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THE IRONIES OF AFFIRMATIVE ACTION

*Kermit Roosevelt III**

INTRODUCTION

The Supreme Court's most recent confrontation with race-based affirmative action, *Fisher v. University of Texas*,¹ did not live up to people's expectations—or their fears. The Court did not explicitly change the current approach in any substantial way. It did, however, signal that it wants race-based affirmative action to be subject to real strict scrutiny, not the watered-down version featured in *Grutter v. Bollinger*.² That is a significant signal, because under real strict scrutiny,

* Professor of Law, University of Pennsylvania Law School. This Article is based on remarks delivered at the Journal of Constitutional Law's annual Symposium, January 24, 2014. I thank the participants in that Symposium for their helpful comments, and the editors of the Journal of Constitutional Law for their assistance in the preparation of the Article.

1 133 S. Ct. 2411 (2013). More recently, in *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1629 (2014), the Court considered the constitutionality of a state-level constitutional amendment banning the use of race (and sex, although there does not seem to be any evidence that sex-based preferences were used or considered by the relevant schools) in admissions at public institutions of higher education. That case turned on the political process doctrine created in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist. No. 1*, 485 U.S. 457 (1982), not the constitutional status of affirmative action. Several Justices did, however, find occasion to discuss the merits of affirmative action on its own, and I will mention those discussions when relevant.

2 539 U.S. 306 (2003). In *Grutter*, oddly, the Court announced that it would defer to the judgment of the University of Michigan Law School as to whether racial diversity was necessary to its educational mission. *Id.* at 329. This was odd because deference and strict scrutiny are normally incompatible. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744 (2007) (stating that “deference ‘is fundamentally at odds with our equal protection jurisprudence . . .’” (quoting *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005))). Indeed, considering a similar issue under the intermediate scrutiny applied to sex-based classifications, the Supreme Court flatly rejected the Virginia Military Institute's contention that its adversative method could not be offered to both sexes. *United States v. Virginia*, 518 U.S. 515, 540–43 (1996). By signaling that strict scrutiny would now operate differently than it had in *Grutter*, *Fisher* sent the same message that *Gonzales v. Carhart*, 550 U.S. 124 (2007), did in the abortion context: the law may not have changed, but there's a new sheriff in town. What distinguishes *Fisher* from *Grutter* is the same thing that distinguishes *Gonzales* from the prior (and irreconcilable) partial birth abortion case, *Stenberg v. Carhart*, 530 U.S. 914 (2000). It is that Justice Samuel Alito has replaced Justice Sandra Day O'Connor. For an analysis of the consequences of this replacement, see Kermit Roosevelt, *The Centrist*

almost all race-based affirmative action programs are likely unconstitutional.³ This is especially true given the conceptual framework the Court has created for such programs—the way the Court has set up the constitutional analysis.

On the other hand, the Court's conceptual framework is wildly, almost absurdly, wrong. This Article will discuss the way the Court has set up the constitutional analysis of affirmative action and why it is wrong. It will do so in the form of a list—a list of the propositions we must accept if we are to take the Court's affirmative action jurisprudence at face value. Some of these are things that the Court has said explicitly, and others are inferences I feel it is fair to draw. Not all of them command majority support, and when they do not, I note that. Some of them, I hope, bear their absurdity on their face; for others, I offer some explanation of why I think they do not make sense. In all, I hope this list supports the assessment I give my first-year constitutional law students: of all the areas of the Court's jurisprudence we cover in our survey of constitutional law, the handling of race-based affirmative action is the least defensible.

I. A MARGINALLY BETTER EDUCATIONAL EXPERIENCE OUTWEIGHS FUNDAMENTAL RIGHTS

Which is more important: education or the Constitution? Teachers everywhere (except perhaps teachers of constitutional law) should be delighted to learn that the Supreme Court believes that increasing the quality of the educational experience is a sufficiently important

Cannot Hold, AM. PROSPECT July 5, 2005, <http://prospect.org/article/centrist-cannot-hold>.

3 This is so because there usually will be some means other than explicit consideration of race that will produce the desired diversity. See *Fisher*, 133 S. Ct. at 2420 (emphasizing that narrow tailoring “requires that the reviewing court verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity” and highlighting the consequent need to examine race-neutral alternatives). Whether a facially race-neutral admissions device employed with the intention of producing a particular racial composition of the student body should in fact be treated differently from an explicit racial classification is a separate issue. Justice Anthony Kennedy has suggested that such an approach would not “demand strict scrutiny.” *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring). That seems odd, since the Court has clearly held that such devices are equivalent to explicit classifications when used to exclude minorities or resist desegregation. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). It makes some sense given the Court's increasing focus on mere classification as the evil to be avoided, and particularly with respect to Justice Kennedy's concern about government imposition of a racial identity that may not match the one an individual assigns herself. See *infra* text accompanying notes 89–90. (This last concern, however, could also presumably be addressed simply by not identifying the beneficiaries of a classification.)

government interest that it can be invoked to meet the demands of strict scrutiny. Educational quality, remember, is what diversity is supposed to enhance. In Justice Lewis Powell's phrasing in *Regents of the University of California v. Bakke*, it is designed to promote "[t]he atmosphere of 'speculation, experiment and creation' . . . so essential to the quality of higher education[.]"⁴

If we think about this proposition in slightly more general terms, however, it should seem absurd. Strict scrutiny is the test that protects our most fundamental rights. It is what stops the government from sterilizing people,⁵ from engaging in content-based speech restrictions,⁶ from forbidding them to marry⁷ or vote.⁸ But would any court allow a state to deny students the vote, or sterilize them, or forbid them from marrying, on the grounds that this would enhance their education? Of course not.

Perhaps you are thinking that such restrictions would not, in fact, enhance education, or that they would not be necessary to do so. But the same objection can be made to affirmative action programs, and the Court has allowed them to stand. Before *Fisher*, *Grutter* would have suggested that deference to educational institutions might be appropriate on the questions of efficacy and necessity.⁹ And even if *Fisher* changes that, we still, apparently, have the rule that racial diversity is a valid consideration for graduate programs in, for instance, mathematics and physics, where one would doubt that the different experiences of students contribute much to the quality of classroom discussion. One can make as plausible an argument, I think, that students who are not distracted by marriage, or voting, or the possibility of children, will get a better education. (Not to say that this *is* a plausible argument, only that it is as plausible as the argument that racial diversity benefits math Ph. Ds.) So, somehow, we have ended up with the idea that educational quality can, in appropriate circumstances, outweigh our most fundamental rights.

How have we come to this? The idea that educational quality is a compelling interest has not gone without criticism. In *Grutter*, for instance, Justice Clarence Thomas argued that Michigan had no compelling interest in operating an elite law school.¹⁰ If that is true, then

4 *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.).

5 *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

6 *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

7 *Zablocki v. Redhail*, 434 U.S. 374 (1978).

