divided into two periods. In the first period, lasting formally until *Brown v. Board of Education* and effectively longer, race-based decision-making ignored interests and reasonable concerns of racial minorities. The "separate, but equal" tradition was a tradition of more inferior educational quality for blacks. This historical aspect retains its importance today. Thus, an educational institution that asserts the homogeneity of the student body as the purpose of its admissions policy and with this pretense excludes members of racial minorities from

222. *Id.*

223. This may seem inconsistent with the discriminatory intent requirement for an equal protection violation, under *Washington v. Davis*, 436 U.S. 229 (1976). However, the gist of the approach adopted here is that discriminatory intent is a prerequisite for any equal protection violation. Without challenging this premise, a consistent indifference to striking disparities in the implementation of a policy along racial lines is sufficient to trigger a heightened degree of suspicion as to the real intent that is hidden behind the policy. A necessary requirement for this conclusion is not the ultimate non-implementation of a policy with disparate results; rather, it is that such a disparity is not even considered to be a problem, subject to genuine discussion as to whether it can be overcome.

eligibility to apply or treats them adversely in the admissions process[224] cannot be presumed trustworthy.

In a second period of race-based decision-making, spanning the last three decades, the consideration of race by educational institutions has benefited racial minorities through affirmative action programs. Against this backdrop, it may be argued on trust grounds that educational institutions today cannot be deemed trustworthy to take into account the concerns of the white majority. However, the picture is more complicated: the mere fact that educational institutions have considered race in admissions through affirmative action policies cannot lead to the inference that they have either intentionally discriminated against whites or have consistently demonstrated a lack of empathy towards their concerns. This inference cannot be made because other elements incorporated in admissions policies or practices point in the opposite direction. Educational institutions also rely heavily on standardized tests, as well as other admissions factors[225] that typically produce disparate results along racial lines.[226] These disparate results are seen even among students with equivalent academic performance[227] or income

224. *Cf.* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 416-17 n.170 (1998) (arguing that the diversity rationale is founded in the Fourteenth Amendment, as the First Amendment "sees no distinction between a racial classification designed to promote diversity in the student body and one designed to achieve homogeneity—as long as each can be justified on academic grounds"); Wayne McCormack, *Race and Politics in the Supreme Court: Bakke to Basics*, 1979 UTAH L. REV. 491, 530 (finding it "hard to believe" that racial classifications disfavoring racial and ethnic minorities could be justified by a school's claim of academic freedom).

225. Such factors include enrollment in high school advanced placements courses that are not offered in most predominantly black high schools *see, e.g.*, Lawrence, *supra* note 18, at 943-945, and preference to children of university alumni. *See, e.g.*, Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L. J. 2331, 2386 (2000); Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173, 1197-98 (1997).

226. *See, e.g.*, BOWEN & BOK, *supra* note 55, at 19 fig. 2.1 (reporting a marked disparity in SAT scores of black and white applicants in competitive institutions); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 992-97 (1996) (noting that reliance on standardized tests for determining merit "screens out a disproportionate number of women and people of color"); Armour, *supra* note 225, at 1187 (citing evidence of the "stereotype vulnerability" phenomenon that tends to drag down performance of blacks in standardized tests); *see also* United States v. Fordice, 505 U.S. 717, 734-35 (1992) (describing the disparately negative impact that the use of American College Testing (ACT) has on black students).

227. *See* William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055 (2001) (citing evidence that the LSAT not only maintains, but produces racial and ethnic differences among students who have managed to overcome obstacles and achieve equivalent academic success in college); *see also* David M. White, *Culturally Biased Testing and Predictive Invalidity: Putting them on the Record*, 14 HARV. C.R.-C.L. L. REV. 89, 115-17 (1979) (noting that "standardized tests produce gaps between the test scores of whites and minority students that are disproportionately wider than the gaps in academic performance" and attributing this magnification of differences to a "continuing cultural bias"); *but cf.* Schuck, *supra* note 12, at 19 (arguing that the deficit for black applicants with respect to high school grade point average is even larger than for SAT scores).

levels.[228] Thus, the complete picture of the admissions policies in competitive institutions includes the consideration of criteria that disproportionately burden racial minorities. The corrective consideration of race only compensates for part of the disparities created by the educational institutions' previous choices.[229] If admissions programs steadily and firmly preferred minorities in the admissions process, regardless of educational concerns, it would be reasonable to expect them to discount criteria that disproportionately burden minorities. In this vein, educational institutions' insistence on relying on admissions criteria that disproportionately burden racial minorities,[230] while merely correcting these results through affirmative action programs, leads to the reasonable assumption that the affirmative action element of an admissions policy serves educational purposes. What in particular these educational purposes consist of or whether these purposes are comprised of mixed considerations (for instance, academic excellence as well as diversity of the student body) is irrelevant at this stage. As long as race-conscious policies reflect a choice of educational nature, this choice should be presumptively respected.[231]

iv. The Practical Foundation--Finally, practical considerations also urge the recognition of a presumption of trust. An educational institution may be presumed to be neutral as to the adoption of race-conscious

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228. *See, e.g.*, Deborah C. Malamud, *Affirmative Action, Diversity and the Black Middle Class*, 68 U. COLO. L. REV. 939, 955-58 (1997) (attributing this disparity to systematic economic inequality that has social and cultural dimensions and repercussions).

229. Educational institutions rely on standardized tests, as they believe that, despite their flaws, these tests have significant predictive value in general. They recognize, however, that the heavy reliance on these tests overwhelmingly burdens minorities. Thus, these institutions initiate race-conscious policies to correct these disparities (e.g., to achieve diversity). *But see* Chen, *supra* note 13, at 1150 (arguing that "giving relatively heavy weight to quantitative factors on some applications while systematically denying the predictive value of these criteria on other applications epitomizes whimsical educational policy") (internal quotation marks omitted).

230. In this regard, it is interesting to note that university officials in California, despite their general commitment to affirmative action, were reluctant to support a recent state legislative committee proposal to stop giving extra weight to advanced placement courses during the admissions process. *See* V. Dion Haynes, *Committee urges dropping Advanced Placement boost; California group takes issue with class availability*, CHI. TRIB., July 5, 2002, at N16.

231. It is beyond the scope of this article to determine whether this same conclusion applies to the consideration of disparate impact admissions criteria, such as standardized tests. Three points though seem especially relevant from a trust perspective. First, history might be seen as urging against the recognition of a presumption of trust, as testing mechanisms were used during the early post-*Brown v. Board of Education* era to perpetuate segregation. *See, e.g.*, Tomiko Brown-Nagin, *A Critique of Instrumental Rationality: Judicial Reasoning About the "Cold Numbers" in* Hopwood v. Texas, 16 LAW & INEQ. 359, 387-91 (1998). Second, the argument made in the text in support of the trustworthiness of educational authorities that apply affirmative action policies based on standardized testing, also has a flip side that counsels for the constitutionality of testing mechanisms, when affirmative action genuinely mitigates their results. Third, an educational institution in a particular case might use standardized tests for purposes of cost-effectiveness, in the sense of reducing the short-term expenses of individualized selection. *See* Sturm & Guinier, *supra* note 226, at 980. To the extent that this consideration is indeed a critical part of the rationale in deciding the use of standardized tests, trust will not be warranted. For administrative convenience as a reason for distrust, *see infra* note 303 and accompanying text.

policies. What it will normally want in the long-run is not to increase minority representation. Rather, the pursuit of race-conscious admissions policies is reasonably perceived not as a purpose in and of itself, but as a means to achieve a further educational end, whatever this end might be. The educational institution may believe, for example, that race-conscious policies are likely to enhance the quality of education because the benefits that flow from a diverse student body enrich the experience of all students.[232] One could agree or disagree with this proposition as a matter of educational policy. As a matter of constitutional law, however, it is critical that the very purpose of an educational institution, that is, the successful fulfillment of an educational mission, normally cannot be squared with considering race in admissions for its own sake. Thus, the initial distrust that is statistically associated with suspect classifications like race is significantly weakened when race for its own sake is absent from the decision-making formula, no matter what is the applicable standard of judicial review.

Moreover, apart from educational goals narrowly defined, there is an additional point that again educational institutions presumptively consider in their decision-making calculations. This point confirms that race is being relegated in the admissions process to a merely instrumental position. For better or for worse we live in an extremely competitive environment, even as far as educational institutions are concerned. One would assume an institution would not risk weakening its position in the educational marketplace just to increase minority representation.[233] While such a possibility should not be ignored, it is not reasonable to think that this will become the rule, especially given the fact that the whole affirmative action controversy centers on especially competitive educational institutions. Thus, the instrumental value of race in decisions of educational policy emerges again with the purpose of improving the reputation of the educational institution in the eyes of the academic community and prospective students.

Up to now, we have completed the abstract stage of the analysis of trustworthiness, concluding that institutional, doctrinal, and practical factors assessed against a historical background, counsel in favor of recognizing a presumption of trust when reviewing the constitutionality of affirmative action policies initiated by educational institutions.

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232. *See, e.g.*, *Johnson*, 263 F.3d at 1253 (pointing out that "the diversity interest . . . does not view racial diversity as an end in itself, but rather as a means to achieve the larger goal of providing a superior education by creating a university community that resembles the broad mix of cultures, experiences, and ideas to be found in society"). As will become clear *infra*, this instrumental nature of race-conscious policies as an educational goal is not limited to diversity, but exists regardless of the particular interest set forth by an educational institution to justify a race-conscious policy.

233. *See also* DWORKIN, *supra* note 62, at 422 ("[Universities] have...a crucial stake in their academic reputations, both absolutely and relative to other comparable institutions, that would check any desire significantly to expand an admissions policy or curriculum that might threaten that reputation").

2. *The Rebuttal of the Presumption*

Nevertheless, the presumption of trust is subject to rebuttal. This will be the case when a particular educational institution actually pursues a race-conscious policy not as a means towards an educational purpose, but either as a means towards other objectives that lie outside the ambit of its competence or even as a goal in and of itself. Then, despite abstract considerations to the contrary, the particular educational institution that initiates a race-conscious policy should not be trusted. Thus, whether the initial presumption of trust is rebuttable will ultimately depend on a concrete evaluation aimed at identifying the real goal that an educational institution is pursuing through a particular policy or practice.

A concrete analysis is also necessary because the constitutional fate of affirmative action differs not only per institutional context (for example, in education compared with public employment, or even in higher education admissions compared with financial aid), but also from case to case within this context (depending on the nature of the particular educational institution). Given this need for variation, the presumption of trust will be rebutted when an institution follows a rigid race-conscious admissions program that is not reformulated and redefined, despite significant changes in the qualifications of the pool of applicants. This rigidity is inconsistent with the inherent *flexibility* of an admissions program that stems from the instrumental nature of the program in attempting to achieve educational goals. Thus, to the extent that educational concerns cannot justify this rigidity, it is inescapable to conclude that non-educational considerations have actually prompted the race-conscious admissions policy. Moreover, an educational institution should not be trusted to follow a race-conscious admissions practice that is *inconsistent* with the broader policy it is pursuing. An institution, for example, that not only permits, but is not even concerned with race-based segregation in dormitories cannot at the same time invoke the benefits that flow from a diverse student body in terms of improving interracial understanding.[234] This inconsistency points to a different goal

234. This is not to say that schools that do not prohibit de facto race-based segregation in dormitories should not be allowed to consider race in admissions. Rather, it suffices that the educational institutions are concerned with such segregative practices and genuinely attempt to address them. The purpose of the approach suggested here is not to impose particular outcomes; rather, it is to assess institutional trustworthiness. Insofar as an institution that uses a race-conscious admissions policy has an educational policy-based plan to respond to de facto segregation, it is beyond the constitutional ambit to determine whether this plan of educational policy should include particular means, such as the outright prohibition of de facto segregation. *But cf.* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1778 (1996) ("[s]chools that permit de facto residential segregation may be estopped from pleading *Bakke* as a defense to affirmative action in admissions"); Chi Steve Kwok, *A Study in Contradiction: A Look at the Conflicting Assumptions Underlying Standard Arguments For Speech Codes and the Diversity Rationale*, 4 U.

for the race-conscious program, rather than the goal asserted, unless the inconsistency is convincingly justified. Similarly, the *obvious lack of fit* between a goal and the means used will demonstrate that the educational institution is not actually pursuing the goal it claims to pursue. For example, a local remedial program that applies to racial groups that have not been discriminated against in the past, as no members of these groups inhabit in this locality, cannot be said to actually serve the proffered goal.[235]

Still, however, it is within the ambit of competence of educational institutions to strike the desired balance among competing educational goals. The fact that an institution attempts to accommodate competing educational considerations cannot by itself become constitutionally fatal for one of these considerations. For instance, an institution might genuinely pursue at the same time, rigorous academic standards on the one hand and the benefits of diversity on the other.[236] In this sense, the adjustment of threshold admission qualifications, even when made repeatedly, is not necessarily prompted by a non-educational consideration.[237] A constitutional problem arises only when the educational institution is *not* actually pursuing an educational goal.[238] In this sense, the observation that the conventional arguments in favor of diversity in the student body largely begin and end with educational policy, not constitutional law,[239] becomes critical for the constitutionality of diversity-oriented admissions policies. In other words, it is crucial precisely for constitutional purposes that educational institutions are indeed pursuing policies of an educational nature as distinguished from other ends under the guise of educational policy.

Thus, although the appropriate degree of trustworthiness of the educational institutions' acts is presumptively heightened, in a particular

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PA. J. CONST. L. 493, 531 (2002) (arguing that the diversity rationale becomes only a pretext when administrators tolerate de facto racial segregation in housing).

235. *Cf. Croson*, 488 U.S. at 506 (striking down a minority set aside program initiated by the City of Richmond, that had borrowed its definition of the eligible minority groups from federal legislation).

236. *See also* Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 682 (1998) (characterizing affirmative action as a "point of compromise in the contradictory missions of the elite universities," as they serve as both "the guardians of a meritocratic vision of achievement and as the guarantors of opportunity so that the elites of the society may be replenished from the diverse groups that have built this country"); *cf.* Kwok, *supra* note 234, at 532 (arguing that it can be "perfectly permissible" at the same time to pursue a diversity-based race-conscious admissions policy and to regulate hate speech, despite the conflicting assumptions of these policies for purposes of "not utterly sacrific[ing] one set of cherished values in obsessive pursuit of another").

237. *But cf.* Killenbeck, *supra* note 6, at 1400 ("Affirmative measures that . . . constantly adjust any predetermined criteria for the sake of results, creates an almost irrebutable presumption that such programs are simply exercises in social engineering. As such, they become recipes for disaster").

238. If there is no educational justification for the constant readjustment of the admissions criteria and thus the conclusion is irresistible that this adjustment is made to increase minority representation for its own sake, there is no room for trust.

239. Liu, *supra* note 224, at 382-83.

case, because of the structure of a particular policy, trust may not be warranted. Part V, *infra* elaborates on the effects this conclusion has on the application of strict scrutiny in affirmative action. However, before proceeding to this stage, it is critical to realize the importance of honesty in assuring this scheme of institutional trustworthiness operates effectively.

