EMBRYONIC THOUGHTS ON RACIAL IDENTITY AS NEW PROPERTY

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I. THE SECOND COMING OF THE DIVERSITY RATIONALE

Bakke has come of age.[1] In the nineteen years since Justice Lewis Powell proclaimed that diversity "clearly is a constitutionally permissible goal for an institution of higher education,"[2] *Bakke* has become a transformative, even religious experience for champions of race-based educational affirmative action.[3] For Michael A. Olivas, the survival of Justice Powell's "surprisingly resilient and supple" opinion serves as "proof that there is a god."[4] Others watch anxiously as *Bakke* teeters under the strain of legal and societal change,[5] while overeager lower federal judges have already pronounced it dead.[6] As for me, I hardly think of *Bakke* as a religious experience. Quite the opposite. As an instrument that coerces group identification and destroys expressive freedom,[7] educational race-consciousness is the closest thing in American public law to damnation.[8]

Having been invited to respond to Professor Olivas's contribution to this Symposium,[9] I am relieved to find at least one point

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

2. *Id.* at 311-12.

3. *See* Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1121 (1997).

4. *Id.*

5. *See, e.g.*, Gabriel J. Chin, Bakke *to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RIGHTS J. 881 (1996).

6. *See* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir.) (holding that "Justice Powell's view in *Bakke* is not binding precedent" on whether diversity in education is a compelling governmental interest), *cert. denied*, 116 S. Ct. 2581 (1996).

7. *See* Jim Chen, *Untenured but Unrepentant*, 81 IOWA L. REV. 1609, 1612, 1626 (1996) (observing that years of pervasive race-consciousness in law faculty hiring and legal scholarship have enabled racialist academics to punish nonwhite scholars and students who express dissenting views).

8. *See* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1867-1910 (1996) (arguing that affirmative action for diversity's sake, by using race as a proxy for political or ideological viewpoint, suffocates the expressive freedom of nonwhites).

9. *See* Olivas, *supra* note 3.

of agreement: *Bakke* lives.[10] Exactly one proposition in *Bakke* won the support of five Justices: A "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[11] Seizing upon this language, John Hart Ely triumphantly—and correctly—proclaimed: "*That* is the Opinion of the Court in *Bakke*. I'll take it."[12] In its recent decision to invalidate race-based affirmative action at the University of Texas Law School,[13] the Fifth Circuit could not and did not overrule *Bakke*. Since the high court retains "the prerogative of overruling its own decisions,"[14] the solemn task of pronouncing *Bakke* dead falls upon "the Supreme Court, not a three-judge panel of a circuit court."[15] Be its grip ever so tenuous, *Bakke* remains good law until further notice,[16] and two Supreme Court Justices have transparently hinted that they will brook no such change in the law.[17]

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10. Professor Olivas evidently agrees. *See id.* at 1090-91, 1114.

11. *Bakke*, 438 U.S. at 320 (reversing "so much of the California court's judgment as enjoin[ed] . . . any consideration of the race of any applicant"); *see also id.* at 326 (Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (noting the presence of "five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future"); *cf.* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (noting that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education").

12. John Hart Ely, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 5, 10 n.33 (1978) (emphasis in original).

13. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

14. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); *accord* American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 180 (1990) (plurality opinion).

15. *Hopwood*, 78 F.3d at 963 (Wiener, J., concurring specially). *But cf.* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 226 (D.C. Cir. 1986) (Bork, J.) (declaring United States v. Topco Assocs., 405 U.S. 596 (1972), and United States v. Sealy Inc., 388 U.S. 350 (1967), "effectively overruled" in light of "more recent Supreme Court decisions"), *cert. denied*, 479 U.S. 1033 (1987).

16. *See* Akhil Reed Amar & Neal Kumar Katyal, Bakke's *Fate*, 43 UCLA L. REV. 1745, 1768 (1996) ("The Court . . . nowhere explicitly overruled *Bakke*, and . . . it clearly remains binding precedent for all lower courts, state and federal."), *quoted in* Olivas, *supra* note 3, at 1091; Laura C. Scanlan, Note, Hopwood v. Texas: *A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. REV. 1580, 1583 (1996) (arguing "that, notwithstanding the Fifth Circuit's decision in *Hopwood*, *Bakke*'s affirmance of the use of race in admissions programs remains the law, at least in the context of higher education").