8 *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

9 *See Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

10 *See Grutter*, 539 U.S. at 356–57 (Thomas, J., dissenting).

surely there is no compelling interest in increasing the quality of the education at whatever law school it does operate, since one of the main differentiating characteristics of an elite school should be the quality of education.¹¹ But the idea that educational quality is central to the Equal Protection Clause has a distinguished pedigree: it originates, in fact, in *Brown v. Board of Education*. There, the Court rested its conclusion that segregated schooling was unconstitutional not on the theory that it was an attempt to perpetuate a racial caste system, but on the purported fact that it was inherently unequal. No matter whether the system was created in good faith or bad, the Court noted, “[t]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹²

The Court constructed its analysis in this way, presumably, because of Chief Justice Earl Warren’s desire to write an opinion that was “above all, non-accusatory.”¹³ But not even the *Brown* Court believed its stated rationale, for *Brown*’s demand for integration was swiftly extended to public pools and golf courses,¹⁴ without any showing that racial segregation of such places increased golf handicaps or lap times. Still, the idea existed—and existed in *Brown*, which became central to our understanding of equal protection. So it was perhaps natural that Justice Powell reached for it when issues of race and education came to the Court in *Bakke*. Justice Powell, I will suggest, had a motive similar to Justice Warren’s, though in his hands the point about educational quality took a surprising new form. It generated the argument that constitutes our next proposition.

11 This is not to say that the teaching at elite schools is better than at non-elite schools. I have seen very little reason to think it is. But the quality of class discussion—which is the main area in which diversity is supposed to bring benefits—is probably enhanced by the presence of highly intelligent students. Elite schools select students on the basis of credentials other than simple intelligence, but one would hope that those too would have something to do with the quality of class participation.

12 *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

13 RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 699 (2004) (citation omitted) (internal quotation marks omitted).

14 *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954) (striking down the segregation of a public park and fishing lake); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (barring Atlanta’s practice of permitting different races to use a municipal golf course only on different days); *Dawson v. Mayor & City Council of Baltimore City*, 200 F.2d 386 (4th Cir. 1955), *aff’d per curiam*, 350 U.S. 877 (1955) (barring Maryland’s segregation of its public beaches and bathhouses); *New Orleans City Park Improvement Ass’n v. Detiege*, 252 F.2d 122 (5th Cir.), *aff’d per curiam*, 358 U.S. 54 (1958) (striking down the denial of the use of a city park to blacks).

II. AFFIRMATIVE ACTION EXISTS TO BENEFIT WHITES

Who benefits from affirmative action programs? In the popular understanding, the answer is almost certainly that racial minorities do—applicants receive preferential treatment in the admissions process and are accepted by schools that would have rejected them otherwise.¹⁵ Much of the popular opposition to affirmative action stems from the prima facie unfairness that its recipients are getting benefits they do not deserve.

But in fact, if we think about the diversity rationale as the Supreme Court has recognized it, the benefit to minorities is only incidental. The point of affirmative action under the diversity rationale, after all, is not to enhance the career prospects of its recipients, but rather to improve the educational experience of all students who are, in the schools where such programs are typically employed, mostly white.

Rather than oppose affirmative action as a burden inflicted on them, white applicants should instead see it as a benefit. True, such a program does create a small chance that a particular white applicant will be rejected in favor of a minority who has received an admissions preference. But that only happens to a small number of truly liminal applicants.¹⁶ Any white applicant has a much larger chance of being admitted to the same schools she would have in the absence of affirmative action, and at each of those schools, the education offered will be of higher quality because of the diversity.

If whites did think about affirmative action in those terms, they probably would not oppose it as strenuously as they do.¹⁷ The fact of white opposition suggests that most people did not buy Justice Pow-

¹⁵ I postpone for the moment the argument that preferential admissions treatment is bad for minorities.

¹⁶ See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1072–78 (2002) (explaining that, mathematically, affirmative action does not have a significant effect on any individual white applicant's probability of admission).

¹⁷ Data on public feelings about affirmative action is actually hard to pin down and seems to depend quite strongly on how questions are phrased. See Allison Kopicki, *Answers on Affirmative Action Depend on How You Pose the Question*, N.Y. TIMES (Apr. 22, 2014), <http://www.nytimes.com/2014/04/23/upshot/answers-on-affirmative-action-depend-on-how-you-pose-the-question.html>. There does, however, seem to be a strong racial divergence—and not the one you would expect if you thought that the main benefits accrued to white students. See Bruce Drake, *Public Strongly Backs Affirmative Action Programs on Campus*, PEW RESEARCH CTR. (Apr. 22, 2014) <http://www.pewresearch.org/fact-tank/2014/04/22/public-strongly-backs-affirmative-action-programs-on-campus/> (finding that more African Americans favor affirmative action programs than whites).

ell's characterization of the interests at stake. But why did he even attempt to make the sale?

The answer is not that there were no other state interests to choose from. In cases that preceded *Bakke*, and in *Bakke* itself, proponents of affirmative action offered other goals that such programs might serve: it could create role models for minorities, or make allowance for the effects of societal discrimination.¹⁸

Some of these interests, it could be said, fall outside the missions of our institutions of higher education, which are in the business of educating students rather than improving society. But perhaps that simply means that the missions have been defined too narrowly. Improving society is certainly part of the mission of government, and if its schools are the instrumentalities best positioned to do so, it is hard to see why they should not be used for that purpose—especially if there is an incidental boost to educational quality.

So it seems unlikely that Powell focused on educational quality because it was the most important interest, or even the most appropriate. Instead, he most likely chose to designate it, and it alone, as compelling for the same reason that Warren invoked it: he was trying to write an opinion that would bring people together. Casting affirmative action as a benefit to white people might have seemed like a clever way to do that.

Of course, it didn't work. To quote Justice Antonin Scalia, "the American people are not fools."¹⁹ If Justice Powell was trying to imitate Justice Warren, he might have considered the response to *Brown*'s olive branch: the Southern Manifesto that decried *Brown* as an abuse of power; the stand in the schoolhouse door; the promise of "segregation now; segregation forever"; the massive resistance that required federal troops to enforce the Court's decrees.²⁰

Just like Justice Warren's, Justice Powell's gambit failed to create consensus. Indeed, it has left us somewhat worse off than we were before, because it has foisted upon the defenders of affirmative action a justification that is transparently dishonest.²¹ Ideologues can of

18 See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (discussing the creation of role models for minorities); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978) (discussing allowance for the effects of societal discrimination).

19 *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., dissenting).

20 See generally Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 97–98 (1994) (describing massive resistance to desegregation).

21 One could make similar criticisms of *Brown* itself. Historians tend to agree that the true rationale for *Brown* was a belief that racial segregation of public schools was an invidious attempt to perpetuate a racial caste system. Warren's failure to state this rationale made

course accommodate all sorts of absurdities and contradictions, and ideologues of the left may have internalized the diversity rationale to such an extent that they subjectively experience it as making sense. But that is something the Supreme Court has forced upon them; it is like Winston, under O'Brien's torture, seeing for one glorious moment that two and two really do make five.²²

And just as O'Brien did not believe the proposition he hammered into Winston's mind, the Supreme Court does not really believe what it has said about the diversity rationale. For one thing, it is hard for Justices to put aside the obvious fact that such programs are designed to benefit minorities.²³ For another, more honest justifications sometimes creep through the wall of denial. Justice Sandra Day O'Connor, in *Grutter*, came perhaps the closest to a statement of what I believe is the main justification: a desire to avoid a society stratified along racial lines.²⁴

In fact, the meaning of diversity has shifted a bit over the years, so that it now means two almost diametrically opposed things. In Justice Powell's original formulation, the point of diversity was what the word suggests: difference. Diverse students brought diverse viewpoints, not simply because of their race but because of qualities that (sometimes) went along with it. In Justice Powell's words, "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."²⁵

But this understanding of diversity, in addition to being dishonest, brought some difficulties. For one thing, it seemed to require university administrators to undertake the unpalatable task of deciding which minorities were "real" representatives of their race, bringing the desired diversity, and which were not. For another, it seemed to

it possible for later Justices to claim that *Brown* stood instead for an anticlassificationist or colorblind understanding of equal protection.