IV. Honesty and Affirmative Action in Education

The focus that this article places on the concept of trust becomes meaningless without honesty. Courts cannot grant an institution a heightened degree of trust while simultaneously encouraging it to be dishonest. Conversely, institutions cannot reasonably be expected to be trusted when they are dishonest as to their actual purposes. More specifically for purposes of our discussion, despite the presumption of trustworthiness, universities and colleges cannot reasonably expect to be trusted when they maintain a dishonest stance. Institutional honesty thus becomes an integral part of the analysis of trustworthiness. This article defines honesty in this context as an attempt to equate the substance of a policy with its external perception and provides an analogy to voting rights law that helps to identify when appearances matter in law and what constitutional problems may pertinently arise. After explaining why this focus on substance is consistent with Justice Powell's landmark affirmative action opinion in *Bakke*, this section concludes by analyzing how the trust and honesty perspective deals with the stereotype-based objection that many opponents of affirmative action deem critical for the constitutional fate of race-conscious programs.

A. Between Substance and Perception

Practically, equating the effect and purpose of a *substantive policy* with its *external perception* may be utopian. Thus, the external perception of a policy will likely remain an incomplete or partly inaccurate depiction of reality even when institutional honesty is at its maximum. Still, this gap should reflect only practically inescapable difficulties in achieving the desired equation, rather than conscious efforts to differentiate substance from perception. The constitutional importance of this discussion is that the outcome of a constitutional challenge should not differ according to whether the public is likely to understand the content and purpose of the policy under attack or even the nature of the problem the policy attempts to remedy. When the courts differentiate the constitutional outcome according to whether substance is understood as such, institutional decision-makers are encouraged to adopt disingenuous formulations and distinctions that rely on trivial

coincidences for purposes of ensuring that their policies pass constitutional muster. Regardless of its short-term results, ultimately such disingenuousness destroys the foundation of trust and increases suspicion about the purposes that an institutional entity actually seeks. In other words, an analysis that relies on honesty to ensure trust deems the existence of a gap between substance and perception as an *anomaly* that we should strive ideally to eliminate. By contrast, this gap does not reflect an *opportunity* to manipulate the form or the mechanics of a policy in order to frame it in a way that is more likely to pass constitutional muster.

At this point it is appropriate to identify a fine distinction: as the analysis in the previous Part has showed us, the critical question in affirmative action is whether, on the basis of both abstract and concrete considerations, an institutional entity that sets forth a race-conscious program should be trusted. To determine whether trustworthiness exists at the concrete level, we relied on objective factors such as the flexibility and consistency of a policy and the obvious lack of fit between the intended goal and the means used. This article adopted this approach out of pure necessity because of the inherent difficulty, and often inability, to detect the true purpose of a policy or practice based on speculation. Thus, objective *indicia* of illicit intent are important only as circumstantial evidence of the true intent of the law-making authority. They are critical only if the true purpose cannot be clearly detected, although this will usually be the case. Their practical importance was emphasized not because they have any intrinsic worth, but rather because they serve as evidentiary proxies. What is more, these evidentiary proxies should be easily determinable: since the difficulty in identifying the true legislative purpose is mainly an evidentiary difficulty and thus we must rely on proxies, these proxies at least should not present problems similar to directly identifying legislative intent. The discussion of perception and substance should be understood against this background. Admittedly, the line that determines when appearances matter is fine, but yet should still be drawn. The external perception of a policy theoretically might have some importance, regardless of its substance at the evidentiary stage. Because it is so difficult to directly detect legislative intent, the way a particular policy appears to the public may well provide a proxy of untrustworthiness. However, in no event will this perception have intrinsic value. Thus, if true intent can be detected, it is irrelevant whether the public understands the content and purpose of the policy at stake. In addition, even at the evidentiary stage, we should rely on the external perception of a policy only when it is easily identifiable and thus appropriate to offset the inherent difficulties in directly determining the actual purpose of a policy.

B. A Voting Rights Analogy

A comparison with voting rights law concerning the constitutional problems of race-conscious redistricting will clarify the two related problems that emerge in this context. In *Shaw v. Reno*, decided in 1993, the Supreme Court held that strict scrutiny applies in the case of race-conscious redistricting resulting in boundary lines with dramatically irregular shape.[240] In an opinion written by Justice O'Connor, the Court overwhelmingly focused on the external perception of the policy at stake, emphasizing that the redistricting plan was so highly irregular that "it rationally *[could not] be understood* as anything other than an effort to segregate voters on the basis of race."[241] The Court seemed to suggest that it would have reached a different result if race had been a predominant consideration in the redistricting process, but subtly, so that the redistricting scheme could be rationally understood as comporting with considerations other than race, even if this was not actually critical in the decision-making process.[242] In Justice O'Connor's words, "reapportionment is one area in which appearances *do* matter."[243] Thus, the Court's focus on the external perception of a policy operated as an independent constitutional prerequisite with intrinsic value.

Commentators have stated that "one can only understand *Shaw*" in the sense of "an expressive harm that results from the ideas or attitudes expressed through a governmental action,"[244] a concept with significant implications beyond redistricting.[245] Under the "expressive harm" concept, appearances do matter, because "apart from any concrete harm to individual voters, such appearances themselves express a value structure that offends constitutional principles."[246] Justice O'Connor,

240. 509 U.S. 630.

241. *Id.* at 649.

242. *Cf.* Abigail Thernstorm, *Voting Rights: Another Affirmative Action Mess*, 43 UCLA L. REV. 2031, 2039 (1996) (arguing that "advocates could have pushed for race-conscious redistricting of a subtle sort and almost no one would have cared").

243. 509 U.S. at 647.

244. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506-07 (1997).

245. *Cf.* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1888-89 (1996) (arguing that "like redistricting . . . academic decisionmaking is one area where appearances do matter") (internal quotation marks omitted); Karlan, *supra* note 50, at 1601 (suggesting a similar possibility); Ian Ayres & Fredrick E.Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1625-28 (1998) (proposing an "independent limitation of expressive harms" in affirmative action schemes that aim at remedying identified past discrimination); *see also* Jerry Kang, *Negative Action Against Asian-Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 19, 24-30 (1996) (suggesting that under the equal protection principle "an individual has the right not to suffer disadvantage from a governmental practice that conveys an objective social meaning of stigma," even under conditions where it has been assumed that this practice has been sincerely adopted for pedagogical or social goals).

246. Pildes & Niemi, *supra* note 244, at 509.

writing for a plurality in *Bush v. Vera*, decided in 1996, endorsed this "expressive harm" concept.[247] Rejecting the argument that shape is relevant only as evidence of an improper motive, she asserted that, "significant deviations from traditional districting principles, such as the bizarre shape and noncompactness . . . cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial."[248] More explicitly, Justice O'Connor added, "the bizarre shaping . . . is *not merely evidentially significant*; *it is part of the constitutional problem* insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race."[249]

The problem with the expressive harm concept, however, is not whether governmental action expressing ideas or attitudes that are inconsistent with constitutional principles can withstand judicial scrutiny—it cannot. But should it be constitutionally dispositive that the inconsistency of a governmental action *or* governmental "ideas and attitudes" with constitutional principles is *perceived at first blush* without the need for special experience or training? On what basis should governmental action that is equally inconsistent with constitutional principles and adopts a more sophisticated and subtle form so as to be understood only by a small percentage of experts or local residents, be distinguished as to its constitutional fate? In this sense, Justice O'Connor's reasoning in *Shaw v. Reno* and *Bush v. Vera* seems flawed due to what we earlier identified as the first significant mistake in drawing the line as to the circumstances under which appearances may matter; that is, that appearances do not possess any intrinsic worth, but are helpful only to the extent that they can perform an evidentiary function.

Against this background, the contrast with the rest Supreme Court doctrine in race-conscious redistricting is interesting. Indeed, opinions written by other members of the Court have not embraced Justice O'Connor's emphasis on the bizarre shape of voting districts as highlighting an intrinsic constitutional flaw (although other Justices have joined Justice O'Connor's opinions in *Shaw v. Reno* and *Bush v. Vera*).[250]

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247. 517 U.S. 952 (1996).

248. *Id.* at 980.

249. *Id.* at 981 (emphasis added).

250. Although there are significant contextual differences, it is interesting to note that this preference for subtlety may also be seen as pervading Justice O'Connor's Establishment Clause jurisprudence, where with her initiative the traditional doctrinal test adopted under *Lemon*, 403 U.S at 612-13, tends to be substituted for an emphasis on the message received by the "reasonable observer." *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772 (1995) (O'Connor, J., concurring in part and concurring in the judgment); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 618 (1989); Wallace v. Jaffree, 472 U.S. 38, 68-70 (1985) (O'Connor, J., concurring in the judgment); Lynch v. Donnelly, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring). *See also* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L.

For instance, in *Miller v. Johnson*, decided in 1995, the Court adopted a substantive standard in assessing the constitutionality of Georgia's reapportionment plan.[251] Shape was not irrelevant but played only an evidentiary role in determining the true nature of the redistricting process. In an opinion written by Justice Kennedy, the Court held that the Georgia reapportionment plan violated the Equal Protection Clause because race was "the predominant factor motivating the drawing of [an additional majority-minority] district."[252] In the context of this analysis, "shape is relevant, *not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.*"[253]

Similarly, in *Shaw v. Hunt*, decided on the same day as *Bush v. Vera*, the Court, in an opinion written by Chief Justice Rehnquist, followed the *Miller* line of shape as evidence, asserting that the race-based motive may be proved "either through circumstantial evidence of a district's shape and demographics" or through "more direct evidence going to legislative process."[254]

The Court has attempted to conceal the tension existing in its redistricting jurisprudence by presenting all cases as following the same doctrinal line. Nevertheless, in *Shaw v. Reno* it was meaningless to use the line of shape as evidence, since the state had admitted that the districts had been drawn purposely on racial grounds,[255] while in *Bush v. Vera* explicitly shape did not perform only an evidentiary function.[256] *Miller* and *Shaw v. Hunt* did not follow that line. Nevertheless, by emphasizing the importance of shape for evidentiary purposes, the *Miller* Court may have been flawed in another way: the use of irregular shape as a proxy for illicit intent presupposes that it is relatively easy to define what constitutes irregular shape (at least significantly easier than directly determining intent). Otherwise, there would be no reason to use shape as a proxy for intent. Deciding what constitutes a bizarre shape, however, is highly arbitrary.[257] In this sense, the Court in *Miller* quite correctly

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REV. 1, 149-50 (2000) (drawing the analogy and suggesting differences between Establishment Clause and Equal Protection jurisprudence).

251. 515 U.S. 900 (1995).

252. *Id.* at 919.

253. *Id.* at 913.

254. 517 U.S. 899, 905 (1996), *quoting Miller*, 515 U.S. at 916.

255. *See* Rubin, *supra* note 250, at 139.

256. *See also* Adams, *supra* note 97, at 1440, 1442 (describing the *Miller* standard, compared with the *Shaw* test, as "a major shift in new precedent").

257. *See* Shaw v. Hunt, 517 U.S. at 925 (Stevens, J., dissenting) ("I know of no workable constitutional principle . . . that can discern whether the message conveyed is a distressing endorsement of racial separatism, or an inspiring call to integrate the political process"); *see also* Ayres & Vars, *supra* note 245, at 1630 n.189 (suggesting that "the most satisfactory answer" in measuring expressive harm "would approximate the results of a hypothetical survey of public

emphasized that the shape of an electoral district lacks intrinsic worth for purposes of constitutional analysis and thus demonstrated the appropriate commitment to honesty. Whether race-based redistricting was or was not obvious at first blush was constitutionally irrelevant. At the same time though, the *Miller* Court accorded critical weight for purposes of determining legislative intent to the shape of the electoral districts, a highly subjective factor. While *Shaw v. Reno* and *Bush v. Vera* focused on perception, *Miller* and *Shaw v. Hunt* focused on substance, but erred in deciding how to define this substance.

By the same token, with respect to affirmative action in education, constitutional analysis should assess a particular policy or practice in terms of substance, rather than external perception. To the extent that objective elements are needed to determine substance, these elements should be easily demonstrable rather than highly arbitrary, as is the case when the focus is on the way the public perceives a particular policy.

C. Honesty and Justice Powell's *Bakke* Opinion

The focus on substance versus perception may seem, however, inconsistent with Justice Powell's pivotal opinion in *Bakke*.[258] In *Bakke*, Justice Powell distinguished the admissions policy adopted by the UC Davis Medical School, that relied on a quota in favor of minority applicants,[259] from the Harvard College policy that took race into account as a "plus" in the individualized assessment of all applicants.[260] This distinction is sometimes seen as encouraging a subtle and invisible consideration of race in admissions decisions.[261] In turn, this perceived subtlety has spawned a considerable amount of criticism of Justice Powell's opinion.[262] Such a preference towards a subtle consideration of race would be utterly inconsistent with the general preference for honesty here endorsed. The quota scheme, if anything, was honest in its content

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opinion"); Ely, *supra* note 114, at 611-12 (noting that drawing a voting district, like deciding where to go to law school, involves an infinity of choices).

258. *Cf.* Rubin, *supra* note 250, at 144 (analogizing *Shaw*'s "bizarre shape" rationale with Justice Powell's opinion in *Bakke*).

259. *Bakke*, 438 U.S. at 279.

260. *Id.* at 314.

261. *See, e.g.*, R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167, 196 (1997) (suggesting that Justice Powell endorsed the Harvard plan "because it seemed more refined, more discreet, more subtle, and more genteel").

262. *See, e.g.*, *Bakke*, 438 U.S. at 379 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part) ("[T]here is no basis for preferring a particular preference program simply because in achieving the same goals . . . it proceeds in a manner that is not immediately apparent to the public"); RONALD DWORKIN, A MATTER OF PRINCIPLE 309-10 (1985) ("There is no difference, from the standpoint of individual rights, between the two systems at all"); Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 129 (1979) (characterizing one of the most disturbing features about Justice Powell's opinion "its encouragement of hypocrisy by those for whom honesty should be an especially high value"); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 484 (1994) (deeming Justice Powell's opinion in *Bakke* "pure sophistry").

and purpose. The apparent objective and necessary upshot of its application would be that the entering class at the Davis Medical School would be comprised of at least sixteen minority students.

The fact, however, that the quota scheme was honest did not make it constitutional; in other words, honesty taken alone does not justify trust. As to the "Harvard plan," as described by Justice Powell, there was no indication that it lacked honesty. The principal reason why Justice Powell distinguished the quota system from the "race as a plus" system was not because it was explicit, but rather because it relied exclusively on race and insulated minority applicants from competition.[263] Race was explicitly a factor in the Harvard plan as well, and the only difference was in the importance attached to it as a matter of substance. To be sure, subtlety might have been an additional consideration for Justice Powell,[264] but it does not seem to have been predominant or dispositive in his analysis.

D. Honesty and the Danger of Stereotyping

The emphasis on substance compared with external perception as a critical precondition of trust, however, may seem difficult to square with a common objection to race-conscious policies that is based on the danger of stereotyping. This objection has two components: first, the white majority may have enacted a policy that *seems* to favor minority groups, but it *results* in stigmatizing them by perpetuating the notion that members of these groups cannot achieve a significant educational goal without the assistance of race-conscious programs.[265] Second, an ostensibly benign policy may result in perpetuating the notions that all members of minority groups think and act alike and that a minority viewpoint can be expressed only by minority members.[266] The Supreme

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263. *Bakke*, 438 U.S. at 319; *cf.* Laurence H. Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice ?*, 92 HARV. L. REV. 864, 877 (1979) (noting that "the individualized admissions process [endorsed by Justice Powell] seems not only more acceptable to the public . . . it is surely also . . . more responsive to a sense that, if such quotas are to be imposed at all, they should be imposed in a more deliberate and cautious manner and by a more accountable body").