17. *See* Texas v. Hopwood, 116 S. Ct. 2581 (1996) (opinion of Ginsburg, J., joined

Bakke has emerged nominally unscathed from the firestorm of the Supreme Court's most recent affirmative action decisions. *Adarand Constructors, Inc. v. Pena*[18] overruled *Metro Broadcasting, Inc. v. Federal Communications Commission*[19] only insofar as *Metro Broadcasting* prescribed intermediate, rather than strict, scrutiny of racial classifications in federal law.[20] Though gutted, *Metro Broadcasting* left an enduring legacy: the holding that diversity in broadcast television and radio is at least an important governmental interest.[21] Whether *Bakke*'s description of educational diversity as "a *substantial* interest that *legitimately* may be served by a *properly* devised admissions program"[22] can survive *Adarand*'s holding that "*all* racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed . . . under *strict* scrutiny"[23]—well, that "will be the richest prize at stake" in an "[a]ffirmative action Armageddon" yet to come.[24] Its hour come round again at last, the diversity rationale of *Bakke* and *Metro Broadcasting* awaits its second coming, in an educational affirmative action case slouching toward Washington to be born.[25]

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by Souter, J.), *denying cert. to* 78 F.3d 932 (5th Cir. 1996).

18. 115 S. Ct. 2097 (1995).

19. 497 U.S. 547 (1990).

20. *See id.* at 564-65 (holding that "benign" racial classifications by Congress should be subject to an intermediate level of judicial scrutiny under the Equal Protection Clause), *standard of review overruled by Adarand*, 115 S. Ct. at 2113; *see also Adarand*, 115 S. Ct. at 2117 (overruling Fullilove v. Klutznick, 448 U.S. 448 (1980), "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard" than "strict scrutiny"). *But see Hopwood*, 78 F.3d at 944 (stressing *Adarand*'s overruling of *Metro Broadcasting* in describing *Metro Broadcasting* as the only Supreme Court decision after *Bakke* that "accepted the diversity rationale").

21. *See Metro Broadcasting*, 497 U.S. at 566; *see also Adarand*, 115 S. Ct. at 2127-28 (Stevens, J., dissenting) (arguing that *Adarand* did not "diminish [the] aspect of [the] decision in *Metro Broadcasting*," which established "[t]he proposition that fostering diversity may provide a sufficient interest to justify" a racial classification).

22. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (emphases added).

23. *Adarand*, 115 S. Ct. at 2113 (emphases added).

24. Chen, *supra* note 8, at 1852. *But cf.* Margaret A. Sewell, Note, Adarand Constructors, Inc. v. Pena: *The Armageddon of Affirmative Action*, 46 DEPAUL L. REV. 611 (1997) (prematurely awarding the coveted title of Armageddon to *Adarand*).

25. *Cf.* WILLIAM BUTLER YEATS, *The Second Coming*, *in* THE COLLECTED POEMS OF W.B. YEATS: A NEW EDITION 187, 187 (Richard J. Finneran ed., 1983) [hereinafter YEATS' COLLECTED POEMS] (lines 21-22) ("And what rough beast, its hour come round at last, / Slouches towards Bethlehem waiting to be born?"). Apocalypse now? A

This admittedly strained metaphor of conception and birth highlights the ironic role played by *Planned Parenthood of Southeastern Pennsylvania v. Casey*[26] in *Adarand*'s partial demolition of *Metro Broadcasting*. Nineteen years after *Roe v. Wade*,[27] *Casey* reaffirmed the high court's commitment to protecting abortion rights on behalf of the "entire generation" that had "come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions."[28] Three Terms later, two of the Justices in *Adarand*'s winning coalition took pains to "point[ ] out the difference between the applications of *stare decisis*" in *Adarand* and in *Casey*.[29] Justices O'Connor and Kennedy, who had supplied the critical votes in *Casey* to sustain *Roe*, suddenly found themselves having to explain why *stare decisis* could not save *Metro Broadcasting* from its ignominious fate in *Adarand*.