22 See GEORGE ORWELL, 1984, at 258 (1950) ("O'Brien held up the fingers of his left hand, with the thumb concealed. 'There are five fingers there. Do you see five fingers?' 'Yes.' And he did see them, for a fleeting instant, before the scenery of his mind changed. He saw five fingers, and there was no deformity.").

23 In *Schuette v. Coalition to Defend Affirmative Action*, for instance, Justices on both sides of the decision conceptualized affirmative action as a program that particularly benefits minorities. Justice Scalia protested in vain that such an understanding had been placed off-limits by *Bakke* and its sequelae. 134 S.Ct. 1623, 1638, 1644, 1676–78 (2014).

24 See *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (stating that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity").

25 *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

use race as a proxy for the diversity. But if there is one thing strict scrutiny should mean, it is that race cannot be used as a proxy unless the desired quality is absolutely impossible to ascertain directly. For viewpoint diversity, however, the direct alternative seems simple: just invite students to write an essay describing their unique viewpoints and how they were formed.

So the defenders of affirmative action shied away from the Powell understanding of diversity as difference.²⁶ While they endorsed the value of different viewpoints, they also ascribed another value to racial diversity: diversity as sameness. The value of racial diversity, on this understanding, is not that it necessarily brings different viewpoints, but that precisely when it does not, it teaches that race may not matter as much as some people think: it breaks down stereotypes and fosters cross-racial understanding.²⁷

It is good for diversity that it means so much, because if it is to work as a justification, diversity has to be irreplaceable. That is, there must be no other way to improve educational quality.

III. NOTHING BUT RACIAL DIVERSITY IMPROVES EDUCATIONAL QUALITY

Here is sad news for those who hope for improvement in our schools: there is nothing to be done that can improve educational quality, other than enhancing racial diversity. This proposition might be hard to accept, but for racial preferences to be permissible, it must be true. Strict scrutiny requires that the chosen measure be necessary to achieve the government's interest: if there is any alternative, it must be used.

²⁶ Wisely so. In addition to the obvious problem that diverse viewpoints can be measured directly, rather than via the proxy of racial classification, the process of deciding whether people are "real" representatives of their race would likely not have sat well with Justice Kennedy.

²⁷ See *Grutter*, 539 U.S. at 330. There is a tension, though not necessarily a contradiction, between the idea of diversity as difference and that of diversity as sameness. It might be that racial diversity can serve both goals, sometimes bringing distinctive viewpoints and sometimes revealing cross-racial similarities. Diversity as sameness does mean, however, that admissions programs should consider race on its own, rather than as a proxy for contribution to the robust exchange of ideas. This point was recognized in the *Parents Involved* litigation; the schools there tried (without success) to defend their programs in terms of diversity as sameness rather than diversity as difference. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725–26 (2007) ("Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.").

Of course, this proposition is almost self-evidently absurd.²⁸ There are plenty of other ways to improve education. We could give every student a laptop. Or we could ban laptops entirely—some evidence suggests that this would improve classroom discussions, perhaps more than racial diversity does.²⁹ We could pay faculty more. The possibilities are almost limitless.³⁰

Here again, the affirmative action cases share a weakness with *Brown*. The *Brown* opinion rested on the proposition that “[s]eparate educational facilities are inherently unequal.”³¹ But this seems unlikely. Assume that the stigma of segregation interferes to some quantifiable extent with the learning of black students. Equality, in terms of educational quality, should be achievable by simply making the black schools better than the white schools in some ways (better teachers, bigger libraries, etc.) until the stigma is offset.

It is hard to imagine the segregationists of the 1950s doing such a thing, of course, but if they had, does anyone believe that the constitutional defect would have been cured? It seems unlikely—which is to say that a difference in educational quality was probably not the real problem.

In both *Brown* and the affirmative action cases, then, the focus on educational quality has given us an analytical structure that fits poorly with the actual constitutional principles at stake. For *Brown*, the existence of alternate paths to equality suggests that integration was not actually constitutionally required. For affirmative action, the existence of alternative means of improving education means that affirmative action programs should be held unconstitutional under real strict scrutiny. *Fisher* does not quite take us there, since it still seems to accept racial diversity in itself as a compelling interest and to ask only whether explicit racial preferences are necessary to achieve diversity. But this is mistaken; racial diversity is not an end in itself, ac-

28 Justice Clarence Thomas does a good job of displaying its absurdity in his opinion in *Grutter*. See *Grutter*, 539 U.S. at 354–58 (Thomas, J., dissenting).

29 Valerie Strauss, *Why a Leading Professor of New Media Just Banned Technology Use in Class*, WASH. POST ANSWER SHEET (Sept. 25, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/09/25/why-a-leading-professor-of-new-media-just-banned-technology-use-in-class/>.

30 I have listed ways of improving educational quality that might be expected to substitute for the effects of diversity as difference. Diversity as sameness does something slightly different; rather than enhancing educational quality in general, it improves cross-racial understanding. But presumably this effect could be achieved by other means as well, most likely by supplementing the curriculum.

31 *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

ording to the Supreme Court.³² It is only a compelling interest because of the benefits it brings, and if those benefits can be realized by alternate methods, those methods must be used.

In fact, and we come now to the next proposition, integration for its own sake is not merely a less than compelling interest. According to the Supreme Court, it is a forbidden state purpose.

IV. RACIAL INTEGRATION IS A FORBIDDEN STATE PURPOSE

What was *Brown v. Board of Education* about? I will consider that question in somewhat more detail later, when I examine the affirmative account the Court has provided. Now, I want only to examine the negative side, to point out what it was not about. According to the Court, *Brown* was not about integration. We know this because *Brown* was (everyone agrees) a great decision pursuing an important value. But whatever that value was, it was not integration (by which I mean simply the presence of members of different races in some particular setting) because integration is not, the Court says, a good thing as far as the Constitution is concerned. It is not a compelling interest; indeed, it is not even legitimate.³³ Attempting to ensure representation of different racial groups for its own sake has actually been repeatedly “condemned as illegitimate.”³⁴

This is not to say that the government is forbidden from operating an integrated school system. Such a system could arise through happenstance, and there would be no constitutional objections. More importantly, the government is free to promote integration and defend it on the grounds that it produces particular benefits, though *Parents Involved* shows that it would be put to demanding proofs. The

³² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729–30 (2007) (“We have many times over reaffirmed that ‘[r]acial balance is not to be achieved for its own sake.’ [Freeman v. Pitts, 503 U.S. 467, 494 (1992)]. See also *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 507 (1989); [*Regents of Univ. of Cal. v. Bakke*, [438 U.S. 265, 307 (1978)] (opinion of Powell, J.) (‘If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid[.]’). *Grutter* itself reiterated that ‘outright racial balancing’ is ‘patently unconstitutional.’ [*Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)].”).

³³ See *supra* note 32.

³⁴ See *Parents Involved*, 551 U.S. at 726. This idea, too, goes back to *Bakke*, where Justice Powell wrote, “If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

government would be forced to show, for instance, that the benefits it claimed were produced by particular levels of integration, and that its program produced those levels and no more.³⁵

What does seem to be the case, though, is that racial integration for its own sake—a mere belief, unsupported by evidence, that racial isolation or de facto segregation is undesirable—is illegitimate. The government cannot simply aver that it believes integration is better than segregation. Perhaps more surprisingly, this phenomenon is true somewhat more broadly: the government cannot simply aver that it prefers equality to inequality. If a particular sorting device—a test for promotion by state employers, perhaps, or one used for admission to state schools—has a disparate impact on some race, it seems that the government is not allowed to discard it for that reason, or at least that it would face a serious constitutional challenge in trying to do so. That is so because of our next proposition: from a constitutional perspective, avoiding disparate impact is worse than accepting it.