264. A footnote he dropped at the end of his analysis may support this inference, although it is not obvious whether this consideration enters the constitutional calculus or reflects only an argument as to the wisdom of race-explicit policies: "There are also strong policy reasons that correspond to the constitutional distinction between petitioner's program and one that assures a measure of competition among all applicants. Petitioner's program *will be viewed* as inherently unfair by the public generally as well as by applicants for admission to state universities." *Bakke*, 438 U.S. at 319 n.53 (emphasis added).

265. *See, e.g.*, *Adarand*, 515 U.S. at 240-41 (Thomas, J., concurring) ("So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicap, minorities cannot compete with them without their patronizing indulgence . . . These programs stamp minorities with a badge of inferiority").

266. *Cf.* Holder v. Hall, 512 U.S. 874, 903 (1994) (Thomas, J., concurring) (condemning as pernicious in the Supreme Court's vote dilution jurisprudence "the Court's willingness to accept . . . the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group

Court's skeptical jurisprudence on affirmative action echoes such concerns. For instance, in explaining why strict scrutiny is the appropriate standard of review for affirmative action policies, Justice O'Connor pointed out in *Croson* that strict scrutiny "ensures that the means chosen fit [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or *stereotype*."[267]

The trust approach here suggested takes into account the risk of stereotype-based decision-making; when the structure of an objectively assessed race-conscious policy points to the conclusion that an educational institution adopted a race-conscious policy for purposes of serving stereotypes, the presumption of trust is rebutted. Under this approach, however, courts cannot constitutionally condemn the mere pursuit of a race-conscious admissions policy without further *indicia* of distrust. Excessive focus on the danger of stereotyping equates strict scrutiny with fatal results; moreover, it is dishonest, as it focuses on external perception rather than substance. As such, it is not only unnecessary, but also dangerous because it erodes the foundations of institutional trust.

More specifically, the concern that race-conscious policies reinforce the notion that members of minority groups cannot achieve significant educational goals without race-conscious policies does not attempt to grapple with existing problems or disparities in performance along racial lines in substantive terms. Rather, it conceals these disparities by insisting on policies that *appear* color-blind.[268] A preference for race-neutral admissions policies satisfies the concern with stereotypes because race will never appear to make the difference in admissions. *Substantively* though, the results of such a policy will remain strikingly disparate along racial lines.[269] Indeed, in universities where the judicial or political battle of affirmative action seems to have

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having distinct political interests as well); *see also* Miller v. Johnson, 515 U.S. 900, 911-12 (1995) (criticizing as "offensive and demeaning" the assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls").

267. *Croson*, 488 U.S. at 493 (emphasis added; internal quotation marks omitted).

268. *Cf.* Forde-Mazrui, *supra* note 225, at 2380 ("While the government might be able to act without stereotypes, people do not").

269. *See, e.g.*, BOWEN & BOK, *supra* note 55, at 27 fig. 2.5 (documenting the probability of admission to selective institutions by combined SAT score and race); *see also* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 14-29, 45-49 (1997) (showing that an admissions policy relying exclusively on LSAT scores and undergraduate grades would result in a sharp increase in the number of minority applicants who would be denied access to legal education at any law school while the consideration of undergraduate major or school selectivity does not increase ethnic diversity of admitted applicants); Sylvia A. Law, *White Privileges and Affirmative Action*, 32 AKRON L. REV. 603, 620 (1999) (finding that a strictly race-neutral admissions policy to undergraduate schools would reduce the numbers of blacks admitted by 50 to 75%, while the elimination of affirmative action would have an even starker impact on legal and medical education).

been lost and completely color-blind admissions processes have been adopted, the numbers of minority students admitted or enrolled in the most competitive campuses has significantly declined.[270] Thus, to the question whether blacks can currently achieve a critical educational goal without affirmative action, the answer is "no," disproportionately compared with the answer to the same question for whites. This disproportionality cannot change if one adopts a stereotype-based rhetoric. It may be easier to pretend that there is no problem of disparate performance and distribution of resources along racial lines and pursue a race-neutral policy that produces seemingly color-blind outcomes. But plainly the critical issue is not deciding the best possible packaging to sell a product so as to hide the side-effects of "our product." Rather, the question should be how to create a legal system that honestly identifies problems and cogently proposes solutions to deal with these problems.

The second component of the stereotype-based objection to affirmative action rests on the concern that affirmative action perpetuates the notion that "all blacks think and act the same way." However, affirmative action enhances the opportunity of non-minority students and faculty to realize that minority members are actually expressing a range of different perspectives, as diverse as those expressed by Thurgood Marshall and Clarence Thomas.[271] Yet, this second component of the stereotype-based objection to affirmative action can be reduced to the more modest proposition that affirmative action reinforces the notion that racial identity, while not always dispositive, still is one factor that may shape human understanding and affect our viewpoints.[272] At this point

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270. *See* Sue Anne Pressley *Texas Campus Attracts Fewer Minorities; First School Ordered to End Admissions Preferences Opens Less-Diverse Classes*, WASH. POST, Aug. 28, 1997, at A1 (noting that in the 1997-1998 academic year, the first year when affirmative action was banned in Texas after the decision in *Hopwood v. Texas*, there were 150 African American students at the University of Texas at Austin, among a freshman class of 6,500—that is, half the previous year's enrollment. At the University of Texas School of Law, where for decades the first-year law school class included about forty African-Americans and about sixty Hispanics, the first-year class in 1997-98 included only four African Americans and twenty-six Hispanics); Michelle Locke, *Black Student Regards Himself as Trailblazer*, L.A. DAILY NEWS, Aug. 19, 1997, at N5 (reporting that only fourteen African-Americans were admitted in 1997-1998, the first year after affirmative action was banned at the University of California at Berkeley Law School, a decline of 81% compared to the number admitted in 1996 and none of the fourteen admitted students actually enrolled; one African-American student who was accepted for 1996 but deferred enrollment for one year prevented the school from being completely devoid of first-year African-American students during the fall term of 1997); *see also* Pamela Burdman, *Top Minorities May Shun UC Berkley/Many Admitted Under Race- Blind Policy Could Go Elsewhere*, S.F. CHRON., Apr. 1, 1998, at A1 (noting that the University of California at Berkeley's undergraduate admission offers for the 1998-1999 academic year dropped by 66% for African Americans, 58% for Chicanos and 25% for Latinos).

271. *Cf.* DWORKIN, *supra* note 62, at 403 ("if some of the blacks turn out not to have the class or cultural or other characteristics that are stereotypically associated with them, that obviously enhances rather than undermines the benefits of racial diversity"); Liu, *supra* note 224, at 426 (suggesting that the diversity rationale contemplates that educational benefits flow from both interracial and intra-racial diversity); Amar & Katyal, *supra* note 234, at 1763 n.87 (same).

272. *See, e.g.*, Erwin Chemerinsky, *What Would Be the Impact of Eliminating Affirmative Action?*, 27 GOLDEN GATE U. L. REV. 313, 320 (1997) ("Common sense tells us that different racial groups . . . will bring different experiences and perspectives to the classroom"); Patricia J. Williams,

the dichotomy between substance and perception appears again: if, for whatever reason, race affects the viewpoints of members of minority groups in terms of substance (and this does not seem seriously challenged),[273] it does not make constitutional sense to hide this substance by prohibiting the use of the means (race-conscious policies) that effectively would reveal it.

Thus, institutions cannot be trusted when they are dishonest. Educational institutions that enjoy a presumption of trust should be careful not to destroy this presumption by being dishonest and courts should not encourage institutions to be dishonest. Honesty in this context is lacking when an institution operates at the same time through two distinct lines, one in terms of substance and one in terms of how this substance is externally perceived. Under such an approach, competitive educational institutions aim *substantively* at increasing minority representation for whatever benefits they associate with this outcome against a background in which minorities would be represented at best as mere tokens in the student body under a race-neutral admissions policy and in which racial status concededly affects collective aspirations and experiences of minority members. In terms of external perception, by contrast, educational institutions tend to adopt formalistic criteria and distinctions that conceal their race-conscious goal believing that their affirmative action policies will pass constitutional muster more easily. Thus, they fall into the trap of the stereotype-based rhetoric and ultimately erode invaluable trust.

Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Terms, 104 HARV. L. REV. 525, 529 (1990) (emphasizing that most racial or ethnic classifications, apart from common biological traits, define a culture that evokes a shared heritage of language patterns, habits, history, and experience); Emily V. Pastorius, *The Erosion of Affirmative Action: The Fifth Circuit Contradicts the Supreme Court on the Issue of Diversity*, 27 GOLDEN GATE U. L. REV. 459, 491 (1997); ("Clearly a minority, simply by virtue of being a minority . . . will have a different conception of life"); *see also* Kimberle Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988) (arguing that "history has shown that the most valuable political asset of the Black community has been its ability to assert a collective identity"); *cf. also* FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 131 (1999) ("[N]othing more is at work here than the intuition that an individual's perspectives and values, understandings and priorities, stand to be inflected in significant ways by that person's social identifiability, self-awareness, acculturation and experience of life as, say, an African American").

273. Interestingly, the debate in the Supreme Court does not focus on the empirical accuracy of this assumption, but rather on its further ramifications. *Compare Metro Broadcasting*, 497 U.S. at 582 ("While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the [F.C.C.] to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves") *with id.* at 620 (O'Connor, J., dissenting) ("Even if the Court's equation of race and programming viewpoint has some empirical basis, equal protection principles prohibit the Government from relying upon that basis to employ racial classification"); *see also* Easley v. Cromartie, 532 U.S. 234, 242 (2001) (acknowledging the correlation of race with political affiliation).

V. Trust and Honesty in Application: Strict Scrutiny of Race-Conscious Policies in Education

After having developed the importance of trust and honesty as an abstract matter, this Part applies these considerations to the specific factors of affirmative action policies that courts usually assess under strict scrutiny. Thus, the following sections examine the circumstances under which a trust and honesty perspective would uphold a race-conscious policy as narrowly tailored to further a compelling state interest.

A. The Compelling Interest Question

Modern affirmative action doctrine generally acknowledges that there is a compelling interest in remedying the present effects of past identified discrimination that justifies the adoption of race-conscious measures.[274] Whether educational diversity, including race as an important component, should receive a similar status is uncertain.[275] Moreover, apart from diversity, the question remains: how do the courts determine when an interest becomes compelling enough to pass strict scrutiny? After elaborating on the trust and honesty-based approach to these questions, this section reviews critically the existing doctrine to the extent that it implicitly associates the compelling interest question with an assessment of the degree of plausibility of asserted interests.

1. *Identifying Compelling Interests Through Institutional Trustworthiness*

Under the analysis suggested here, it is elusive to determine, in substantive terms, how important a policy or practice is for an educational institution. Instead, the compelling interest question should be raised in terms of institutional trustworthiness. Can we trust educational institutions to set, specify and seek their goals? As the foregoing analysis suggests, educational institutions enjoy a presumption of trust. This presumption might be rebutted if, in a particular case, it is proved that an educational institution is not trustworthy. In such a case, the courts, though initially ill-equipped for such decisions, should undertake the compelling interest inquiry. This is not the upshot of different views that favors the courts over educational institutions from a standpoint of institutional optimality. Rather, it is an approach that

274. *See supra* notes 32-34 and accompanying text.
275. *See supra* notes 35-37 and accompanying text.

should be adopted as a matter of necessity due to the fact that the presumption of trust that the educational institution generally enjoys has been rebutted.

How, then, should this analysis proceed as to the particular potentially compelling interests that are discussed in the affirmative action discourse? The answer depends on the specific goals that a particular race-conscious program is pursuing. Sometimes the predominant force behind these programs will be to enhance diversity in the student body. Indeed, as we have seen in Part I of this article, diversity has become the justification educational institutions usually embrace for race-conscious decisions. Nevertheless, the analysis of trust is not limited to diversity. When an institution adopts a race-conscious admissions policy with the purpose of remedying past discrimination or integrating the student body,[276] the presumption of trust continues to apply. Whether this presumption will be rebutted more or less often in remedial compared with non-remedial programs is an empirical question. Regardless, when an educational institution adopts a race-conscious admissions policy as a sincere part of its educational mission, the institution's choice should be respected. Thus, to the extent that race-conscious admissions and financial aid policies aim at remedying the educational institution's bad reputation and hostile environment toward the minority community, this choice should be respected,[277] unless convincing evidence demonstrates that these asserted goals are a sham. Since the goal of race-conscious policies consists of considerations of educational nature, the courts should consider this goal a compelling interest for purposes of strict scrutiny. *How important* the remedy of bad reputation and hostile racial environment is in terms of educational policy is beyond the sphere of judicial authority to decide. In sum, increased minority representation can be instrumental to the attainment of an educational mission not only in the case of non-remedial diversity-oriented programs, but also in the case of remedial schemes.

2. *Assessing the Plausibility of Governmental Interests*

Nevertheless, with respect to remedial programs, the Supreme Court consistently distinguishes between remedying identified discrimination, which it recognizes as a reason compelling enough to survive strict scrutiny, and societal discrimination, which is constitutionally insufficient, as it reflects in the words of Justice Powell in *Bakke*, "an amorphous concept of injury that may be ageless in its reach into the past."[278] As a general matter, the analysis from a trust

276. *Cf.* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195 (2002) (defending racial integration as a central goal of race-based affirmative action).

277. *But see Hopwood*, 78 F.3d at 952-53; *Podberesky*, 38 F.3d. at 153-54.

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

standpoint that is endorsed here does not justify such a distinction. Courts should trust educational institutions regardless of the particular goal they assert as long as this goal is genuinely part of their educational mission. In this sense, it is totally sensible for an institution to deem as part of its broader educational mission to eradicate existing vestiges of discrimination in society at large, regardless or whether these vestiges may be traced to the institution's past policies. The suspicion with which the courts view such justifications for race-conscious policies is misplaced, to the extent that it reflects a substantive assessment of the importance of educational goals, which is beyond the judicial role. Still, however, this suspicion does not reject the proposition that educational institutions are presumed trustworthy to identify when a compelling interest exists for the adoption of a race-conscious policy. Rather, it represents a case in which the courts see this presumption of trustworthiness as being rebutted. As Justice Powell suggested in *Bakke*, "[the University's] broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality . . . [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria."[279] What seemed to trigger Justice Powell's objections in *Bakke* then, was that he could not assume the remedy of past discrimination that stems from society at large as genuinely reflecting what the UC Davis Medical School actually wanted to achieve. In other words, remedying past societal discrimination was so remote to the university's mission, in Justice Powell's understanding, that the mere reference to such a program by the Medical School was an objective factor forceful enough to rebut the presumption of trust. By rejecting the remedy of societal discrimination as a compelling interest, Justice Powell in *Bakke* implicitly acknowledged the importance of trust in adjudicating affirmative action cases, while at the same time recognizing different degrees of trustworthiness depending on the particular interests an institution asserts to justify its race-conscious policies.