Whether *Adarand*'s overruling of *Metro Broadcasting* in fact "restore[d]" legal order after a recent and poorly reasoned "depart[ure] from the fabric of the law" is beside the point;[30] what concerns us here is the significance of private reliance in legal transitions.[31] The constitutional view of affirmative action stands today on the verge of a paradigmatic shift, just as constitutional protection of abortion rights did in 1992. The relevant comparison, however, does not pit *Roe* against *Metro Broadcasting*, but rather *Roe* against *Bakke*. The appropriate baseline is "Justice Powell's lonely opinion in *Bakke*,"[32] the opinion that gave affirmative action its initial judicial sanction, however modest. *Bakke*

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pending Supreme Court case involving the layoff of a schoolteacher might prove to be the beast of this much-anticipated affirmative action Armageddon. *See* Piscataway Twnshp. Bd. of Educ. v. Taxman, 117 S.Ct. 2506 (1997), *granting cert. to* 91 F.3d 1547 (3d Cir. 1996).

26. 505 U.S. 833 (1992).

27. 410 U.S. 113 (1973).

28. *Casey*, 505 U.S. at 860.

29. *Adarand*, 115 S. Ct. at 2116 (opinion of O'Connor, J., joined by Kennedy, J.).

30. *Id.*

31. *Cf., e.g.*, Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994) (articulating a presumption against retroactive application of statutes); Landgraf v. USI Film Prods., Inc., 511 U.S. 244 (1994) (same); Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) (barring the selectively prospective application of judge-made law). *See generally* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986).

32. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

thus is to affirmative action as *Roe* is to abortion.[33] Just as men and women across "two decades of economic and social developments . . . have organized intimate relationships and made choices . . . in reliance on the availability of abortion in the event that contraception should fail,"[34] "[a]n entire generation of Americans has been schooled under *Bakke*-style affirmative action, with . . . explicit blessing[s]" and meticulous, step-by-step guidance by the Supreme Court.[35] And so *Bakke* came to be the Kama Sutra of educational affirmative action—for some a do-it-yourself guide to ecstasy, for others a vector for viral contagion.[36]

Fear not if affirmative action so depicted is a subject fit only for mature audiences,[37] for the larger story of the diversity rationale since *Adarand* has made a fine *Bildungsroman.* In *Hopwood* American constitutional law has found its match for Goethe's *Die Leiden des Jungen Werthers*;[38] advocates of affirmative action have discovered the self-destructive nature of their passion. Divisions over affirmative action have split the coalition

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33. *See* Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1044-46 (1996) (asking whether *Bakke* has "the 'super-precedential' value of *Roe*" and concluding that "there are strong reasons to doubt that *Bakke* carries the same precedential value of *Roe*"); *see also* Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893, 916 (1994) (noting that "[t]he longer current [affirmative action] doctrine remains in place, the more solidified it becomes as a matter of *stare decisis*").

34. *Casey*, 505 U.S. at 856.

35. Amar & Katyal, *supra* note 16, at 1769; *see also* Kenneth L. Karst & Harold W. Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 7 (1979) (describing *Bakke* as an explicit guide on affirmative action for educational administrators).

36. *Cf.* Chen, *supra* note 8, at 1859, 1877 (describing the virus-like way in which elements of Justice Powell's *Bakke* opinion were duplicated in legal opinions and college admissions manuals).

37. *Cf., e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-58 & n.7 (1973); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968).