V. AVOIDING DISPARATE IMPACT IS WORSE THAN ACCEPTING IT

We all know the doctrinal rules about disparate impact. Mere disparate impact by itself is of no constitutional significance. The appropriate level of scrutiny is rational basis review. Unless the plaintiff can show that the disparate impact was generated intentionally—that some sorting device was used in order to produce a particular racial outcome, the Court will not consider it intentional discrimination.³⁶ Thus, if a state actor persists in using some device that has been demonstrated to produce a disparate impact, rational basis review remains appropriate unless a plaintiff can show that the use was “because of” rather than “in spite of” or “without regard for” the outcome. Strict scrutiny comes only if the plaintiff can show that the state actor sought to produce a particular racial outcome.

So a state actor who is indifferent to disparate impact is free to persist in the course of action that produces it. But what if the state actor is not indifferent? What if the state actor thinks disparate impact is undesirable? That attitude, perhaps, is similar to a state view that integration is better than isolation. And the Court treats it the same way: as illegitimate.³⁷

³⁵ See *Parents Involved*, 551 U.S. at 725–31 (utilizing this test).

³⁶ This is subject to the caveat that this rule appears to have been undermined in the context of affirmative action programs in higher education, as discussed in note 43 *infra*.

³⁷ See *supra* note 32.

If a state actor discards a sorting device that produces disparate impact, what has it done? It has selected a new one (let us suppose, a race-neutral one) in order to achieve a particular racial outcome. And our disparate impact doctrine, described above, tells us that this is intentional discrimination. An attempt to avoid disparate impact, then, will get strict scrutiny.

We do not yet have a Supreme Court decision articulating this proposition in the context of affirmative action, but it seems a relatively straightforward application of disparate impact doctrine. Since a preference for racial balance is illegitimate, avoiding disparate impact is nothing more than seeking to achieve a particular racial outcome. And that, we know, triggers strict scrutiny.

We do, moreover, have a decision articulating a similar proposition in the context of government employment: *Ricci v. DeStefano*.³⁸ In that case, the city of New Haven discarded a test it had used to identify firefighters eligible for promotion on the grounds that it had a disparate impact on blacks.³⁹ Doing so, the Court ruled, was disparate treatment—intentional discrimination—with respect to the white firefighters.⁴⁰

In *Ricci*, of course, the test had already been administered, and throwing out the scores meant denying the white firefighters something they had earned under the announced system.⁴¹ That unfairness no doubt made the plaintiffs sympathetic on the facts. But the logic of the decision does not depend on whether the test had been taken (it was about discrimination, not vested rights). Surely, if we were dealing with an attempt to produce a disparate impact, we would not consider it anodyne if done on a prospective basis.⁴² And since no particular racial outcome is constitutionally preferable—since there is no outcome that state actors are permitted to seek for its own sake—an attempt to avoid disparate impact is conceptually and constitutionally identical to an attempt to produce it.

³⁸ 557 U.S. 557 (2009).

³⁹ *Id.* at 563.

⁴⁰ *Id.*

⁴¹ *Id.* at 593.

⁴² Imagine, for instance, that a college admissions board decides that a particular race-neutral test is letting in too many blacks and switches to a different, also race-neutral, test that will let in fewer. Surely that counts as intentional discrimination, as *Gomillion v. Lightfoot* tells us. 364 U.S. 339, 342 (1960) (“[I]t is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens.”).

This leads to the puzzling conclusion that one thing the Equal Protection Clause does is to lock in disparate impacts that state officials would like to eliminate. If the officials are indifferent, of course, there is no problem: they are free to change the rules that produce disparate impacts. But officials (those concerned, presumably, with racial equality) who care about disparate impact are the ones who are foreclosed from acting.⁴³

Generally speaking, the majority culture arranges things around its own norms and expectations, and so generally speaking, we are more likely to see disparate impacts that burden minorities. The consequence, then, is that the Equal Protection Clause will tend to lock in legal regimes or administrative systems that disproportionately disadvantage minorities. That might seem strange. A facially race-neutral action that intentionally benefits historically disadvantaged minorities might seem less constitutionally problematic, from an equality perspective, than a facially race-neutral action that unintentionally injures them. After all, when we say that the injury is unintentional, all we mean is that the plaintiff cannot prove intent. If we thought that intent was frequently hard to prove, we might think that a bad intent is more likely to lurk behind the “unintentional” burden on minorities than behind the intentional preference for them.⁴⁴

But it turns out—according to the Court—that this instinctive reaction is wrong. Racial preferences for minorities (and here I include both explicit racial classifications and facially neutral classifica-

⁴³ There’s another puzzle here, in that the Supreme Court has long noted that discrimination can exist without classification. If a government actor employs a race-neutral screening device in order to produce a particular racial outcome, that has historically been considered race discrimination. Obviously, if it were not, there would be no protection against discrimination via various proxies that correlate with race. But in the context of affirmative action, various Justices have suggested that this rule does not hold. The United States offered “race-neutral” methods for achieving racial diversity in *Gratz* and *Grutter* by pointing to the Texas Ten Percent Plan. *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003). Similarly, in *Parents Involved*, Justice Kennedy wrote of drawing attendance zones with an awareness of neighborhood demographics. *Parents Involved in Cmty. Sch. V. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment). Yet in the ordinary course of things, neither of these measures would be considered race-neutral. Indeed, the Court’s redistricting cases show a vivid sensitivity to the possibility of race discrimination through boundary drawing. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 901 (1996) (rehearing *Shaw v. Reno*); *Shaw v. Reno*, 509 U.S. 629, 633 (1993) (highlighting that the case involves the “sensitive issue[]” of “race-based state legislation designed to benefit members of historically disadvantaged racial minority groups”).

⁴⁴ For a broader perspective on this issue, see generally Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

tions with intentional disparate impact, since they both receive strict scrutiny) are more likely to be a disguised attempt to harm minorities than is a race-neutral program that injures them.

VI. RACIAL PREFERENCES THAT FAVOR MINORITIES ARE MORE LIKELY TO BE AN ATTEMPT TO HARM THEM THAN IS A RACE-NEUTRAL PROGRAM THAT INJURES THEM

Who believes this? If you answered no one, you are not far off: there is probably no one on the current Supreme Court who does. But for a while, one Justice did, or claimed to: Justice O'Connor. And because Justice O'Connor was for a while the median Justice on affirmative action issues, her view was for a while controlling.

That view was that racial classifications are not all the same. (This distinguishes her from the current majority, which has a more strongly anticlassificationist view.⁴⁵) Some are benign, and some are invidious. The point of strict scrutiny, Justice O'Connor repeated again and again, is to distinguish the benign from the invidious.⁴⁶

Of course, this makes no sense at all. If an invidious classification is one that is intended to oppress or stigmatize, or one motivated by racial hostility or notions of inferiority,⁴⁷ while a benign one is one that is intended to promote equality and cross-racial understanding,

⁴⁵ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741–43 (2007) (rejecting “the argument that motives affect the strict scrutiny analysis”). Justice Kennedy, who is the new median Justice after Justice O'Connor’s replacement by Justice Alito, occasionally suggests that motives might matter, but the current majority view is better captured by the proposition that all racial classifications carry heavy costs and strict scrutiny is a method of ensuring that those costs are offset by sufficient benefits. In Jed Rubenfeld’s words, the justification for strict scrutiny has shifted from smoking-out to balancing. See generally Jed Rubenfeld, *Affirmative Action*, 107 YALE L. J. 427, 465 (1997) (“[C]urrent affirmative action shifts from the smoking-out to the cost-benefit view of strict scrutiny . . .”).