The way the courts allocate the evidentiary burden required to uphold remedial or non-remedial race-conscious programs implicates a similar approach. The Supreme Court requires a "strong basis in evidence" to support race-conscious programs that aim at remedying identified discrimination.[280] In *Bakke*, the sole Supreme Court opinion to date that assessed both a remedial and a non-remedial interest for purposes of strict scrutiny in educational affirmative action, Justice Powell required extremely specific evidentiary support including "judicial, legislative or administrative findings of constitutional or

279. *Id.* at 309.

280. *See, e.g.*, *Croson*, 488 U.S. at 500-03 (requiring a prima facie case of a constitutional or statutory violation that can rely on "great enough" statistical disparity).

statutory violations."[281] Such findings, according to Powell, "must precede the fashioning of remedial measures embodying racial classifications."[282] By contrast, with respect to diversity in the student body, Justice Powell promptly acknowledged the compelling nature of the interest in educational diversity (including a racial component), and proceeded immediately to the narrow tailoring prong of strict scrutiny, without requiring from the UC Davis Medical School *any* evidentiary support for its assertion of the benefits of diversity.[283] Thus, the necessary evidentiary support for diversity as a compelling interest seems, for Justice Powell, to be significantly looser than the "strong basis in evidence" that the Court requires with respect to remedying identified discrimination.[284] This distinction reflects similar concerns with the outright rejection of societal discrimination as an appropriate basis for race-conscious policies. In Justice Powell's understanding, it seems much more likely that an educational institution genuinely considers diversity in the student body as part of its educational mission. At the other end of the spectrum, the Justices see the goal of remedying societal discrimination as far-fetched; they feel that an institution that asserts only an abstract remedial interest simply attempts to hide its real intentions. Even the strongest evidence of societal discrimination is constitutionally insufficient. Finally, when an institution adopts a race-conscious policy for purposes of remedying identified discrimination, there is a connection with the institution's goal, but the Court deems this connection remote. Thus, strong evidentiary support is necessary for the compelling interest requirement to be met.

Classifying asserted interests according to whether courts view them as plausible goals of educational policy, however, is unsound. A university might be committed to the goal of eradicating racial castes and feel socially responsible for the discriminatory practices that still exist, so that admissions criteria are defined to identify those applicants who are best qualified to achieve this goal.[285] Moreover, there is no principled basis for the courts to select particular interests as plausible or implausible views on educational policy.[286] As long as trust exists and a race-conscious program's operating structure does not trigger suspicion as to whether this goal is genuinely part of the institution's educational mission, neither is it within the judicial competence to determine, nor are

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

282. *Id.* at 309 n.44.

283. *Id.* at 314-315.

284. *Cf.* Liu, *supra* note 224, at 430-38 (arguing that, in order to maintain a diversity-based affirmative action policy, "a public university must provide a 'strong basis in evidence' to support its interest in educational diversity," *id.* at 430, but concluding that the evidentiary requirement for diversity "need not amount to a statistically valid proof," *id.* at 438).

285. *See* Lawrence, *supra* note 18, at 972.

286. *See also* DWORKIN, *supra* note 12, at 160 (suggesting that the distinction between identified and societal discrimination is arbitrary in terms of both legitimate political goals and individual moral or constitutional rights).

there judicially manageable criteria to define the degree of plausibility of different remedial or non-remedial interests. Any such determination will necessarily be highly subjective and even arbitrary.[287] Similarly, courts should address the evidentiary question without any previous determination as to the plausibility of the asserted interests. Such an approach would require reconsideration of the stringent "strong basis in evidence" standard with respect to remedial programs. At a minimum, insofar as the competent institutional entities are trusted, courts should not require them to present particularized evidence of past discrimination, present effects and the causal link between them.[288] Courts should allow educational institutions to introduce evidence of the lingering effects of past discrimination, even if this evidence was gathered or developed *after* the adoption of an affirmative action program. To the extent that there is no reason to distrust an institution, this evidentiary support might be garnered even with the precise purpose of defending a race-conscious policy against attack in the courts.

When trust is challenged and the question of a possible rebuttal of the presumption of trust is raised, however, the evidentiary discussion should not rely on general assertions. At this point, the plaintiffs in an affirmative action case should set forth specific evidence in order to demonstrate, for instance, that the policy was not geared towards the particular needs of the specific school, department, or program; but rather the policy was modeled on other schemes without adjusting for differences in factors such as local context,[289] discipline, or educational

287. For example, while this article has argued that the educational benefits that are associated with diversity are usually the critical factor that triggers race-conscious policies, other commentators reach different conclusions. *See, e.g.*, Greenawalt, *supra* note 262, at 122 (noting that "diversity is undoubtedly one reason for [race-conscious admissions], but the justification of countering the effects of societal discrimination . . . comes closer to stating their central purpose"); McCormack, *supra* note 224, at 530 (arguing that diversity "is simply not the most honest statement of the objective of [most affirmative action programs]"); ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 194 (2002) (suggesting that "the demand for diversity is at least in part a cover for a political power grab by the left").

288. *Cf.* Kende, *supra* note 161, at 601-08 (arguing that the more findings for past violations the antidiscrimination laws made, the more reliable the institution's remedial motives become, although conceding that where "the nature of an institution gives a court special reason to rely on its factfinding capacities, the court should accept less particularized findings"). This argument is roughly reverse to the argument presented in the text. It demonstrates though a lack of trust, that is not always warranted. Requiring strong evidentiary support at the risk of unconstitutionality is not necessary to demonstrate trust. Under the approach adopted here instead, other factors and not the evidentiary support result in a determination of trustworthiness and, *as a result*, the required evidentiary burden is relatively light. In the end however, the difference between these two approaches may be only one of degree given Kende's caveat that the courts should accept less particularized findings when "the nature of an institution" gives a court special reasons to rely on its factfinding capacities.

289. *Cf. Croson*, 488 U.S. at 504 (finding the probative value of abstract findings that there had been discrimination in the construction industry "extremely limited" for purposes of demonstrating the existence of discrimination in Richmond, as "the scope of the problem would vary from market area to market area").

program.[290] The reference point at this concrete stage of the analysis is the *particular* institutional entity that sets forth a race-conscious policy or practice.[291] In this limited sense, the Fifth Circuit correctly held in *Hopwood v. Texas* that the appropriate governmental unit for measuring the propriety of a race-conscious remedy was not the educational system of Texas, or the University of Texas overall, but the University of Texas Law School in particular.[292]

B. The Narrow Tailoring Question

This section discusses the application of the trust and honesty perspective to the narrow tailoring of affirmative action policies. The following section discusses all factors that are examined in the context of the narrow tailoring analysis, though later analysis may show that it is actually more precise to elaborate on them in the context of the compelling interest prong of strict scrutiny.

1. *The Interests of Third Parties*

The main concern that militates against the adoption of affirmative action policies is that the positive consideration of racial identity in educational decisions can negatively impact third parties. The prominence of this concern is highlighted by the fact that other elements that are separately examined in the narrow tailoring analysis are closely related to the protection of third parties and limit the burden on them by scrutinizing factors such as the duration and the flexibility of race-conscious policies. Apart from these broader ramifications, the interests of third parties are important in both relative and absolute dimensions.

i. The Relative Dimension--In relative terms, it is often argued that an institution should not adopt a race-conscious policy unless no *alternative* means are available that are less burdensome for third parties.[293] A formal approach to identifying such alternatives would require the competent institutions to try or at least seriously consider

290. *Cf.* Amar & Katyal, *supra* note 234, at 1778 (noting that "diversity cannot function the same way, or be as important, in every academic context"); Kwok, *supra* note 234, at 531 (arguing that the payoffs from diversity vary across departments and academic programs); *see also* Richard A. Epstein, *Affirmative Action in Law Schools: The Uneasy Truce*, 1992 KAN. J. L. & PUB. POL'Y, 33, 36-37 (pointing to a wide range of differences among law schools in national, regional, statewide or local influence, public or private status, and secular or religious orientation).

291. *Cf.* Liu, *supra* note 224, at 431 (arguing that "[a university] would have to articulate why a racially diverse student body is vital to the specific school, department or educational program in which affirmative action is used").

292. *See Hopwood*, 78 F.3d at 949-52.

293. *Paradise*, 480 U.S. at 171-79 (plurality opinion); *Wygant*, 476 U.S. at 282-84; *Johnson*, 263 F.3d at 1254.

alternatives before rejecting them and applying more burdensome means. Conversely, under a functional approach, it would be sufficient that in retrospect no less-burdensome alternatives are available. Generally, the formal approach is preferable for two reasons. First, the implementation or thorough consideration of alternative means may be an indication of the "good faith" of the bodies that administer the program. An institution that does not hesitate to use or sincerely considers the possibility of pursuing a goal through means that do not intrude disproportionately upon third parties demonstrates a genuine intention to achieve this goal. This institution focuses on its *goal* in and of itself; it relegates the *means* that will be used in this connection to a merely instrumental position. If the means initially considered or implemented either fail to produce the intended outcome or are rejected before being applied due to serious setbacks, the possibility that the same goals were sought through more burdensome means becomes constitutionally irrelevant. The educational institution has demonstrated its "good faith." A second reason to prefer the previous implementation or serious consideration of a less-burdensome alternative is that such an alternative may ultimately produce the intended result, although this was not initially expected.

There is no additional need, however, to prove the "good faith" of educational institutions. As long as these institutions are entitled to a heightened degree of trust, "good faith" is presumed. Moreover, the likelihood of the intended result occurring unexpectedly is dramatically diminished, if the competent bodies of the trustworthy educational institutions do not consider this possibility likely. As is generally the case with the presumption of trust, this presumption may be rebutted. This will be the case, for instance, when an admissions policy operates impermissibly rigidly, without consideration of and adjustment to factors such as the less-burdensome alternatives that may exist in a specific academic context. An institution that mechanically applies one admissions pattern, without adapting to account for these differences ignores the need for flexibility, which stems from pure educational necessity. Thus, the true reason the institution implemented a race-conscious program may not have been a genuine consideration of educational policy. If this is the case, the educational institution acted beyond the limits of trust to which it is entitled.

ii. The Absolute Dimension--In absolute terms the narrow tailoring analysis takes into consideration whether the burden that a policy imposes on innocent third parties is unacceptably heavy.[294] Perhaps the most powerful moral objection to affirmative action emerges in this

294. *Paradise*, 480 U.S. at 182-83 (plurality opinion); *Wygant*, 476 U.S. at 283 (plurality opinion); *id.* at 295 (White, J., concurring); *Johnson*, 263 F.3d at 1259.

setting.[295] Is it fair for an educational institution to treat favorably a black applicant merely because he is black, even if his socioeconomic background does not indicate any particular disadvantage, while denying admission to a white applicant with potentially equal or even better academic qualifications who may come from a more socioeconomically disadvantaged background?

Unqualified proponents of affirmative action usually evade this question by raising two arguments. First, from a statistical standpoint, the antecedent probability of admission of any particular white applicant who was rejected under a race-conscious admissions policy would increase only slightly under a race-neutral scheme.[296] Second, apart from race-conscious policies, deviations from a model of admissions strictly on the basis of grades and test scores usually abound, including preferences for athletes and alumni children, which in the last case disproportionately benefit white students.[297] In other words, these arguments acknowledge the possibility that under a race-conscious policy, a black male student whose father is a physician may be admitted while a white female student whose mother is on food stamps may be rejected. Proponents of affirmative action, however, often underestimate its importance, pointing out at the same time that deviations from a merit-based ideal are rare (on the basis of race) and common (in the broader context of admissions policies).

Assuming their empirical accuracy though, the premises on which these arguments rest do not offer a sufficient response to the moral problem of race-conscious admissions: despite its statistical improbability, the possibility remains that a socially and economically disadvantaged white applicant would be rejected so that a less disadvantaged black student would be admitted. Similarly, the fact that other considerations enter the decision-making calculus that are of dubious consistency with a merit-based model, such as legacy admissions, is insufficient to dispel the moral objection to affirmative action. At most, this argument points to the moral need to eliminate from admissions decisions not *only* affirmative action, but also other factors that contradict a merit-based ideal.

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295. *See also Bakke*, 438 U.S. at 298 (opinion of Powell, J.) ("there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making")

296. *See* BOWEN & BOK, *supra* note 55, at 36 (suggesting that this probability of admission would raise only from 25% to roughly 26.5%). According to the data gathered by Bowen and Bok, however, there are considerable differences in the comparative probability of admission of blacks and whites in different SAT score ranges. *See id.* at 27 fig. 2.5.

297. *See, e.g.*, Armour, *supra* note 225, at 1195-98 (describing the "old body network" and legacy admissions as the white equivalent to affirmative action); Sidney Buchanan, *Affirmative Action: The Many Shades of Justice*, 39 HOUS. L. REV. 149, 163-64 (2002) (emphasizing the use of other immutable criteria that rarely bear rationally on fitness for function to suggest that governmental interests of sufficient strength justify the use of race and gender in affirmative action programs).

Under the trust analysis, for purposes of dealing with this profound problem, it is critical to determine whether an educational institution operates flexibly. As a race-conscious admissions scheme is only a means to an end, no matter how this end is further specified, the admissions policies adopted should be adaptable to the specific characteristics of the changing pool of applicants. This means that the admissions bodies should address the potential cost associated with admitting a black applicant of a relatively high socioeconomic background compared with a much more disadvantaged white applicant. Since the educational institutions are trustworthy, this further reflection presumably takes place during the course of the admissions process. As a result, the courts should respect the choice to nevertheless admit the black applicant, as this is the deliberate decision of the institutionally trustworthy body. However, proof of rigid adherence to an admissions pattern rebuts this presumption of trust. Thus, if the educational institution simply applies its admissions criteria rigidly, without considering and evaluating the results they produce in particular cases, it adheres, in an absolute way, to these criteria. It overlooks the fact that these criteria have only an instrumental significance and that adherence to them is warranted only if the goal that they aim at is actually promoted. In case of such rigidity in the admissions policy, trust is not warranted.

2. *The Duration of a Race-Conscious Program*

In the context of the narrow tailoring analysis courts commonly scrutinize also the *duration* of a race-conscious program.[298] The importance of this factor arguably may depend on the remedial or non-remedial orientation of an affirmative action policy.[299] Regardless of this distinction, however, educational institutions operating under the presumption of trust constantly reevaluate the decisions that allocate educational benefits. The admission process by its very nature is regularly repeated on the basis of applicant pools that correspondingly change. To meet these changing needs, an educational institution reevaluates its admissions policies on a regular basis. If factual developments weaken the need for race-conscious policies, other means that reflect competing admissions considerations will normally strive to take their place in this evaluation process. Given the merely instrumental significance of increased minority representation to educational goals,

298. *See, e.g.*, *Paradise*, 480 U.S. at 178 (plurality opinion); *Croson*, 488 U.S. at 505.