38. *See* JOHANN WOLFGANG GOETHE, DIE LEIDEN DES JUNGEN WERTHERS (E.L. Stahl ed., B. Blackwell 1981) (1774). The protagonist of *Die Leiden des Jungen Werthers* falls passionately and catastrophically in love with Lotte, another man's wife. The "intensity of" Young Werther's unsatisfied "inner life" condemns him to a deep "cultural malaise," a "legitimate sense that in the modern world outrage is being done to the living substance of man." MARTIN SWALES, THE SORROWS OF YOUNG WERTHER 50, 52 (1987). Werther's failure to find refuge in "a social situation" that condemns him to "joining the complex judicial and administrative machinery of the Holy Roman Empire," *id.* at 56, has made the novel a favorite among Marxist literary critics, *see, e.g.*, Arnold Hirsch, Die Leiden des Jungen Werthers: *Ein Bürgerliches Schicksal im absolutistischen Staat*, 13 ÉTUDES GERMANIQUES 229 (1958).

that was "principally responsible for the Civil Rights Revolution" like an overripe melon.[39] Not even affirmative action rationales can peaceably coexist; diversity and compensation for race-based injury, so it seems, are mutually incompatible.[40] And to think that a scholar dared a decade ago to declare that the affirmative action debate was "all over but the shouting."[41]

As the first generation of Americans born since *Bakke* comes of age,[42] it has found many an occasion to rehearse the bitter arguments over affirmative action.[43] Whether these disputes have yielded any fruit is an altogether different question. Most scholarship on affirmative action has stubbornly "approach[ed] racial issues only on the plane of high principle," at the expense of careful attention to the "difficult tradeoffs and complex empirical questions" that confound official race-consciousness.[44] In this regard a page of German Romanticism is worth volumes of Critical Race Theory: *Grau, teurer Freund, ist alle Theorie / Und grün des Lebens goldner Baum.*[45] All theory, dear friend, is gray, but the golden tree of life springs ever green.

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39. *See* Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327-28 (1986) (noting how this progressive political coalition "has been riven by bitter disagreement over the means by which American society should attempt to overcome its racist past"—namely, over whether to adopt or to oppose race-based affirmative action).

40. *See* Hopwood v. Texas, 78 F.3d 932, 966 n.86 (5th Cir.) (Wiener, J., specially concurring) (noting that a public law school's pursuit of "two putative compelling interests," in diversity and in remedying past discrimination, "ultimately proved to produce so much internal tension as to damage if not fatally wound" both claims), *cert. denied*, 116 S. Ct. 2581 (1996); Chen, *supra* note 8, at 1866 ("The legal signals sent by remedial affirmative action fatally interfere with the courts' receptivity to . . . diversity-based affirmative action, and *vice versa*."); *cf.* Davis v. Halpern, 768 F. Supp. 968, 980 (E.D.N.Y. 1991) (noting that a law school's affirmative action program "seem[ed] to confuse or merge the goal of diversity . . . with that of the remedial consideration of race and ethnicity").

41. Herman Swartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524 (1987).

42. *See* Chen, *supra* note 8, at 1871, 1880.

43. *See* Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 160 (1994) (noting that we have heard the same affirmative action arguments "many times before and are apparently doomed to hear them repeatedly in the future" and describing the entire legal literature on the subject as "somewhat depressing").

44. Farber, *supra* note 33, at 932. For an ideologically different look at the gap between rhetoric and reality in the affirmative action debate, see Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173 (1997).

45. 1 JOHANN WOLFGANG VON GOETHE, FAUST (Munich, Hans von Weber 1912). For an authoritative translation, see JOHANN WOLFGANG VON GOETHE, FAUST I & II, at 52 (Stuart Atkins ed. & trans., Princeton Univ. Press 1984).

At this point, alas, Professor Olivas and I must part company. I do not seriously dispute Professor Olivas's larger points—that putatively "hard," quantitative criteria used in university admissions are far from objective, that an immediate end to affirmative action would impose hardship on some nonwhites, and that the organic image of the river more aptly describes the educational process than does either the stagnant image of the pool or the industrial image of the pipeline. But I cannot imagine, for doctrinal purposes, that any respectable American university would contain, curtail, or abandon race-based affirmative action "because of," and not merely "in spite of," its impact on historically disadvantaged nonwhite groups.[46] Nor am I convinced, as a purely pragmatic matter, that affirmative action in practice advances any of its supposed purposes—distributive justice, corrective justice, community service, expressive diversity, or even progressive political transformation. Rather than responding point by point to Professor Olivas's thorough survey of the social science and common law of university admissions, I propose to treat his article as a springboard toward a more ambitious, though incomplete, reconceptualization of race under law. *Estoy también cruzando una frontera metaforica*[47]—I too am crossing a metaphorical boundary, the one that separates "the checkmated arguments of an earlier age" from the "tangible methods" that may yet free us from "the deadlocked paradoxes" of affirmative action.[48]