⁴⁶ See, e.g., *Johnson v. California*, 543 U.S. 499, 505 (2005) (“We have insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications . . .”); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“‘Absent searching judicial inquiry into the justification for such race-based measures,’ we have no way to determine what ‘classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’” (internal citations omitted)); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (quoting *Croson*’s explanation of why strict scrutiny of all governmental racial classifications is essential); *City of Richmond v. J.A. Croson Co.*, 448 U.S. 469, 500 (1989) (“But the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight.”).

⁴⁷ This is more or less how the Court used the word in its early cases interpreting the Equal Protection Clause. See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1676–77 (2005) (discussing “the story of equal protection jurisprudence”).

there is no doubt as to how to classify affirmative action programs. More significantly, the complicated dance of strict scrutiny does not help with that classification—not least because the Court has said that the only compelling interest in the educational context is diversity, and diversity is not, in this taxonomy, benign. (As the Court has defined it, remember, diversity primarily benefits white students and is intended to do that.) In fact, if we accept Justice O'Connor's view, we reach the following surprising conclusion: the University of Michigan sought to oppress minorities at the undergraduate level but uplift them at the law school.

VII. THE UNIVERSITY OF MICHIGAN WAS INVIDIOUS IN ITS UNDERGRADUATE ADMISSIONS BUT BENIGN AT THE LAW SCHOOL LEVEL

Here again we have a proposition that only Justice O'Connor believed. In the *Gratz* and *Grutter* cases, eight Justices found the Michigan law school and undergraduate programs indistinguishable and voted either to uphold both or strike them both down. Justice O'Connor, however, managed to find a distinction and split the difference, voting to uphold the law school program but strike down the undergraduate one.⁴⁸ But because Justice O'Connor was the median Justice, her views controlled.

What was the difference she saw that no one else could? Doctrinally, what separates *Gratz* from *Grutter* is that the law school program (which used no fixed point system and considered each applicant holistically) was narrowly tailored to serve the diversity interest, while the undergraduate one (which used a fixed point-based system) was not.⁴⁹ This in itself is a somewhat odd feature on which to pin decisive significance: in both cases, some individuals who would have been accepted under a race-blind admissions process were rejected because of their race. If that is the injury from which the Equal Protection Clause protects, it is hard to see why it should matter that the law school inflicted the injury in a less obvious way.⁵⁰ (In fact, the im-

48 See *Gratz*, 539 U.S. at 276–77 (O'Connor, J., concurring) (differentiating between the two cases); *Grutter*, 539 U.S. at 343–44 (2003) (holding that the Equal Protection Clause was not violated by the law school).

49 See *Gratz*, 539 U.S. at 273–74 (illustrating the flaws in the university's system); *Grutter*, 539 U.S. at 334–35 (holding that the law school's program survives strict scrutiny).

50 See *Gratz*, 539 U.S. at 298 (Souter, J., dissenting) (“The ‘percentage plans’ are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be

plication that seems to follow from the *Gratz/Grutter* narrow tailoring analysis is that the Equal Protection injury is something else—most likely the stigma imposed on beneficiaries and/or the stoking of resentment and racial tension, since that is what concealment of the role of race reduces.)

But taking a step back reveals another oddity. Remember that the point of strict scrutiny, according to Justice O'Connor, is to distinguish benign from invidious classifications.⁵¹ In her mind, then, the difference between the University of Michigan graduate and undergraduate admissions procedures would seem to be that the former is benign and the latter invidious.⁵²

We have seen thus far that in the Court's jurisprudence, the Equal Protection Clause is doing some things that one might not have expected—prohibiting a preference for integration, for instance, and locking in practices that disadvantage minorities. Since the Equal Protection Clause was designed first and foremost to protect the freed slaves, these are surprising roles for it to play. But a moment's consideration of the clause as it appears in the Court's affirmative action jurisprudence will show us more surprising things yet. For one, the Equal Protection Clause is designed to keep blacks in their place.

VIII. THE EQUAL PROTECTION CLAUSE IS DESIGNED TO KEEP BLACKS IN THEIR PLACE

This is perhaps an inflammatory way of phrasing the point. One could also say that it is designed to prevent black students from reaching above their abilities and injuring themselves by stretching too far. Affirmative action in fact harms its purported beneficiaries, goes the argument. As Justice Thomas put it in *Grutter*, “[t]he Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot

tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.”)

51 See, e.g., *Crosby*, 488 U.S. at 493 (“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.”).

52 This is an absurd conclusion, of course, the absurdity showing us that strict scrutiny does not in fact distinguish benign from invidious discrimination. Instead, it now seems to play the role of balancing out the injury inflicted by racial classifications—although, as noted in the text, the form that the narrow tailoring analysis takes suggests that the injury is not what one might have expected.

succeed in the cauldron of competition.”⁵³ Soon after *Grutter*, the mismatch argument appeared in the academic literature: black students, and other beneficiaries of racial preferences, are placed into schools where they cannot compete and end up with worse outcomes than they would have had they attended less selective schools.⁵⁴

The merits of mismatch as a policy argument are open to debate. The factual premises have been criticized,⁵⁵ and even if they are accepted, it may be that there are other benefits (such as networking) that accrue to students at elite schools. (And as far as the policy argument goes, one wonders why it is presented with respect to racial preferences but not, for example, preferences for alumni children or recruited athletes.) As a constitutional argument, however, and in particular as an interpretation of the Equal Protection Clause, it is quite astonishing. The Reconstruction Congress was concerned about various things, and there are various plausible ways of characterizing the principles they enacted with the Equal Protection Clause. But one must strain pretty hard to find on that list the idea of keeping blacks out of schools that are too good for them.

Still, this principle is at least nominally linked to the welfare of minority students. The Court’s next understanding of the role of equal protection lacks even that shred of justification.

IX. THE EQUAL PROTECTION CLAUSE IS DESIGNED TO AVOID WHITE RESENTMENT

It takes a bit of digging to get to this principle, but only a bit. One of the problems with racial classifications, the Court frequently observes, is that it may “pit[] the races against one another [and] exacerbate[] racial tension”⁵⁶ Preferences may “provoke resentment among those who believe that they have been wronged by the government’s use of race.”⁵⁷

⁵³ 539 U.S. at 372 (Thomas, J., dissenting).

⁵⁴ See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 479 (2004) (claiming that affirmative action produces low minority bar passage rates).

⁵⁵ See, e.g., Daniel E. Ho, Comment, *Why Affirmative Action Does Not Cause Black Students To Fail the Bar*, 114 YALE L.J. 1997, 1998 (2005) (criticizing Sander’s methodology).

⁵⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 759 (2007) (Thomas, J., concurring).

⁵⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995); see also *Parents Involved*, 551 U.S. at 746 (describing consequences of racial classifications, including “a politics of racial hostility” and “an escalation of racial hostility and conflict” (citations omitted) (internal quotation marks omitted)).

Racial tension is a bad thing, certainly, and it does not seem entirely unreasonable to suppose that the Equal Protection Clause is designed to reduce it . . . until we start to think about exactly what this racial tension and resentment amount to. In the context of affirmative action, this resentment is the resentment of white applicants who think that the minority beneficiaries are getting something they do not deserve, something that properly belongs to the whites. Racial tension and resentment, in short, mean whites getting upset that blacks and other minorities are being treated too well, and particularly that they are being treated well at the expense of whites.