299. *Johnson*, 263 F.3d at 1252 ("by definition, the goal of remedying past discrimination has a logical end-point, the goal of exposing students to a diverse student body may not"); *Grutter v. Bollinger*, 288 F.3d at 752 ("unlike a remedial interest, an interest in academic diversity does not have a self-contained stopping point."); *Gratz v. Bollinger*, 122 F.Supp.2d 811, 824 (2001) (suggesting that diversity is "by its very nature a permanent and ongoing concern").

few obstacles will normally preclude these developments. The need to remain competitive in the overall educational environment will check any desire to remain attached to an obsolete admissions framework.[300] Therefore, the lack of a specific provision for the duration of a race-conscious program should not be constitutionally fatal. Again, these abstract considerations can be challenged if practices followed by a particular institution dispel the presumption of trust. In other words, when an educational institution fails to respond to the imperatives of logical, educational, and marketplace necessity that mandate the regular reconsideration of its admissions policies, the presumption of trust will be rebutted.

3. *The Flexibility Requirement*

On different occasions, the courts' applications of strict scrutiny to affirmative action programs have emphasized a third factor in the narrow tailoring analysis that more explicitly incorporates a flexibility requirement.[301] Flexibility takes different forms depending on the remedial or non-remedial nature of the interest that an affirmative action policy pursues.

i. Flexibility in Remedial Programs--As far as remedial interests are concerned, the Supreme Court has referred to factors that relate to flexibility in race-conscious policies in contexts like public contracts and public employment. The benchmark of flexibility, in this sense, is the availability and form of waiver provisions if the race-conscious goal cannot be met.[302] In public contracts and public employment though, the legislature or city council may set a policy requiring or encouraging the hiring of minority subcontractors or minority employees to be implemented by other public or private entities. In this context, a waiver may be needed to protect the interests of these other entities from an

300. *Cf.* BOWEN & BOK, *supra* note 55, at 286 ("University faculties and administrators know that they will have to live with their mistakes, and this realization acts as a restraint on hasty, ill-conceived policies"); *see also* Schuck, *supra* note 12, at 26 (noting that "[u]niversities, employers, and other decision-makers are in the best position to define and measure merit . . . because they must bear most if not all of any efficiency losses and other costs arising from any errors in definition or measurement").

301. *Johnson*, 263 F.3d at 1253-54 (suggesting that even when race is used as a factor in admissions decisions "the weight accorded that factor is not subject to rigid or mechanical application and remains flexible enough to ensure that each applicant is evaluated as an individual and not in a way that looks to her membership in a favored or disfavored racial group as a defining feature of her candidacy"); *see also Fullilove*, 448 U.S. at 487-48; *Paradise*, 480 U.S. at 177-79 (plurality opinion).

302. *See Paradise*, 480 U.S. at 171-79 (plurality opinion) (upholding an one-for-one promotion requirement that can be waived if no qualified black applicants are available); *cf. also Croson*, 488 U.S. at 508 (noting that programs that allow for a waiver "are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration").

inflexible consideration of race. By contrast, in educational decisions, the bodies that set a race-conscious policy play a critical role in its implementation. Thus, it becomes meaningless to *formally* require a waiver option.

Moreover, the presumption of trust offers sufficient safeguards that competent educational institutions will *effectively* reach the same result as they would had a waiver process existed in a different context. Based on this presumption, educational institutions are trustworthy to reevaluate policies, abandon projects, and set different priorities on the basis of changing characteristics in the pool of applicants. To the extent, however, that concrete circumstances relating to a particular educational institution and its policies reveal the implementation of a rigid scheme, the presumption of trust will be rebutted. Although the waiver option exists from the very nature of an educational institution, if this is the case, it effectively remains in the books, without being used or even seriously considered.

ii. Flexibility in Diversity-Oriented Programs: The Quota vs. Goal Dichotomy--Courts also consider flexibility in a different sense with respect to non-remedial interests, particularly diversity. Although usually articulated in the narrow tailoring prong of strict scrutiny, the compelling interest prong is the more appropriate stage at which to consider this part of the flexibility inquiry. The two prongs of strict scrutiny are related in the sense that, depending on the particular interest that the courts deem compelling, they may require a more or less precise fit for purposes of the narrow tailoring analysis. Nevertheless, these two elements are still analytically distinct: Courts use the compelling interest prong to scrutinize the *goal* of a policy, while the narrow tailoring prong assesses the *means* used to further that goal. If a goal is compelling enough to pass constitutional muster and the equal protection analysis proceeds to the narrow tailoring question, this goal becomes immune from further constitutional challenge. Under no circumstances should the courts assess for the second time the compelling nature of a particular state interest in the context of the narrow tailoring analysis. Moreover, this immunity from further constitutional challenge does not refer to an abstract policy goal, but rather encompasses the specific results that a policy or practice aims at bringing about. Thus, if the courts accept a particular race-conscious educational goal as compelling for purposes of strict scrutiny, they should also recognize the power of educational institutions to specify this goal by determining *how much* minority representation is necessary to fulfill it. Specifying the goals of an admissions policy is thus actually part of the compelling interest inquiry and should not be challenged again at the narrow tailoring stage of strict scrutiny.

Scrutinizing the goal of a policy at both stages of strict scrutiny is logically incoherent, apart from any trust-related consideration.

However, close the scrutiny of a goal, this *goal*, to the extent that it passes constitutional muster as compelling, cannot be assessed for the second time as a matter of means. Nevertheless, generally, when strict scrutiny applies, the distrust of the lawmaking institution is so pervasive that it may appear meaningless to insist on a strict conceptual distinction between ends and means. In the context of decisions of educational institutions, however, such distrust of the means used is, as earlier demonstrated, unwarranted. Thus, we should maintain the distinction between ends and means and reject arguments that refer to the impropriety of ends, when discussing means.

As discussed previously, educational institutions that make critical decisions about the allocation of educational benefits presumptively act flexibly and are inclined to change their policies to the extent necessary. In a particular case, though, this flexibility may be wanting. This is an indication that the foundation of trust should be challenged. Thus, when an educational institution relies on rigid quotas that increase minority participation regardless of context, it is reasonable to suspect that the institution, under the guise of an educational objective, is actually attempting to further a non-educational objective. If this is the case, trust is lost and strict scrutiny fails.

What will more often be the case is that the race-conscious policy is the result of genuine educational concerns, but the particular manner an institution has structured its admissions policy reflects an attempt to evade the additional administrative costs and effort that individual assessment of all applicants requires. Nonetheless, the constitutional fate of such a program should be the same as it would were its true purpose not related to educational concerns for two reasons. First, the identification of the true legislative intent for purposes of strict scrutiny will necessarily rely on objective, rather than subjective considerations. In this context, a policy's lack of flexibility is an objective factor of which the courts can take judicial notice in identifying legislative intent. By contrast, speculation as to what triggered the lack of flexibility is constitutionally insignificant in this vein. Second, and more importantly, any attempt to identify the goal of a program does not refer to an abstract policy goal, but rather incorporates a host of different specific results that a particular policy or practice aims at. For instance, the purpose of a race-conscious admissions policy will not be limited to increasing minority representation for whatever benefits are associated with this outcome, but rather may consist of increasing minority representation for purposes of enhancing diversity, but not bearing the burden of assessing on an individualized basis all applicants. In this sense, administrative convenience is actually part of the purpose of an inflexible race-conscious admissions policy.[303]

303. Thus, as a general matter, the Eleventh Circuit was correct in noting in *Johnson* that "if UGA [University of Georgia] wants to ensure diversity through its admissions decisions, and wants

Thus, determining whether a race-conscious policy has the form of an *inflexible quota* or an *elastic goal* becomes critical to the narrow tailoring analysis.[304] The concepts of a quota and a goal should be defined functionally. In this sense, the mere fact that an admissions policy is couched in terms of a goal should not be constitutionally dispositive if its actual operation reveals that the scheme actually works like a quota and the use of goal-based terminology is merely pretense. Being suspicious of programs that attempt to conceal their true nature, however, is quite different than rejecting the constitutional distinction between flexible goals and rigid quotas as a matter of principle.[305]

Existing doctrine incorporates this distinction between goals and quotas. In *Bakke*, Justice Powell distinguished, in terms of constitutional fate, between the quota scheme implemented by the UC Davis Medical School, which assigned a fixed number of places to minority groups and the Harvard Plan, which had not set a quota, but aimed at admitting more than a token number of minority students.[306] Indeed, an admissions quota, is critically different from a race-conscious admissions policy with an elastic goal. While the quota scheme requires a predetermined enrollment of minority students in a way utterly insensitive to the facts of a particular case, the goal approach is subject to adaptation based on different circumstances, regardless of whether this goal is expressed in numerical or non-numerical terms.

Despite Justice Powell's opinion in *Bakke*, a District Court in *Grutter v. Bollinger* considered the University of Michigan Law School's race-conscious admissions policy to enroll a "critical mass" of minority

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race to be part of that calculus, then it must be prepared to shoulder the burden of fully and fairly analyzing applicants as individuals and not merely as members of groups." *See* Johnson, 263 F.3d at 1256.

304. *But cf.* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1784 (1996) (arguing that the antipathy for quotas is overstated as quotas may be more narrowly tailored to achieve the remedial interests as is the case when an invariant goal induces higher levels of minority participation than would a quota). However, the distinction between "quotas" and "credits" or "goals" should not be understood as encompassing the entire narrow tailoring analysis. Other factors should be examined as well, including the over-inclusiveness or under-inclusiveness of a policy. According to this analysis, invariant goals would be difficult to withstand constitutional scrutiny. Moreover, such schemes would not easily pass muster under a functional definition of goals and quotas that does not rely on the terminology used, but rather on actual operation. See *infra* in the text.

305. *But see* Daniel C. Leonardi, *Race-conscious Admissions in Higher Education*, 28 J.C. & U.L. 153, 226 (2001) ("To increase the chances of the race-conscious measure surviving strict scrutiny, the school should avoid focusing on a target percentage of favored applicants"); Wright, *supra* note 261, at 197 ("The presence of a numerical goal suggests rigidity").

306. *Bakke*, 438 U.S. at 316-17; *see also Gratz*, 122 F. Supp. 2d at 827-32 (distinguishing the University of Michigan undergraduate program's current admissions scheme which "does not utilize rigid quotas or seek to admit a predetermined number of minority students" and passes constitutional muster from the previous scheme that "protect[ed] or reserv[ed] seats for under-represented minority applicants"); *see also* Johnson v. Transp. Agency, 480 U.S. 616, 638 (1987) (emphasizing that an affirmative action policy upheld under Title VII of the Civil Rights Act did not set aside a predetermined number of positions for the preferred group, but rather merely authorized that consideration be given to affirmative action concerns when evaluating qualified applicants).

students unconstitutional.[307] In reversing this holding, the Court of Appeals for the Sixth Circuit emphasized that the University of Michigan Law School's admissions policy was "virtually indistinguishable" from the Harvard plan Justice Powell had approved in *Bakke*.[308] Michigan's "critical mass" concept may, indeed, constitute an indication of the flexible form of diversity that Justice Powell had endorsed: the participation of minority students in the student body must exceed mere tokenism, but its extent remains unspecified because the qualifications of a particular pool of applicants cannot be known *ex ante*. Thus, the general preference for flexibility, which is of critical importance in strict scrutiny is at odds with the rejection of the "critical mass" concept,[309] provided that the goal to enroll a critical mass of minority members is not practically equated with a rigid quota scheme.

4. *Race-Neutral Alternatives*

In several cases, the narrow tailoring analysis has served to gauge whether the rule-making authority has considered or implemented race-neutral means before adopting race-conscious policies.[310] After elaborating on this practice that is sometimes viewed as the ideal compromise out of the affirmative action conundrum, this subsection describes significant problems associated with the consideration of so-called race-neutral alternatives, focusing especially on an honesty-based objection. Using a freedom of speech analogy, this article argues that race-neutral means are actually non-existent to serve a race-conscious goal. Nor is consideration of race-neutral alternatives warranted for purposes of avoiding racial tensions possibly triggered by the explicit consideration of race.

i. The Ideal Compromise?--It is almost conventional wisdom that the

307. *Grutter*, 137 F. Supp. 2d. at 850-51 ("Critical mass has proved to be an amorphous concept . . . . Narrow tailoring is difficult, if not impossible, to achieve when the contours of the interest being served are so ill-defined") (internal quotation marks omitted).

308. *Grutter*, 288 F.3d at 747 ("The Law School's pursuit of a 'critical mass' of under-represented minority students. . .tracks the Harvard plan's pursuit of a class with meaningful numbers of minority students").

309. Interestingly, while rejecting the "critical mass" approach as amorphous, the District Court in *Grutter v. Bollinger* emphasized that the admissions scheme at stake was operating like an inflexible quota system, which made it unconstitutional under *Bakke*. *See Grutter*, 137 F. Supp. 2d. at 851. In this sense, the District Court's decision rejected both flexibility and inflexibility, without proposing a scheme that would meet constitutional standards. It thus reflected an unwarranted lack of trust and overlooked *Adarand*'s maxim that strict scrutiny is not fatal in fact. With good reason the Sixth Circuit, in reversing this decision, emphasized that the fact that the Law School's pursuit of a "critical mass" has resulted in an approximate range of under-represented minority enrollment, does not transform critical mass into a quota because *Bakke* allows institutions of higher education "to pay some attention to the numbers and distribution of under-represented minority students over time." *Grutter*, 288 F.3d at 748.

310. *See, e.g.*, *Croson*, 488 U.S. at 507; *Johnson*, 263 F.3d at 1259.

examination of race-neutral alternatives is the predominant factor to be considered in the narrow tailoring analysis. However, this is not always the case. For example, although *United States v. Paradise* is cited as imposing the requirement to consider the use of race-neutral means to increase minority participation in public employment,[311] careful analysis challenges this claim. In upholding the one-for-one minority promotion requirement in the Alabama Department of Public Safety, the Supreme Court in *Paradise* referred to the "relief and the efficacy of alternative remedies."[312] The Supreme Court, however, does not seem to have meant race-neutral alternatives, but only less-burdensome alternatives for third parties. This becomes clear based on the specific alternatives discussed in both the plurality and the dissenting opinions and rejected by the majority as ineffective. These alternatives included the promotion of four *blacks* and eleven *whites* as a stopgap measure,[313] the imposition of heavy fines and fees on the Department pending compliance with the requirement to formulate promotion procedures that would not have an adverse impact on *racial* minorities,[314] the appointment of a trustee,[315] or a combination of other penalties with the *same* purpose.[316] All these means incorporate the consideration of "race" either explicitly or at least in terms of their purpose and intended effect.[317] The only difference between these options and a quota scheme was that they imposed less of a burden on third parties.[318] No other criterion considered in *Paradise*,

311. *See, e.g.*, *Croson*, 488 U.S. at 507.

312. 480 U.S. at 171 (plurality opinion).

313. *Id.* at 172.

314. *Id.* at 174-75.

315. *Id.* at 177 n. 28 (plurality opinion of Brennan, J.); *id.* at 200 (O'Connor, J., dissenting).

316. *Id.*

317. In the educational context this proposition applies also to recruitment strategies that aim at attracting minority students, such as those that have been especially successful in Georgia in overcoming the adverse impact of the elimination of race-conscious admissions policies. *See, e.g.*, Michael A. Fletcher, *Universities Alter Recruiting; Race-Neutral Admission Tactics Found to Boost Diversity*, WASH. POST, Dec. 3, 2002, at A10 (reporting a slight increase in the University of Georgia's minority representation under an aggressive recruitment strategy compared with a race-conscious admissions program). The purpose and effect of these policies are race-conscious; thus, while such measures might be preferable to a race-conscious admissions policy as less burdensome for non-minorities, they cannot be consistently labeled "race-neutral."