The border that looms before this entire Symposium is temporal and metaphysical rather than geographic and tangible. It is the line between affirmative action as we know it and a legal future of still indeterminable shape. The coming season of change finds most legal academics woefully unprepared. We have blithely assumed that "any State . . . is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program."[49] So far we have sup-

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46. McCleskey v. Kemp, 481 U.S. 279, 298 (1987); Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

47. I am indebted to fellow Symposium participant Margaret Montoya for this expressive phrase. *See* Margaret E. Montoya, *Border Crossings in an Age of Border Patrols: Cruzando Fronteras Metaforicas*, 26 N.M. L. REV. 1 (1996).

48. SUSANNE K. LANGER, PHILOSOPHY IN A NEW KEY: A STUDY IN THE SYMBOLISM OF REASON, RITE, AND ART 25 (3d ed. 1957).

49. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and

posed that affirmative action is like at-will employment, something that government can take or leave as it sees fit. We have regarded "constitutional equal protection" merely as "a shield," not as a sword.[50] When we grasp the real meaning of two decades of race-conscious educational administration, however, this "childish illusion[ ]" will evaporate and "like first love . . . pass[ ] into memory."[51] For not only are there many "unconstitutional ways to establish race-based affirmative action programs"; there may be, "surprisingly enough, . . . unconstitutional ways to disestablish such programs as well."[52]

Two decades after *Bakke*, an embattled but mature diversity rationale has returned like an anadromous fish to its birthplace—perchance to spawn, probably to die.[53] The first coming of the diversity rationale depicted the tragedy of lingering racial discrimination; its second shall expose the farce that racial classifications under law have become.[54] Once upon a time, supporters of affirmative action denounced *Bakke*;[55] today, Michael Olivas stands in good progressive company in urging "the

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dissenting in part); *see also* Amar & Katyal, *supra* note 16, at 1778 ("Schools are not required to adopt affirmative action policies."); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997) (same); *cf.* Crawford v. Board of Educ., 458 U.S. 527, 539 (1982) (noting that "the purposes of the [Fourteenth] Amendment" would not "be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects").

50. *Bakke*, 438 U.S. at 405 (Blackmun, J., concurring in the judgment in part and dissenting in part).

51. DAVID BERLINSKI, A TOUR OF THE CALCULUS 239 (1995).

52. Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1020 (1996).

53. *See, e.g.*, Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1019-20 (1983); Idaho *ex rel.* Evans v. Oregon, 444 U.S. 380, 382-83 (1980); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 662-64 (1979). At last, we have a compelling answer to that hitherto bewildering question, "Why study Pacific salmon law?" Michael C. Blumm, *Why Study Pacific Salmon Law?*, 22 IDAHO L. REV. 629 (1986); *cf.* Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 930 (1990) ("Why, indeed."); James L. Huffman, *Chicken Law in an Eggshell: Part III—A Dissenting Note*, 16 ENVTL. L. 761, 761 (1986) ("dissent[ing]" from the idea of an entire symposium "on the subject of anadromous fish law").

54. *Cf.* KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS NAPOLEON 9 (Daniel de Leon trans., Charles H. Kerr & Co. 1919) ("Hegel says somewhere that all great historic facts and personages recur twice. He forgot to add: 'Once as tragedy, and again as farce.'").

55. *See* TERRY EASTLAND & WILLIAM J. BENNETT, COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO *BAKKE* AND *WEBER* 172-73 (1979) (documenting opposition to *Bakke* by progressive politicians and academics).