Again, there might be a policy argument that this is a factor decisionmakers should take into account—though I think the case is considerably weaker than for the mismatch argument. But as an interpretation of the Equal Protection Clause, it beggars description. The Reconstruction Congress dissolved Southern legislatures and put the South under military control in order to obtain the ratification of the Fourteenth Amendment.⁵⁸ It did not do that to ensure that someday in the future whites would not be upset because they thought blacks were taking what was rightfully theirs.⁵⁹

It is very strange to think of the Equal Protection Clause as designed to prevent blacks from aspiring above their abilities and to protect whites from the offense of seeing their entitlements given away to minorities. If you did think that, though, you might actually accept the next of the Court's propositions, which is that the Clause is based on animus against minorities.

⁵⁸ See generally Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1629 (2013) ("The Southern states had been placed under military rule, and were forced to ratify the [Fourteenth] Amendment—which they despised with an (un)holy hatred—as a condition of ending military occupation and rejoining the Union.").

⁵⁹ Though flat-out absurd as a valid concern under the Equal Protection Clause, the issue of white resentment does raise an interesting question: why, among the various preferences used by institutions of higher education (legacy status, geography, athletic ability, wealth, etc.), does race alone trigger such outrage? There are, I think, two plausible explanations. One is that whites experience more resentment at the thought that a racial minority has taken their places than at the thought that alumni children have. (Which is to say, simple racism is a possible explanation.) Another, which I prefer, is that whites feel accused by affirmative action in ways that they do not by other preferences. A legacy preference contains no suggestion that the nonpreferred applicants are being forced to atone for their sins, while a racial preference may. See *Adarand Constructors, Inc.*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) (arguing that "there can be no such thing as either a creditor or debtor race."). But of course this is not a necessary implication; we ask people to accept burdens to help out the victims of natural disasters without in any way blaming them for hurricanes and droughts.

X. THE EQUAL PROTECTION CLAUSE IS BASED ON ANIMUS AGAINST
MINORITIES

It takes a bit of digging to uncover this proposition, too, and it turns out to be held (even implicitly) by only one Justice. But since that Justice is Anthony Kennedy, the proposition is very important.

Start with the consequences of the use of strict scrutiny for race-based affirmative action. What does the college admissions process look like if explicit racial preferences are forbidden, as seems likely to happen in the near future? The answer is not that we return to a perfectly fair world of pure meritocracy, on whose escutcheon racial preferences were a solitary and singular blot. As mentioned earlier, the admissions process is riddled with preferences, some with connections to an expansive concept of merit (e.g., athletic ability), and some with no connection at all (e.g., legacy status and parental wealth). All of these preferences survive; racial preferences alone are struck down. Rather than being the only departure from merit used by schools (as opponents sometimes portray them), racial preferences end up being the only departure from merit that *cannot* be used by schools.

Generalize one step further to the broader receipt of government benefits. Most groups that want to receive benefits from the government can do so by persuading politicians at any level of government that have the power to award them—admissions officers, university regents, city councils, state legislators, or what have you. Whether these groups get benefits depends simply on their ability to work the political process.

But the situation is different for racial minorities. An award of benefits to them will be subjected to strict scrutiny, and if recent cases mean what they seem to, it will almost always fail. There are only two interests that have been recognized as compelling in the affirmative action context. The first—remedying the state's own discrimination, which could support properly tailored government contracting set-asides—has become increasingly unavailable as that discrimination recedes into the past. The second—diversity in higher education—is likewise on the way out, if *Fisher* means what it seems to. The result, in short order, will be that the award of benefits to racial minorities is categorically impermissible. Almost any other group can receive benefits from any level of government, but for racial minorities to obtain similar relief, they will have to amend the federal Constitution.

The imposition of this disability on racial minorities is quite similar to the restructuring of the political process that the *Hunter/Seattle* doctrine⁶⁰ condemns, and similar also to the Colorado constitutional amendment that Justice Kennedy described as “inexplicable by anything but animus.”⁶¹ The *Hunter/Seattle* doctrine has perhaps been modified by *Schuette v. Coalition to Defend Affirmative Action*,⁶² but *Romer v. Evans* is certainly still good law. It is only a bit of a stretch, then, to say that for the Court’s current understanding of equal protection to make sense, we must conclude that the Clause embodies animus against racial minorities.

We can also put the point slightly differently, relying on a case that has informed the Court’s understanding of when heightened scrutiny is appropriate under the Equal Protection Clause.

XI. CAROLINE PRODUCTS’ FOOTNOTE FOUR IDENTIFIES GROUPS THAT SHOULD BE FROZEN OUT OF THE POLITICAL PROCESS

In a famous footnote in *United States v. Carolene Products Co.*, the Supreme Court noted that prejudice against certain “discrete and insular” minorities might “be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”⁶³ Such minorities, the Court believed, might find the political process insensitive to their interests because other groups would not form coalitions with them. In the ordinary play of politics, interest groups will form coalitions whose composition shifts over time. Today’s loser will be tomorrow’s

60 See *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (holding that “the [s]tate may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size”); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486–87 (1982) (applying the Hunter Doctrine and finding that a community could not require that laws created to improve race relations or protect minorities be confirmed by a popular vote of the electorate when comparable laws are “exempted from a similar procedure”).

61 *Romer v. Evans*, 517 U.S. 620, 632 (1996). In *Romer*, Colorado enacted an amendment that prevented the state and also local subdivisions such as cities and municipalities from enacting laws that favored LGBT people by, for instance, prohibiting discrimination against them.

62 See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1633–34 (2014) (Kennedy, J., plurality opinion) (rejecting the lower court’s reading of “broad language” from *Parents Involved*); *id.* at 1640 (Scalia, J., concurring in the judgment) (agreeing the Kennedy’s “repudiat[ion]” of those decisions); *id.* at 1653–54 (Sotomayor, J., dissenting) (accusing the majority of “effectively discard[ing]” those precedents).

63 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

winner, and vice versa. In the long run, the idea goes, each group will get a relatively equal opportunity to be part of a majority coalition and receive benefits on that basis. But if other groups refuse to form coalitions with discrete and insular minorities—of whom racial minorities are a paradigm case—those minorities may never get the chance to be in the majority, and their interests will repeatedly be sacrificed.⁶⁴ Footnote four, in short, identifies groups who may be frozen out of interest group politics by prejudice and whose interests therefore require extra judicial protection.

At least, that is what the footnote does if we use it to identify groups that are special in terms of heightened scrutiny for laws that *burden* their interests. If we start using it to identify groups that are special because laws that *benefit* them get heightened scrutiny, we have done something very different. Imposing strict scrutiny on laws that benefit racial minorities means, as suggested above, that very few such laws, if any, will survive. And what *that* means is that interest group politics, on the model described above, is closed to racial minorities. They might, conceivably, form part of a majority coalition, but a law that is designed to benefit them—the ordinary spoils of the democratic process—will be invalidated under the Equal Protection Clause. If it is invalidated only as to them, it simply takes away any reason for that group to participate in interest group politics, since they can never reap the benefits. If it is invalidated in toto, there is a somewhat stronger effect: the group becomes poison to any aspiring majority coalition. No other group will ally with it. Footnote four, on this reading, identifies groups that *the Constitution* freezes out of interest group politics.