318. The narrow tailoring analysis of both Justice Brennan, for the plurality, and Justice O'Connor, dissenting, does not help making this distinction clear. Justice Brennan presented the relative and the absolute dimensions in which the interests of the third parties are considered in the narrow tailoring analysis, respectively first and fourth in his narrow tailoring analysis, which creates the impression that the reference to alternatives was unrelated to the burden on third parties. *Paradise*, 480 U.S. at 171, 172-77, 182-83. Further, the formulation he adopted ("in determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies," *Id.* at 171) might have created the impression that these alternative remedies should be race-conscious. What seems more accurate is that, in the case of race-conscious remedies, alternative remedies should be examined that impose a lesser burden on third parties. Moreover, Justice O'Connor stated at the outset of her analysis that "the District Court had available several alternatives that would have achieved full compliance with the consent decrees *without trammeling on the rights of nonminority troopers*", *Id.* at 199-200. She added that "by imposing the trustee's promotion procedure . . . the District Court could have enforced the decrees without the use of *racial preferences*," *Id.*, at 200, and concluded that "the District Court imposed a racial quota

where the Supreme Court elaborated on the more complete way to date on the narrow tailoring analysis, related even remotely to race-neutral alternatives.

Regardless, the Supreme Court in subsequent cases has emphasized the importance of race-neutral means in applying strict scrutiny. The very same Court that has generally demonstrated skepticism about the explicit consideration of race has suggested that the use of race-neutral means would not need to meet the requirement of strict scrutiny.[319] Even members of the Court who intensely oppose affirmative action seem to agree on the constitutionality of race-neutral policies.[320] Several commentators as well as the George W. Bush administration emphatically support what is termed "class-based affirmative action," as the ideal compromise, a necessary and desirable alternative to affirmative action.[321]

Following such suggestions, several educational institutions have attempted to pursue their affirmative action objectives through ostensibly race-neutral means. An example of such efforts includes demonstrating a preference for applicants who have managed to overcome serious social or economic disadvantages. In this vein, the University of California evaluates applicants for admission using multiple measures of achievement while considering the context in which each student has demonstrated academic accomplishment.[322] Similarly, the Texas state legislature confronted with the invalidation of an explicitly race-conscious program at the University of Texas Law School in *Hopwood v.*

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without first considering the effectiveness of alternatives that would have *a lesser effect on the rights of nonminority troopers*," *Id.* at 201 (emphasis added).

319. *Adarand*, 515 U.S. at 213 (noting that "to the extent that the statutes and regulations involved in this case are race-neutral" they are subject to the most relaxed judicial scrutiny).

320. *Croson*, 488 U.S. at 526 (Scalia, J., concurring) ("A State can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race") (internal quotation marks omitted); *see also* Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race*," 1979 WASH. U.L. Q. 147, 156 ("I strongly favor . . . what might be called . . . affirmative action programs of many types of help for the poor and disadvantaged."); Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 410-11 (1987) ("Any preferences given should be directly related to the obstacles that have been unfairly placed in those individuals' paths, rather than on the basis of race or gender").

321. *See, e.g.*, RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION (1996); *see also* SUNSTEIN, *supra* note 127, at 178-82 (endorsing policies designed in race- and sex-neutral terms against the problems faced by African Americans, as well as women); *see also Brief for the United States as amicus curiae supporting petitioner*, *available at* www.cir-usa.org/legal_docs/michigan_amici_US_grutter.pdf (last visited, Apr. 2, 2003) (including the Bush administration brief to the Supreme Court against the University of Michigan Law School admissions policy; according to this brief, nothing in the Constitution prevents public universities from achieving the laudable goals of ensuring diversity, accessibility and opportunity for students of all races because there are a variety of race-neutral alternatives available to achieve these goals).

322. *See supra* note 52.

Texas[323] and against the background of widespread *de facto* school segregation, initiated a scheme under which all applicants who graduated at the top ten percent of their high school class were automatically admitted to the state university of their first choice.[324] California and Florida have also introduced variations of this plan, though without guaranteeing admission to the state's most selective campuses.[325]

To maintain a *race-conscious goal* while using means not explicitly referring to race, however, is quite different from sincerely pursuing *race-neutral goals*, no matter whether the means used to implement them will disproportionately benefit and respectively burden identifiable racial groups.[326] In reality, discussions about race-neutral means predominantly focus on using a device that may pass constitutional muster to achieve a race-conscious goal whose explicit reference the courts would probably strike down. That is, educational institutions have devised race-neutral means for purposes of addressing judicial (or political) hostility against affirmative action.[327] The judicial consideration of race-neutral means in the narrow tailoring analysis of policies with an explicitly race-conscious component encourages such an approach. But even if the *consideration of race-neutral means* might be judicially imposed, an institution's *sincerity* as to the pursued goals cannot. Thus, in these cases what becomes race-neutral is primarily the means of an admissions policy; by contrast, its goal and effect likely remain race-conscious.

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323. As the legislative history reveals, the adoption of the "ten percent" plan in Texas was the direct response to the Fifth Circuit's decision in *Hopwood v. Texas* and to the growing Mexican American population in South Texas. *See* Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 253 (1999); *see also* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY 72 (2002) (acknowledging that the ten percent plan started with a focus on race, although adding that "it moved to incorporate issues of class and democratic opportunity").

324. TEX. EDUC. CODE. ANN. § 51.803(a), *supra* note 51.

325. The California "Four Percent Plan" guarantees admission to one of the eight campuses of the University of California to all California high school graduates who finish in the top 4% of their class, but not necessarily to the more prestigious Berkeley or UCLA campuses; *see* V Dion Haynes, *U Of California Alters Its Policy On Admissions Change Aims To Increase Number of Minority Students*, CHIC. TRIB., Mar. 20, 1999, at 1. The "One Florida" plan guarantees admission to at least one university in the state, though not necessarily the student's first choice, to the top 20% of the students in every Florida high school graduating class; *see, e.g.*, Sue Anne Pressley, *Florida Plan Aims to End Race-Based Preferences*, WASH. POST, Nov. 11, 1999, at A15.

326. This distinction roughly parallels the distinction made (although in the narrower setting of affirmative action based on economic disadvantage) by Professor Fallon between "economically-based affirmative action as a partial, second-best surrogate for race-based affirmative action in a legal and political climate in which race-based affirmative action may no longer be feasible" and "economically-based affirmative action as attractive for reasons independent of the arguments supporting race-based affirmative action." See Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1914-15 (1996).

327. *Cf.* Killenbeck, *supra* note 6, at 1376 ("Neither race nor ethnicity are included in the eighteen admissions factors listed [in the Texas Uniform Admissions Policy], although it is quite clear that several of them were included precisely because they have a high correlation with race"); Forde-Mazrui, *supra* note 225, at 2389 ("Rather than relying on race-neutral means instead of race to pursue nonracial purposes, [race-neutral programs] instead appear to be targeting racial minorities, albeit through race-neutral means, to create a diversity of racial groups").

ii. Doctrinal and Practical Objections--At the outset, a doctrinal objection can be raised when replacing explicitly race-conscious policies by so-called race-neutral alternatives. Despite widespread belief to the contrary, facially race-neutral admissions processes that are motivated by a race-conscious purpose and applied with a race-conscious impact would not necessarily pass constitutional muster. Under standard equal protection analysis, violation of the Equal Protection Clause must rest on discriminatory intent, whereby a mere racially disproportionate impact is not enough.[328] In determining discriminatory intent, whether a policy or practice explicitly refers to race is not dispositive. Rather, it is crucial whether decision-makers "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."[329] Thus, a race-neutral policy with disparate impact along racial lines adopted "because of" a race-conscious consideration would seem unlikely to withstand standard equal protection analysis.[330]

Nevertheless, the Supreme Court's holdings on the narrow tailoring of race-conscious affirmative action policies are rather ambiguous as to whether these general principles apply. More specifically, the Court has adopted at least three lines of reasoning as to the constitutionality of measures that do not explicitly refer to race but were motivated by a racial purpose. First, when analyzing the factors considered in the narrow tailoring prong of strict scrutiny in typical affirmative action cases, the Court usually offers an unqualified suggestion that race-neutral measures benefiting minorities without explicitly relying on race would pass constitutional muster without distinguishing as to whether these measures are racially motivated.[331] Indeed, the Court employs language that reasonably may be interpreted as endorsing the use of race-neutral means to achieve even a race-conscious goal. Justice O'Connor, for example, writing for a plurality in *Croson*, urged "the use of race-neutral means *to increase minority participation*,"[332] emphasizing that "many of the barriers to minority

328. Washington v. Davis, 436 U.S. 229 (1976).

329. *Feeney*, 442 U.S. at 279 (defining what constitutes discriminatory intent in the context of gender-based discrimination); Hernandez v. New York, 500 U.S. 352, 360 (1991) (applying the *Feeney* test to race-based discrimination).

330. *Cf. also* Ayres, *supra* note 304, at 1791-92 (noting the Court's preference for "facially-neutral, but racially-motivated" programs, as decidedly race-conscious legislative activity cannot sidestep strict scrutiny analysis).

331. *See supra* notes 319-20 and accompanying text.

332. *See Croson*, 488 U.S. at 507 (emphasis added), quoted in *Adarand*, 515 U.S. at 237-38; *see also* Ayres, *supra* note 304, at 1791 ("The Court is still counseling legislatures to engage in race-conscious decision making—to enact certain subsidies because of the race of the beneficiaries. And, of course, the Court cannot avoid this causal connection: any race-neutral program attempting to remedy past racial discrimination would necessarily have a motive to benefit the victimized race").

participation in the construction industry relied upon by the city [of Richmond] to justify a racial classification appear to be race-neutral."[333]

Second, the Court uses ambiguous language that tends to convey the impression that the constitutionality of race-neutral means to obtain a race-conscious goal has not been settled by existing affirmative action doctrine. For example, Justice O'Connor, writing for the Court in *Adarand*, initially noted that "to the extent that the statutes and regulations involved in this case are race-neutral . . . the most relaxed judicial scrutiny"[334] applies. She added, however, in brackets: "We note, incidentally, that this case presents only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race-neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose."[335] For this proposition Justice O'Connor cited "generally" two cases from the Court's discriminatory intent jurisprudence.[336] Based on this extract, determining the Court's position with regard to facially race-neutral policies with a racially discriminatory purpose and racially disproportionate impact becomes difficult. If these policies are subject to strict scrutiny as well, why does the Court not explicitly state so? What are the "additional difficulties" that emerge in these cases, and why does the Court adopt a language that it customarily uses when it wants to distinguish an issue that is beyond its holding? If, on the other hand, the applicable standard in these cases is "the most relaxed," how can that be reconciled with the overall discriminatory intent requirement for an equal protection violation articulated in cases that are cited approvingly? Although it is true that the Court has not directly dealt in its affirmative action jurisprudence with challenges to facially neutral laws disproportionately favoring racial minorities,[337] *Adarand*'s emphasis on consistency and congruence in terms of the applicable standards of review[338] would seem to compel the extension of the *Washington v. Davis* holding to facially neutral affirmative action programs.

Third, the language used in race-based redistricting decisions to describe the Court's general equal protection jurisprudence returns to the general rule in equal protection analysis, emphasizing that "[(outside the districting context)], statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race-neutral on their face, they are motivated by a racial purpose or object."[339] Given these three distinct

333. *Croson*, 488 U.S. at 507.
334. *Adarand*, 515 U.S. at 212-13.
335. *Id.* at 214.
336. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 436 U.S. 229 (1976).
337. Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1047 (1998).
338. *Adarand*, 515 U.S. at 223-24.
339. *See* Shaw v. Reno, 509 U.S. at 644, *quoted in Miller*, 515 U.S. at 913.

positions, the constitutionality of ostensibly race-neutral means to achieve a race-conscious goal is all but certain.[340] No matter what eventually prevails as to the constitutionality of such measures, at this point it is important to bear in mind that policies with racially disparate impact and race-conscious intent do not escape a reasonable possibility of constitutional invalidation.

Apart from this doctrinal objection to race-neutral alternatives, a practical objection may arise as well. To the extent that the goal of an educational institution remains race-conscious, race-neutral alternatives are of dubious efficiency to achieve a race-conscious goal.[341] Minority enrollment figures under such admissions policies in Texas,[342] Florida,[343]

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340. *See also* Tung Yin, *A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213, 238 (1997) ("It is questionable whether an admissions plan focusing on [economic disadvantage] would survive judicial review"); *but cf.* Killenbeck, *supra* note 6, at 1368 (characterizing the Texas scheme as "almost certainly" permissible); William E. Forbath & Gerald Torres, *Merit and Diversity After* Hopwood, 10 STAN. L. & POL'Y. REV. 185, 188 (1999) (conceding that "the 10 percent plan is bound to be challenged in federal court," but concluding that plaintiffs "most likely would lose"); Glenn C. Loury, *When Color Should Count*, N.Y.TIMES, July 28, 2002, § 4, at 13 (while acknowledging that the ten percent plan intentionally uses a proxy for race, the author suggests that this is neither legally nor politically controversial).

341. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, BEYOND PERCENTAGE PLANS: THE CHALLENGE OF EQUAL OPPORTUNITY IN HIGHER EDUCATION (Draft Staff Report) (2002), *available at* www.usccr.gov (last visited, Dec. 20, 2002) (concluding that "percentage plans alone do not improve diversity by reaching underrepresented minority groups and will only have their desired effect if affirmative action and other supplemental recruitment, admissions, and academic support programs remain in place"); Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, *available at* www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf (last visited, Apr. 2, 2003) (showing that it is incorrect to attribute any significant increase in campus diversity to a percent plan alone and adding that a variety of race-conscious outreach, recruitment, financial aid, and support programs appears to be central to the ability of some campuses to partially recover from the loss of minority students that follows the abolition of affirmative action, while in almost every case, even with these additional efforts in place, institutions have not been completely successful in maintaining racially/ethnically diverse campuses through percent plans); Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida, available at* www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf (last visited, Apr. 2, 2003) (finding that the percent plan in Florida has led to the admission of very few students to the state university system who would not have been admitted under pre-existing, non-race-conscious rules); *see also Bakke*, 438 U.S. at 376 (opinion of Brennan, White, Marshall, Blackmun, JJ.) ("Whites make up a far larger percentage of the total population and therefore far outnumber minorities in absolute terms at every socioeconomic level"); Fallon, *supra* note 326, at 1947 ("[I]f economically based affirmative action is supported as a 'second best' substitute for race-based affirmative action, it is likely to be a distant second-best"); EDLEY, *supra* note 17, at 152-53 ("In absolute dollars terms, a fixed amount of resources or opportunities will be available to many fewer blacks if we substitute race-neutral criteria"); Forde-Mazrui, *supra* note 225, at 2372 ("especially in . . . higher education, the majority of those benefited by disadvantage-based programs are likely to be white"); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?* 47 STAN. L. REV. 855, 898 (1995) (suggesting that, were socioeconomic status the only basis for granting preferences, a school would likely have to enroll between two and eight disadvantaged white students to enroll one disadvantaged African American student).