Supreme Court to affirm" Justice Powell's opinion "when it takes up *Bakke*'s progeny."[56] The same Board of Regents that contested *Bakke* in 1978 voted in 1996 to end affirmative action throughout the University of California system. California voters followed with a broader ban on all sorts of "preferential treatment."[57] Proposition 209, to date the most extensive and successful effort to end affirmative action by democratic means, faces an ongoing federal court challenge.[58] Till now no one has seriously contended that affirmative action is an official *obligation*, that historically disempowered nonwhites have the power to demand and to receive favorable governmental treatment based on race. But the nineteen years since *Bakke*, like the nineteen years between *Roe* and *Casey*, are dangerously close to the magic twenty-one years of the rule against perpetuities[59] and the period for adverse possession in traditional property law.[60] And sure enough, by enjoining the California Civil Rights Initiative as a lawless "political restructuring . . . aimed at" affirmative action as "a subject of particular interest to minorities,"[61] a federal district court has effectively held that nonwhites own a property interest in race-based affirmative action—and, concomitantly, in their race as such.

Behold then the second coming of *Bakke*'s diversity rationale: nonwhite racial identity as new property.

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56. Olivas, *supra* note 3, at 1121.

57. *See generally* Symposium, *The Meanings of Merit: Affirmative Action and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 921 (1996).

58. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), *vacated*, 110 F.3d 1431 (9th Cir. 1997). The litigation over Proposition 209 does not "implicate" the Regents' decision "to voluntarily repeal [their] affirmative action policies." *Id.* at 1490.

59. *See* JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942) ("No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.").

60. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 5530(a)(1) (West 1981) (requiring an "action for the possession of real property" to "be commenced within 21 years").

61. *See Coalition for Econ. Equity*, 946 F. Supp. at 1510.

II. NONWHITENESS AS NEW PROPERTY

In 1964, Charles Reich published *The New Property*,[62] one of the most celebrated and influential law review articles of all time.[63] "[O]ne of the genuinely original breakthroughs in legal thought,"[64] *The New Property* has been cited in six Supreme Court opinions[65] and more than fifty opinions by lower federal courts.[66] Professor Reich recognized that the rise of the regulatory state had occasioned a fundamental change in the nature of wealth, from "tangible goods" to "rights or status" derived from individuals' relationship with the state.[67] His call for protection of the individual "against [the] ruthless pressures" of "a collective society"[68] profoundly changed the law of procedural due process.[69] "[W]ith the expansion of the governmental role" in economic growth and private progress, the new property perspective made it "less and less tolerable that the government should wield [such] potentially arbitrary power over the lives of individuals" simply by classifying public benefits as "mere 'privileges' or 'gratuities.'"[70]

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62. Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

63. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1549 (1985) (rating *The New Property* as the fourth most-cited law review article written since 1947); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 760, 766 (1996) [hereinafter Shapiro, *Most-Cited Articles Revisited*] (rating *The New Property* as the fourth most-cited law review article of all time). *But cf.* William M. Landes & Richard A. Posner, *Heavily Cited Articles in Law*, 71 CHI.-KENT L. REV. 825, 827 (1996) (citing Reich as "an example of the scholar who produces a single influential article in his lifetime").

64. Shapiro, *Most-Cited Articles Revisited*, *supra* note 63, at 760. The sheer number of retrospectives on the silver anniversary of *The New Property* gives some indication of that article's scholarly impact. *See, e.g.*, Symposium, *The New Property and the Individual—25 Years Later*, 24 U.S.F. L. REV. 221 (1990); Brigitte Fleischmann, *A Cultural Historian's Reading of Charles Reich's Impact on the Contemporary Discourse on "Welfare,"* 31 WM. & MARY L. REV. 307 (1990); Paul R. Verkuil, *Revisiting the New Property After Twenty-Five Years*, 31 WM. & MARY L. REV. 365 (1990).