That might seem like a paradox. *Carolene Products* is generally understood to say something about groups that need protection from the political process, not groups that must be excluded from it by judges. But paradox, or even outright contradiction, should not faze us. In fact, it is a hallmark of the Court's affirmative action jurisprudence. Another example follows.

XII. PATERNALISM IS ANTI-PATERNALISM

We have already seen that, according to the Court, the benefits of affirmative action accrue primarily to white students, and its burdens, at least potentially, fall on those minority students who are unable to

⁶⁴ See Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 992 (2006) (describing the failure of interest group pluralism to protect discrete and insular minorities).

resist the temptation to attend good schools.⁶⁵ These characterizations might seem strange—certainly, they do not line up very well with the demographic realities about who supports affirmative action and who opposes it.⁶⁶ To find the next contradiction in the Court’s jurisprudence, though, we do not need to look at demographics. A dictionary suffices.

How would we characterize the act of “tantaliz[ing]” minority students with the prospect of an elite education?⁶⁷ Justice Thomas chooses the phrase “racial paternalism.”⁶⁸ This is an odd thing to say, because paternalism, after all, is the act of limiting people’s choices on the grounds that they will make a bad one. Affirmative action does not do that, even on the mismatch theory: what it does is offer minority applicants an option they should be wary of taking.

The misdescription by itself would not merit comment were it not for the fact that one side in this debate is, indeed, engaged in paternalism. It is Justice Thomas’s side; it is the side of mismatch theorists. Their claim, remember, is that attending an elite school will ultimately prove harmful to minority students . . . and that, therefore, this option should be taken away from them. That is paternalism, plain and simple. And since this argument is made with respect to racial minorities alone, and not other beneficiaries of admissions preferences such as legacies or athletes, it is fair to call it racial paternalism.⁶⁹

⁶⁵ By focusing on the harm minorities inflict on themselves by making bad decisions, the mismatch argument interestingly parallels some of the more recent anti-abortion arguments, which also work in terms of protecting women from the consequences of their choices. See generally Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992). Abortion opponents, who used to frame the issue as a conflict between selfish women and the innocent unborn now add an extra dimension, suggesting an additional conflict between naïve women and unscrupulous abortionists. Likewise, opponents of affirmative action, who used to frame the issue as a conflict between deserving whites and undeserving minorities, now add the extra dimension of conflict between naïve minorities and unscrupulous administrators. Questions of scruples aside, it is worth considering the benefits that people of color bring to institutions that want an appearance of diversity. For an exploration of this issue, see generally Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

⁶⁶ See *supra* note 17.

⁶⁷ See *supra* text accompanying note 53.

⁶⁸ *Adarand Constructors v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment).

⁶⁹ That does not necessarily mean that the argument is incorrect. The Constitution, after all, is paternalistic. It takes away certain policy choices—slavery, censorship, etc.—that today’s majorities may think are desirable. But it does give an odd flavor to Justice Thomas’s plea on behalf of minorities to be “[l]et . . . alone!” *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on January 26,*

Still, paternalism is motivated by a desire to improve the welfare of those whose choices are restricted. So it is relatively clear, according to the Supreme Court, that the people who oppose affirmative action are the ones who truly care about the welfare of minority students.

XIII. THE OPPONENTS OF AFFIRMATIVE ACTION ARE THE ONES WHO CARE ABOUT MINORITY STUDENTS

Again, this proposition matches up somewhat uneasily with the demographics of opinion about affirmative action at the national level. But it appears quite well entrenched at the Supreme Court. Proponents of affirmative action, as the Court has framed the issue, are seeking to improve the education of white students.⁷⁰ They do so in a way that stigmatizes minorities, makes them the target of resentment, and may hurt their career prospects.⁷¹ Small wonder that anyone who cares about minority welfare would take the other side. (Indeed, by focusing on the plight of beneficiaries of racial preferences, rather than legacies or recruited athletes, the opponents of affirmative action demonstrate how pure and focused is their concern for minority welfare.⁷²)

Small wonder, too, that the champions of minorities resent any questioning of their devotion. In *Schuette*, Chief Justice John Roberts bristled at the suggestion that his solution to discrimination on the basis of race (stopping discrimination based on race⁷³) might be something less than a complete cure. “People can disagree in good faith on this issue [of whether racial preferences ‘do more harm than

1865, reprinted in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991). An applicant who does not wish to benefit from affirmative action can probably manage to avoid it. One might equally imagine blacks asking the Supreme Court to let them alone, to let them succeed or fail through the ordinary political process open to other groups.

⁷⁰ See *supra* text accompanying notes 15–16.

⁷¹ See *supra* text accompanying notes 53–58.

⁷² The reference to legacies is a bit of a joke, since there seems to be no substantial reason to think that legacy admits have worse outcomes than non-legacies. The plight of recruited athletes at universities with major athletic programs, however, is serious. See, e.g., Maureen A. Weston, *Academic Standards or Discriminatory Hoops? Learning-Disabled Student Athletes and the NCAA Initial Academic Eligibility Requirements*, 66 TENN. L. REV. 1049, 1051 (1999) (discussing “charges that the college sports industry recruits student-athletes without regard for their academic preparation for college, exploits them for their athletic prowess and marketability, and then tosses them aside once their athletic eligibility is exhausted”).

⁷³ See *Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

good’],” he wrote, “but it similarly does more harm than good to question the openness and candor of those on either side of the debate.”⁷⁴ Chief Justice Roberts was perhaps particularly offended because he believes that in ending affirmative action, he is carrying forward the noble work of the litigants and activists behind *Brown v. Board of Education*.

That might surprise you. If affirmative action ends, it seems likely that the representation of minority students at elite schools will decrease. (Indeed, the California experience substantiates this fear.⁷⁵) And is de facto resegregation of elite schools really the culmination of the dream of *Brown*? From the Court’s perspective, the question is misleading because, according to the Supreme Court, *Brown* was actually not about segregation.

XIV. *BROWN WAS NOT ABOUT SEGREGATION*

In *Parents Involved*, Chief Justice Roberts explained that the great achievement of the Supreme Court in *Brown* was to “require[] school districts to ‘achieve a system of determining admission to the public schools on a nonracial basis.’”⁷⁶ It follows from this that the constitutional defect in the pre-*Brown* systems of racially segregated schools was not segregation, per se. Fundamentally, it was nothing more than “according differential treatment to American children on the basis of their color or race.”⁷⁷ And since race-based affirmative action

⁷⁴ *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623, 1639 (2014) (Roberts, C.J., concurring). There is a striking contrast in tone between this acknowledgement of good faith disagreement and the Roberts opinion in *Parents Involved*. In *Parents Involved*, in addition to explaining how to stop discrimination on the basis of race, Chief Justice Roberts proclaimed it clear which side of the debate was faithful to *Brown* and accused Justice Stephen Breyer of arguing that the ends justified the means, among other things. See *Parents Involved*, 551 U.S. at 735–36, 747 (stating that “[t]here is no ambiguity” in the plaintiffs’ position in *Brown* and claiming that Breyer’s dissent “fails to ground the result it would reach in law [but instead] selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, and greatly exaggerates the consequences of today’s decision”).

⁷⁵ See *Schuette*, 134 S. Ct. at 1679–82 (Sotomayor, J., dissenting) (citing the decline at the University of California of the number of minority students since the abandonment of race-conscious admissions policies).

⁷⁶ *Parents Involved*, 551 U.S. 701 at 746–47 (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300–01 (1955)).