342. In 1996, the last year before Texas abolished its affirmative action plan, blacks made up 4.1% and Hispanics 14.5% of the entering freshman class at UT-Austin. In 1997, with neither affirmative action nor the "ten percent plan," blacks made up 2.7% of the class and Hispanics 12.6%. In 1998, the first year of application of the "ten percent plan," the black enrollment increased to 3% and the Hispanics enrollment to 13.3%. *See* Holley & Spencer, *supra* note 323, at 262. According to press reports, blacks accounted for about 3.5% and Hispanics for more than 14% at the freshman

and California[344] only partly confirm such concerns. In any event, however, "percent programs" are limited to the undergraduate level and thus cannot be used to increase minority representation at graduate or professional schools.[345]

iii. The Objection from Honesty--More importantly for purposes of this article, even if these alternatives achieve their goal and pass constitutional muster, the preference for racially motivated "race-neutral" means is inconsistent with the general preference for honesty from educational institutions.[346] If the same race-conscious goal remains and the adopted means further this goal by increasing minority representation, it is insignificant whether an admissions policy explicitly considers race as a means if regulatory honesty remains a goal. Because the goal is not race-neutral (and nonetheless it has been recognized as compelling enough to advance strict scrutiny analysis to the narrow tailoring prong), the means employed to achieve it cannot actually be race-neutral. The preference for constitutionally neutral means is

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class in the fall of 2002. *See* Lee Hockstader, *Texas Colleges' Diversity Plan May Be New Model*, WASH. POST, Nov. 4, 2002, at A1.

343. In the first full year of implementation of the "One Florida" plan, the number of minority freshmen attending state universities rose 5%, compared with an explicitly race-conscious admissions policy. However, black freshman enrollment at the University of Florida, the state's most selective school, dropped to 7.2% from 11.8% the previous year, hitting a five-year low while the percentage of Hispanic students declined from 12% to 11%. *See* Amie Parnes, *Enrollment Data Feed Rift on Fla. Policy*, BOSTON GLOBE, Sep. 9, 2001, at A19. The figures for the 2002-2003 academic year showed only slight changes in minority enrollment patterns. *See* Scott Powers, *Universities' Racial Makeup in Freshman Class Stays Same; Gov. Bush Said the Numbers Prove One Florida Works. Others Said Only Time Will Tell*, THE ORLANDO SENTINEL, Sep. 7, 2002, at B5.

344. The University of California has announced that it has admitted a greater proportion of underrepresented minority students for the fall freshman class of 2002-2003 than it did in 1997, the last year before the abolition of affirmative action (19% compared with 18.8%, or an increase of 4.9% from last year). The minority admission rates, however, for Berkeley and UCLA, the most competitive institutions in the system remained virtually unchanged or increased only slightly compared with last year. *See* Rebecca Trounson, *Minority Levels Rebound at UC Education: The Percentage Admitted Tops 19%, Higher Than in 1997 When Affirmative Action was in Place*, L.A.TIMES, Apr. 5, 2002, at B1. Moreover, minority enrollment to medical schools has declined; the five University of California medical schools enrolled 20 blacks in 2001, down from 27 five years ago. *See* Sabin Russell, *Fewer Blacks Go to Med Schools; 20 Enrolled in UC Institutions Last Year—That's a Drop of 7 From 5 Years Ago*, S.F. CHRON., Sep. 5, 2002, at A3.

345. The importance of affirmative action at the graduate level is reinforced by the fact that the vast majority of graduate and professional schools follows competitive admissions processes. *See* BOWEN & BOK, *supra* note 55, at 15 (estimating that only about twenty to thirty percent of all four-year colleges and universities in the nation are able to "pick and choose" among applicants), *id.* at 282 ("In law and medicine, all schools are selective.")

346. *Cf.* Fallon, *supra* note 326, at 1950 (considering it "preferable to face honestly the question why the absence of reasonably proportionate minority representation ought to be viewed as disturbing in the first place and to frame a response in light of the answer to that question"); EDLEY, *supra* note 17, at 155 (suggesting that one objection to a policy, that although race-neutral is targeted as a racial preference would be its absence of candor in stating and defending its intention to benefit minorities, a lack of candor that diminishes everyone as well as our civic culture); Lawrence H. Summers & Lawrence H. Tribe, Editorial, *Race is Never Neutral*, N.Y.TIMES, Mar. 29, 2003, at A11 (noting that calling methods that aim at keeping minority enrollments up "race-neutral" is disingenuous); see *also* Schuck, *supra* note 12, at 89-90 (arguing that concealment of the truth about affirmative action inflames social conflicts and injustices).

appropriate when the government is pursuing a neutral goal that has incidental effects on a constitutionally protected interest. This preference, however, is inadequate when the goal by definition is not constitutionally neutral, as is the case with race, and, nevertheless, it is constitutionally permissible to further a compelling interest. In this context, a preference for "race-neutral" means to achieve a race-conscious goal can only be explained in terms of taking advantage of coincidences, like the disproportionate correlation of racial groups with low socioeconomic status or the dominant pattern of housing segregation—thereby choosing the subtle, covert, perhaps efficient, but dishonest way to achieve this same goal. The sole difference between ostensibly race-neutral and explicitly race-conscious programs then is a difference in honesty.

iv. A Freedom of Speech Analogy--Implications for Equal Protection--In other contexts, such as the freedom of speech doctrine, the Supreme Court has recognized the impropriety of requiring that constitutionally non-neutral goals be accomplished through neutral means. Thus, a content-based restriction of speech in a public forum is constitutional only if it is necessary under strict scrutiny; that is, narrowly drawn to achieve a compelling state interest.[347] Because this restriction is content-based, courts do not assess whether its constitutionally non-neutral goal (if constitutionally permissible) can be achieved through neutral means. For instance, in *Burson v. Freeman*, decided in 1992, the Supreme Court upheld a statute prohibiting the solicitation of votes and the display or distribution of campaign materials within a hundred feet of the entrance of a polling place, while permitting charitable, religious or commercial speech.[348] The Court upheld the regulation even after subjecting it to strict scrutiny.[349] Because a compelling non-neutral interest existed, the legislature was not required to use neutral means to further the interest. This would amount to requiring states to regulate for problems that do not exist.[350] The Court did not attempt to invent a neutral regulation that would coincide with the application of content-based means for the sole purpose of averting the explicit and honest consideration of a content-based means, since the goal was indeed content-based.

At the same time, the Supreme Court in its First Amendment jurisprudence has consistently gauged whether a goal can be achieved by constitutionally neutral means, to the extent that the interest that justifies incidental intrusion upon First Amendment rights is neutral. This is the

347. *See, e.g.*, United States v. Playboy Entm't Group Inc., 529 U.S. 803, 813 (2000); Turner Broad. Sys., Inc. v. F.C.C, 512 U.S. 622, 677-78 (1994).

348. 504 U.S. 191, 205.

349. *Id.* at 211.

350. *Id.* at 208.

case in the context of expressive conduct[351] or time, place, and manner regulations of speech in a public forum.[352] In both these cases, a regulation aims to further an interest that is unrelated to the suppression of free expression; that is, the regulation aims at a constitutionally neutral purpose. Incidentally, though, this regulation intrudes upon freedom of speech concerns. Only then does the Court consider whether the same content-neutral and thus constitutionally neutral goal can be furthered through alternative means that do not cause this incidental intrusion.

The same analysis should apply in the equal protection context. We should examine whether a goal can be achieved through constitutionally neutral means (unrelated to the content of speech in the context of First Amendment and unrelated to race in the context of race-based classifications under the equal protection doctrine) only when this goal is *neutral*. This would be the case in equal protection if a classification based on constitutionally neutral criteria incidentally intruded upon racial equality. But this is not the case when the goal is not neutral, but nevertheless passes constitutional muster since it furthers a compelling interest. In such a case, it is a logical consequence that the choice of *means* that explicitly refer to race cannot be constitutionally prohibited since the race-based *goal* is compelling. Thus, in the case of race-based classifications that the courts have approved as compelling enough to withstand constitutional scrutiny, there is no constitutionally important difference whether or not the means used towards a race-conscious goal appear race-neutral.

v. The "Racial Tensions" Fallacy--Critics might argue, however, that the preference for race-neutral means is important even in the context of an assuredly race-conscious goal. More specifically, explicit consideration of race may tend to exacerbate racial tensions and hostility, which is less likely when race is masked through neutral classifications.[353] In the educational context, this might refer to racial tensions either on campus or in the community in general.

No empirical evidence is offered to support this contention.[354] In contrast, the Bowen and Bok study demonstrates that the effect of race-

351. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); Texas v. Johnson, 491 U.S. 397, 406-07 (1989); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

352. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989); Thomas v. Chicago Park Dist., 534 U.S. 316, 322-24 (2002); Hill v. Colorado, 530 U.S. 703, 719-20 (2000).

353. *See, e.g.*, Forde-Mazrui, *supra* note 225, at 2376 ("race-neutral classifications . . . are less likely than racial classifications to . . . exacerbate racial tensions"); *cf. Bakke*, 438 U.S. at 298-99 (opinion of Powell, J.) ("disparate constitutional tolerance of [race-based] classifications may serve to exacerbate racial and ethnic antagonisms"); *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment) (affirmative action programs "provoke resentment among those who believe that they have been wronged").

354. As Professor Rubenfeld notes, "it is as if one were to oppose seat belt laws on the ground that seat belts can lead to physical injury in the event of an accident without even trying to assess

conscious policies for students of all races during their educational experience is beneficial in terms of breaking down racial hostility.[355] Still, the potential remains that race-conscious policies generate racial animosity in society overall, especially considering the backlash of white applicants and their families who are rejected from the competitive institution of their first choice while they might not have been rejected if affirmative action programs had not come into play. Again, empirical evidence does not seem to support this claim.[356] In any event, it seems more reasonable to conclude that whether affirmative action is really more likely to exacerbate racial tensions does not depend on the explicit consideration of race, but rather on the particular way a race-conscious policy is administered. If, for instance, race-conscious admissions schemes in effect rigidly adhere to goals without flexibly reconsidering these goals and assessing all applicants on an individualized basis, racial tensions may increase as a result. However, this can be the case in an ostensibly race-neutral program as well if it disproportionately favors a particular racial group. Indeed, it seems reasonable to assume the reaction to a policy that explicitly states its objectives and the means used to achieve them will be less hostile to third parties that bear its burden than a scheme that achieves the same result without caring to explain its content and nature.[357] Moreover, if the critical point is to avoid racial tensions, hostility could also arise from racial minorities[358] who feel that an admissions policy that excludes them from critical educational opportunities perpetuates prior discrimination against them.[359]

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whether the alternatives one supports would result in more injuries." Rubenfeld, *supra* note 5, at 447.

355. BOWEN & BOK, *supra* note 55, at 266-68 (reporting that a large number of both white and black respondents felt that their undergraduate experience made a significant contribution to their ability to work with and get along well with members of other races).

356. *Cf. id.* at 268 (noting no tendency for students turned down by their first-choice selective colleges to be more opposed to racial diversity than their classmates).

357. *See also* Ayres, *supra* note 304, at 1796 ("Racially motivated legislation is inherently suspect, but unacknowledged racial motivation by legislatures is all the more worrisome"); Sunstein, *supra* note 120, at 1193 (noting that "it is plausible to think that some of the public backlash against affirmative action is attributable to the perception that the relevant programs have never been debated and defended publicly").

358. *See also* Amar & Katyal, *supra* note 234, at 1776 (pointing out that "failure to do anything to integrate disadvantaged minorities into mainstream America risks minority backlash—race riots tomorrow, perhaps, and potential democratic breakdown in a generation or two"); Kathleen Sullivan, *City of Richmond v. J.A.Croson Co.: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609, 1623 (1990) (noting that "it is paradoxical to factor white resentment heavily into judicial review of democratically enacted affirmative action programs while discounting altogether black resentment of laws with racially disparate effect").

359. This is not to say that this reaction would be necessarily justified. But the focus on reducing the potential of racial hostilities as an independent reason to prefer the furtherance of a race-conscious goal through race-neutral means, is not qualified according to whether the reaction of third parties against affirmative action is justified. Rather, it reflects an unqualified concern with the danger of racial tensions.

vi. The Illusion of "Race-Neutral Alternatives"--The conclusion of this subsection is that race-neutral alternatives to achieve a race-conscious goal do not actually exist. A policy that appears race-neutral may conceal the explicit consideration of race through characteristics that coincide in effect with racial distinctions, such as de facto school segregation or the comparative socioeconomic disadvantage of racial minorities. Courts should not see these ostensibly race-neutral means as reflecting a constitutional requirement. Since the courts have approved a race-conscious goal as compelling in the first prong of strict scrutiny, race-consciousness should not be tested again in the narrow tailoring prong. This rule, adopted by the Court in its free speech doctrine, should apply in equal protection as well. Likewise, courts should not strike down a race-conscious policy in favor of race-neutral means that might produce the same results in terms of increasing minority representation. As the existence of race-neutral means is actually a matter of coincidence, to require them would be to scrutinize for the second time a legislative goal that the court has already approved as compelling at the first stage of strict scrutiny.

5. *Comparing Numerical Goals of a Race-Conscious Policy with the Relevant "Reference Pool"*

In the context of the narrow tailoring analysis, the courts sometimes draw a comparison between the numerical goals of a race-conscious policy and the extent to which racial minorities participate in the relevant reference pool.[360] Applied in the educational context, such a comparison means that an educational institution cannot set goals that are relevant to proportional representation of minorities in the overall population but irrelevant to the pool of qualified applicants. The reference pool is thus a narrower concept than the overall population in the sense that only qualified applicants can be included in it. This comparison, however, does not refer to the choice of means that are used to pursue a race-conscious goal, but rather to the way the race-conscious goal in and of itself is specified. This specification of the race-conscious goal is part of the goal, not of the analytically distinct scrutiny of the means that further that goal. In other words, the comparison of the numerical goals of a race-conscious policy with the relevant reference pool is not a question of narrow tailoring; rather, it is a question of compelling interest.

360. *Cf. Wygant*, 476 U.S. at 294 (O'Connor, J., concurring) (suggesting that "it is only when it is established that the availability of minorities in the relevant labor pool substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment").

From a trust perspective, a question arises as to whether this comparison is appropriate in the first place. Since we trust an institution to achieve its goals and decide which means are optimal in this vein, why should the courts require it to limit the consideration of race among "qualified applicants"? Doesn't this part of the analysis implicate a substantive assessment of the goals an educational institution should pursue that is beyond judicial competence?