⁷⁷ *Parents Involved*, 551 U.S. at 747 (quoting Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument at 15, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), 1953 WL 48699 at *15).

programs⁷⁸ do just that, *Brown* clearly marks them as unconstitutional. “[H]istory will be heard.”⁷⁹

Not everyone agrees with this characterization of *Brown*.⁸⁰ For one thing, while Roberts focuses on language about race-neutrality from *Brown II*,⁸¹ he ignores the fact that the Court then went on to order race-conscious remedies, such as bussing, which “determine admission to a public school on a racial basis.”⁸² If determining school admission on a racial basis is sometimes the cure for a constitutional violation, it may be that the violation is a little more complicated than merely the consideration of race.

In fact, when *Brown I* identifies the constitutional violation, it does not talk about mere racial classifications. What violates the Constitution, according to *Brown I*, is *separation that denotes inferiority*.⁸³ (To his credit, Roberts acknowledges this point, before dropping it in favor of *Brown II*’s language about race-neutrality.)⁸⁴

So *Brown* may not quite do the work that opponents of affirmative action hope. But there is another important and controversial Supreme Court case that might. The strongest support for the Roberts

78 It is worth noting that the *Parents Involved* program was not classic affirmative action because it did not involve a preference in a generally merit-based competition for benefits. School assignments were not merit-based, and no racial group was systematically benefited or burdened. This means that some of the standard arguments against affirmative action—that it stigmatizes its beneficiaries, for instance, or places them in environments where they cannot succeed—had no traction. For further development of this point, see *infra* Part XV.

79 *Parents Involved*, 551 U.S. at 746.

80 Roberts asserts that the plaintiffs in *Brown* argued for colorblindness. See *id.* at 747 (“The parties and their amici debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” (quoting Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument, *supra* note 78, at 15)). Two of those lawyers, Jack Greenberg and William T. Coleman, Jr., described this claim as, respectively, “preposterous” and “100 percent wrong.” See David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249, 1279 (2013).

81 *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

82 See *Parents Involved*, 551 U.S. at 747.

83 See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

84 See *Parents Involved*, 551 U.S. at 746 (“In [*Brown*] we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority.”).

position in *Parents Involved* is probably *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁸⁵

XV. WHAT SUPPORTS *PARENTS INVOLVED* IS NOT *BROWN* BUT *CASEY*

This proposition might not be obvious. But it follows from a consideration of what harms inhered in the *Parents Involved* program. The schools in that case occasionally used race to determine assignment in what was not otherwise a merit-based competitive system.⁸⁶ That means that the program did not suffer from the prima facie unfairness of giving people things they were not otherwise entitled to. Nor did it pose a risk of stigmatizing its beneficiaries, or placing them in a “cauldron of competition” in which they could not succeed. The main harm of the program was simply that it involved government classification of individuals on the basis of race.

What kind of a harm is that? One might say (some Justices do) that mere classification is undesirable because it increases the salience of race. But that is hardly an argument about injury to a specific person, and the Equal Protection Clause, the Court frequently reminds us, protects persons, not groups.⁸⁷ The harm a person suffers is the harm of being placed in a particular racial category, a classification with which he or she may not agree.

This is a harm to individual self-definition, to the attempt to make sense of the world and one’s place in it. Not many Justices recognize this harm, but Justice Kennedy does. It is the harm he identified in *Casey*, in the passage that Justice Scalia would later mock as a paean to “the sweet-mystery-of-life.”⁸⁸ “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”⁸⁹

That Kennedy takes this concern seriously in the context of affirmative action is clear. In his *Parents Involved* concurrence, he described the classifications as “official labels proclaiming the race of all

⁸⁵ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (stating that matters “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment”).

⁸⁶ *Parents Involved*, 551 U.S. at 711–12, 715–16.

⁸⁷ See, e.g., *id.* at 742–43.

⁸⁸ *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

⁸⁹ *Casey*, 505 U.S. at 851.

persons,”⁹⁰ and in the oral argument expressed concern about the process of “*characterizing* each student by reason of the color of his or her skin.”⁹¹ More recently, in *Schuette*, Kennedy expressed concern about the project of “defin[ing] individuals according to race . . . in a society in which those lines are becoming more blurred”⁹² In each case, his evident concern is that racial classification by the government affixes a state-mandated label that may not comport with an individual’s self-definition. That is an offense against the liberty interest that *Casey* identifies.

XVI. THE MOST PERSISTENT DISADVANTAGE IS THE LEAST PERMISSIBLE TO REDRESS

Thus far I have explained why, on the Court’s account, those who promote affirmative action are promoting the interests of whites, while those who oppose it are the true champions of racial equality. But there is one final proposition we may draw from the Court’s jurisprudence, which is somewhat at odds with the prior ones. It is that the most persistent disadvantage is the least permissible to redress.

If we look at civil rights movements of the last hundred years or so, there are three notable success stories: the movements for equality based on race, on sex, and on sexual orientation. In each instance, the movement initially sought to abolish unequal and oppressive treatment—segregated public schools,⁹³ or less favorable social security treatment of female wage earners,⁹⁴ or criminalization of same-sex sexual activity.⁹⁵ Following the achievement of formal equality, in each instance there then arose the question of whether the government should not merely refrain from discriminating but should take further steps (“affirmative action”) to remedy the effects of past discrimination.

The legal regime we have, which allocates strict scrutiny to racial classifications, intermediate scrutiny to sex-based classifications, and (for now) rational basis (perhaps with bite) to sexual orientation discrimination, means that affirmative action for gays and lesbians would be easy. For women, it would be somewhat more difficult, but

⁹⁰ *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment).

⁹¹ See Transcript of Oral Argument at 33–34, *Parents Involved*, 551 U.S. 701 (2007) (No. 05-908) (emphasis added).

⁹² *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623, 1634 (2014).

⁹³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁹⁴ *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

⁹⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

it is possible in a relatively wide range of circumstances.⁹⁶ With race, however, affirmative action is more difficult, and will soon likely become impossible.

This is peculiar from several perspectives, but the most important one is the perspective that considers the extent to which disadvantage is heritable. Disadvantage based on sexual orientation discrimination is not heritable. The vast majority of gays and lesbians have heterosexual parents, and certainly any gay or lesbian individual has mostly heterosexual ancestors. Discrimination may have reduced the wealth and welfare of gays and lesbians in the past, but that shortfall does not overhang the present generation.

The picture is slightly different with respect to sex discrimination. Women who suffered discrimination in the past did hand down that disadvantage to their descendants; they had, for instance, less money to pass on to children. But women, of course, pass that disadvantage down to both sons and daughters, and those sons and daughters generally also had fathers who might have benefited from the discrimination. As far as the current generation goes, the effects of past discrimination against women are distributed relatively evenly among men and women.

But race is very different. Because race is heritable in a way that sex and sexual orientation are not, and because interracial marriages have been relatively rare (though their frequency is increasing) current minorities are quite likely to have a very high percentage of minority ancestors. The disadvantage suffered by those ancestors, men and women alike, is passed down from generation to generation.⁹⁷ But this disadvantage—which does persist, which if anything compounds over the years—is the one that cannot be redressed.

Oh, well. A small price to pay to avoid the prospect of going to a school that's too good for you.

⁹⁶ The Court has allowed women, for instance, to exclude low-income years from their social security calculations. See *Califano v. Webster*, 430 U.S. 313, 320 (1977) (finding that the advantages accruing to women under Social Security were the result of Congress's intent to resolve economic imbalances between men and women).

⁹⁷ For a recent attempt to calculate the magnitude of this effect, see Ta-Nehisi Coates, *The Case for Reparations*, *THE ATLANTIC*, June 2014, at 59–70.