In a sense, the requirement that applicants possess certain minimum qualifications is of critical importance no matter what educational goal a race-conscious admissions program aims at attaining. A student who lacks skills that are fundamental to an academic program will not be able to function well in an advanced setting among peers who possess these skills. Moreover, with the educational institution's choice of particular educational goals taken as given, each institution should enroll only students who are capable of fulfilling these goals. For instance, in the case of a program on European or East-Asian studies that requires significant exposure to foreign literature, only students that speak the pertinent foreign language should be enrolled. A university can accomplish this goal either by requiring applicants to fulfill the necessary prerequisites as a condition for admission or by offering a satisfactory alternative solution that helps under-qualified students to compensate for their defects. A decision to admit students despite the lack of these minimum qualifications and without the use of compensatory devices that make up for existing defects reasonably triggers judicial suspicion as to whether the consideration of race actually aims at attaining the professed goal. The obvious lack of fit between the asserted goal and the means used to achieve it is an objective element sufficient to rebut the presumption of trust. Furthermore, the presumption of trust will be rebutted if it is affirmatively established that the minimum admissions qualifications rigidly follow an established pattern without taking into account differences that may exist according to the distinct identity, structure and rigor of each particular program. This is not to say that, in a particular case, the minimum admissions qualifications may not be similar among institutions of a diverse nature. Rather, it is to say that the particular needs of each institution should be seriously addressed when setting these qualifications.

6. *The Policy's Overinclusiveness or Underinclusiveness*

The narrow tailoring analysis sometimes gauges whether a race-conscious policy is over-inclusive or under-inclusive. For purposes of the underinclusiveness inquiry, three possibilities may be distinguished. First, a race-conscious admissions policy may be allegedly underinclusive because certain identifiable ethnic groups, already represented in significant numbers in the student body, like Asian-

Americans of Japanese or Korean ancestry or Jews, do not come within its reach. To the extent that an educational institution is within the scope of the presumption of trust, such programs should be upheld. Educational institutions feel obliged to act affirmatively to increase minority representation only to the extent that the standard admissions criteria result in the under-representation of racial groups in the student body. This is not the case for all racial groups, even if these groups have been discriminated against in the past. In this sense, for an educational institution to exclude from the student body Asian-Americans or Jews is quite different than merely not including Asian-Americans or Jews in the reach of affirmative action policies[361] because the regular admissions criteria result in significant participation of these groups and thus, an affirmative policy that includes them is not necessary.[362] If this is the case, it might be that "coalitional consequences" will arise,[363] in the sense that groups that are excluded from the reach of affirmative action might not support such policies. Even if this concern is empirically accurate, however, such considerations should not be critical in assessing the constitutionality of race-conscious admissions policies.

Second, the alleged underinclusiveness may rest on the fact that certain ethnic groups not currently represented by more than mere token numbers in the student body, are excluded from the reach of the affirmative action policy, despite the possible contributions members of these groups can bring to the furtherance of the institution's educational goals.[364] With respect to this objection, the presumption of trust will be

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361. Still, it is a different question whether an educational institution cannot only exclude such groups from the reach of its affirmative action policies (treating them, as a result, in the admissions process, like whites), but initiate "negative action" against them, say, by imposing caps on the numbers of Asian Americans or Jews that may be admitted (treating them worse than whites). Although the detailed development of this problem is outside the ambit of this article see, for example, Kang, *supra* note at 245; Selena Dong, *"Too Many Asians": The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027 (1995)], the application of the trust analysis here proposed is still appropriate. Under such an approach, the discriminatory policies and practices enforced in the past or still enforced against Asian Americans or Jews should inform, among other factors, the relevant discussion.

362. *Cf. Bakke*, 438 U.S. at 310 n.45 (opinion of Powell, J.) (noting as "curious" the fact that Asians were accorded preferential treatment in the admissions process of the UC Davis Medical School because they were admitted in substantial numbers through the regular admissions process); *see also* Kang, *supra* note 245, at 45 (noting that "it will often be perfectly constitutional to give Asian Americans neither affirmative nor negative action"); *but cf.* Chin, *supra* note 153, at 918-20 (arguing that "the most diverse possible class would be one with equal representation of every relevant group", and thus, "until that is achieved, admissions of additional members of any group, other than the largest, contributes to diversity at that institution"). This is a legitimate view of *educational policy*; the problem though is whether an admissions body, in light of the multifaceted form of its decisions and the limited number of slots available, should be *constitutionally required* to tie the number of whites it decides to admit with the number of other racial groups, as a prerequisite for *any* consideration of race in admissions to pass constitutional muster.

363. Malamud, *supra* note 228, at 966.

364. *See* Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 898 (1998) (pointing to the exclusion of members of less populous groups, such as Armenians and Middle-Easterners as evidence that race-conscious policies do not reflect a "serious effort to protect cultural diversity").

rebutted when it is established that the admissions bodies have failed to consider the contribution to institutional needs that members of such groups, for instance, a recent Middle-Eastern immigrant will provide compared with applicants from "protected" groups. While the instrumental nature of race-conscious admissions policies makes it likely that such a comparative assessment of applicants will take place, it is still possible that an educational institution fails in a particular case to meet this burden. As was the case with respect to the burden an affirmative action policy entails for white applicants, an educational institution is not required to reach any particular outcome in this comparative assessment. That is, the Middle-Eastern immigrant may still be rejected in favor of a black candidate as long as the educational institution has genuinely addressed and not ignored her potential to contribute to the institutional goals. The fact that she is a member of a less populous group in the United States may affect this determination.[365] Nonetheless, the administrative inconvenience of examining her cultural group's contribution to the institutional goals is not a sufficient basis for rejection.

Third, a claim of underinclusiveness may arise when not *all* the members of a group (e.g., all black applicants), but only a particular segment of it (e.g., high-achieving black applicants) falls within the ambit of an affirmative action policy. In this respect, courts should realize the multifaceted character of admissions decisions by not condemning a policy that honestly recognizes that race-conscious considerations are only part of the decision-making calculus. The Fourth Circuit succumbed to this flaw in *Podberesky*, where it struck down a race-conscious scholarship program initiated by the University of Maryland that was limited to high-achieving African American students because "high achievers, whether African-American or not, are not the group against which the University discriminated in the past."[366] Nonetheless, the University of Maryland had framed its scholarship program based on a honest recognition of a dual goal: on the one hand, a race-conscious consideration and on the other, the goal of ensuring that all students that receive a scholarship have extraordinary academic potential. The mere fact that a program aims simultaneously at more than one objective cannot be fatal to one of them.

As to the constitutional fate of an over-inclusive program, a distinction should be drawn between remedial and non-remedial programs. When an educational institution is considering race in attempting to remedy the present effects of past discrimination, its policy may not be overinclusive in the sense of remedying effects of

365. *Cf.* Brest & Oshige, *supra* note 341, at 873 (considering factors such as the numerical size of a group and the extent to which its culture differs from the dominant culture of students attending the school in determining the reach of diversity-oriented affirmative action policies).

366. *See Podberesky*, 38 F.3d. at 158.

discrimination against groups that have not been subjected to discrimination in the past in this particular context. This was the case for the minority "set aside" program at stake in *Croson.* This program defined as minority group members apart from blacks, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons, although there was "*absolutely no evidence* of past discrimination" against these racial groups "in any aspect of the Richmond construction industry."[367] Although educational institutions enjoy a presumption of trust as a general matter, this presumption will be rebutted, if, as was the case in *Croson*, an obvious lack of fit exists between the proffered remedial goal and the means adopted to this effect.

By contrast, when the admissions scheme is non-remedial in its orientation, no claim of overinclusiveness can be made, as the race-conscious policy is not tied to any prior discrimination. Competent bodies of educational institutions retain their authority to identify racial groups that, if admitted, can support the institution's educational goals and thus accord in the admissions process special consideration to students belonging in those groups. Aberrations from this principle cannot be precluded as a general matter, in cases of rebuttal of the presumption of trust. It is rather difficult, however, to imagine how an admissions scheme that aims at diversity (by its nature an inclusive goal) can be over-inclusive (that is, it includes in its reach more groups than justified by its asserted purpose).

7. *Educational vs. Racial Diversity*

Finally, concerning diversity as a compelling interest, certain opinions draw a distinction between educational and racial diversity. Justice Powell in his pivotal opinion in *Bakke* acknowledged that diversity is a compelling interest only to the extent that it is *educational*, rather than merely *racial*.[368] An initial structural objection applies here as well: whether an educational institution aims at achieving educational or merely racial diversity is a question relating to the goal the institution is pursuing and not to the means it is using to fulfill this goal. Thus, the question cannot be whether racial or educational diversity complies with the narrow tailoring requirement, but rather whether each constitutes a compelling interest for purposes of the first prong of the strict scrutiny test. Only subsequent to this initial level of analysis does the question of means to further this interest emerge.

As the distinction between educational and racial diversity is a question of goal rather than a question of means, its importance from a

367. *See Croson*, 488 U.S. at 506.

368. *Bakke*, 438 U.S. at 315; *see also Johnson*, 263 F.3d at 1253-54 ("while we can assume that racial diversity may be one component of a diverse student body, it is not the only component").

trust perspective may be challenged. In general, educational institutions are not constitutionally required to take race into account.[369] Similarly, they are not required to consider other potential contributors to diversity, such as extraordinary athletic performance or work experience. They may decide to consider a specific set of qualities especially important to an institution's educational policy as a pure matter of institutional discretion. Nevertheless, the burden of the educational institutions seems to change when they consider race. If they do, an additional duty emerges: they are allowed to consider race only if they consider other potential contributors to diversity as well. But as long as we trust an institution to achieve its goals, is it not an inappropriate intrusion into its sphere of authority to decide whether racial diversity or only a broader understanding of educational diversity can pass constitutional muster?

The trust analysis does not result in a categorical answer to this question. An institution that aims at a genuine diversity of viewpoints and perspectives should necessarily consider additional factors apart from race. The presumption of trust is rebutted when an institution asserts that diversity is an important goal of its admissions policy and at the same time bases its admissions decisions exclusively on tests, grades and race. This obvious lack of fit between the asserted goal and the means used to attain this goal reasonably results in the conclusion that the educational institution is not genuinely interested in diversity of viewpoints and perspectives, as it may claim; rather, the institution may want to increase minority representation in the student body as a goal in and of itself or to advance other goals beyond its educational mission.

Apart from the genuineness requirement, however, courts should not require the educational institutions to consider *any* possible contributor to diversity. Such an option would demonstrate a significant, as well as unwarranted challenge to the trustworthiness of educational institutions. The trust accorded to these entities necessarily encompasses the right to decide independently which factors are critical enough to be taken into account to fulfill a particular educational goal. Indeed, this analysis necessarily will not be uniform for all institutions, as it directly relates to the distinct identity of each educational institution. The mandate of the Fourteenth Amendment cannot be to equalize all educational institutions by requiring them to follow the same criteria even within the rubric of diversity. Moreover, a requirement for "true" educational diversity beyond mere genuineness, would amount to fatal scrutiny, which the Supreme Court rejected in *Adarand*.[370] Diversity is an extremely broad concept that encompasses a myriad of considerations that evolve over time and change as the applicant pool changes. The majority of applicants to competitive institutions possess qualities that may be seen as contributing, in one or the other way, to the ideal of

369. *See supra* note 13 and accompanying text.

370. *See supra* note 8.

diversity. An admissions committee that chooses those characteristics that are of greater significance to the mission of the particular institution is well within constitutional constraints of strict, but not fatal scrutiny. Thus, a diversity-oriented admissions policy that genuinely does not limit its consideration to race should be upheld, even if this same policy ignores the possible contribution to diversity adherents of fundamentalist religious groups,[371] neo-Nazis or National Rifle Association members may bring to campus.[372]

VI. Conclusion

Under the approach endorsed here, *Adarand* did not signal the end of the interpretive difficulties associated with affirmative action, but rather their beginning. The determination of strict, but not fatal scrutiny as the standard of review that applies to any federal, state or local race-based classification indicates that not every consideration of race is morally repugnant and constitutionally impermissible. Rather, the enunciation of strict, but not fatal scrutiny in terms of standards of review should prompt the articulation of principles that inform doctrinal analysis and meet simultaneously competing requirements that stem from flexibility, predictability and fairness. The Constitution's original understanding, a moral reading, and the process-based theory of constitutional interpretation as traditionally articulated are inconclusive for this analysis. Instead, considerations such as trust and honesty, not foreign to the existing doctrinal framework, may guide the constitutional analysis of affirmative action programs. The application of these considerations in the race-conscious allocation of educational benefits, overwhelmingly affirms the constitutionality of race-conscious policies, to the extent that educational institutions are actually pursuing an educational goal.

This approach is consistent with the nature of strict scrutiny, which requires a "smoking out" of illegitimate purposes, encompassing both elements of trust and honesty, if its mechanical correlation with fatal results is set aside. Moreover, the trust and honesty perspective comports with the need for predictability and a check on judicial discretion, as it relies on the recognition of a presumption that applies

371. *But cf.* Volokh, *supra* note 124, at 2075 (arguing that "excluding religion as a factor but including race might suggest that the program is not narrowly tailored" as well as that "the actual purpose of the program isn't really the stated purpose"); Schuck, *supra* note 12, at 38-39 (suggesting that race-conscious programs' lack of interest in the nation's religious diversity casts doubt on the coherence, of the diversity rationale).

372. *Cf.* Rubenfeld, *supra* note 5, at 471 (arguing that "everyone knows that in most cases a true diversity of perspectives and backgrounds is not totally being pursued", as in the case of fundamentalist Christians and neo-Nazis no preferences are granted); DERSHOWITZ, *supra* note 287, at 193-195 (suggesting that diversity proponents do not seek a truly diverse campus community, but rather "more students and faculty who think like they do").

unless it is affirmatively established on the basis of the structure of a particular policy that trust is unwarranted. At the same time, this scheme is sensitive to differences among institutional roles, rejecting a "one size fits all" paradigm and instead placing the appropriate emphasis on context.

The implications of such an approach for strict scrutiny and equal protection in general under the regime of "strict" as "fatal" scrutiny would be revolutionary. But having set aside this possibility in the post-*Adarand* era, it is necessary to distinguish among cases where a law passes or fails strict scrutiny. If this distinction is made in a principled manner, whether the courts invoke the label "strict scrutiny," another label or no label at all becomes less important. The choice of strict scrutiny as the standard of review is explained statistically: most of the time, the use of race triggers suspicion. Even within this same doctrinal rubric however, we should seek to elaborate concrete and qualitative rather than abstract and quantitative principles and standards to apply strict scrutiny. With these aims, the approach presented here represents a view that is not only normatively desirable but also consistent with the basic tenets of current Supreme Court jurisprudence.

Would the Supreme Court endorse such an approach? There is no definitive answer. What is certain is that by dispelling the correlation of strict scrutiny with fatal results, the Court demonstrated the need for principled, rather than merely statistical, distinction among cases. This distinction must provide flexible solutions, given our nuanced pattern of life that cannot ignore circumstances that might be deemed extraordinary. Furthermore, it must not ignore the possible emergence of utterly unfair results, as this would be inconsistent with the fundamentally moral ideals that the Constitution embodies. Any approach that will serve these purposes will be likely to result in a more complicated, but also more accurate, materially more predictable, and at the same time flexible, fairer, and hopefully dispassionate approach to equal protection. The coin has its flip side as well: maybe Justice O'Connor's rejection of the traditional concept of strict as fatal scrutiny was mere dicta. Perhaps what we should wait for in the future of equal protection doctrine is merely the perpetuation of the dominant pattern of selectively heightened scrutiny, selective fairness, statistical predictability, insensitivity to differences among contexts, and substitution of naked policy preferences for constitutional law. With the University of Michigan cases pending before the Supreme Court, it may be only a matter of time until the future of equal protection doctrine becomes evident.