65. *See* Arnett v. Kennedy, 416 U.S. 134, 208 n.2 (1974) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 89 n.2, 96 n.10 (1971) (Marshall, J., dissenting); Wyman v. James, 400 U.S. 309, 326 n.1 (1971) (Douglas, J., dissenting); Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970); Thorpe v. Housing Auth., 386 U.S. 670, 678 (1967) (Douglas, J., concurring); Rehman v. California, 85 S. Ct. 8, 9 (1964) (Douglas, J., in chambers).

66. *See, e.g.*, United States v. Salvadore, 110 F.3d 1131, 1141 (5th Cir. 1997); New York State Trawlers Ass'n v. Jorling, 16 F.3d 1303, 1311 (2d Cir. 1994).

67. Reich, *supra* note 62, at 738.

68. *Id.* at 787.

69. *See Goldberg*, 397 U.S. at 262 n.8 (citing Reich, *supra* note 62).

70. Richard B. Stewart, *The Reformation of American Administrative Law*, 88

Liberated from its debilitating legal treatment as public largesse, the new property acquired the dignified status and dignifying power of older forms of property.

Almost three decades later, Cheryl Harris's twist on the contemporary understanding of property inspired one of the most provocative law review articles of the 1990s, *Whiteness as Property*.[71] After an exhaustive and relentless analysis of the essential attributes of property, Professor Harris concluded that "white supremacy and economic hegemony over Black and Native American peoples" had helped reify "whiteness from color to race to status to property."[72] In American courts, "white status" had become "something of value that could be accorded only to those persons whose proofs established their whiteness as defined by the law."[73] Whiteness as property confers "the right to transfer . . . , the right to use and enjoyment, and the right to exclude others."[74] By the same token, Professor Harris argued that nonwhite racial identity lacks the essential characteristics of property, principally because "[a]cknowledging Black identity does not involve the systematic subordination of whites" or "even set up a danger of doing so."[75] In particular, she denied that race-based "affirmative action [might] reestablish a property interest in Blackness."[76]

Professor Harris's denial of any property interest in nonwhite racial identity does not withstand serious scrutiny. Whatever the role of subordination and exploitation in older notions of property,[77] the new property rests on nothing more than positive law—on accounts of what legislatures have done in fact, and nothing more pretentious.[78] The Supreme Court's procedural due

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HARV. L. REV. 1667, 1717-18 (1975).

71. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

72. *Id.* at 1714.

73. *Id.* at 1740-41.

74. *Id.* at 1731.

75. *Id.* at 1785.

76. *Id.*

77. *Cf., e.g.*, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 590-91 (1823) (justifying the elimination of Native American property claims precisely because the Indians did not expropriate and exploit natural resources in a European, agrarian fashion); Harris, *supra* note 71, at 1722 & n.49 (recognizing that American land law "recognized and legitimated" only those "particular forms of possession . . . that were characteristic of white settlement").

78. *Cf.* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (defining the practice of law as "prophecies of what the courts will do in fact, and nothing more pretentious").

process decisions recognize property interests whenever they "are created and their dimensions are defined by existing rules or understandings that stem from [a nonconstitutional] source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[79] Nor does race-based affirmative action fail to deliver the sort of economic benefits that legally privileged racial identity has historically conferred on whites. Affirmative action is fiercely defended precisely because it is perceived as the key to higher education, public employment, and public contracts—three of the few remaining magic gates to bourgeois comfort in an increasingly competitive global economy.[80] Especially for poor nonwhites, these benefits "tak[e] the place of traditional forms of wealth."[81] Education in particular, described by Professor Reich as "[t]he most important public service of all," is undeniably "one of the greatest sources of value to the individual."[82]

Describing expectations and entitlements under race-based affirmative action programs as new property ought not come as a shock. Many a dispute over admission to a public university can be analyzed as a straightforward procedural due process claim.[83] There is little conceptual difficulty in treating admissions qualifications, however fluid and discretionary, as establish-

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79. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); *accord, e.g.*, Perry v. Sindermann, 408 U.S. 593, 601, 602 n.7 (1972); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011-12 (1984).

80. *See generally* United States v. Lopez, 115 S. Ct. 1624, 1659-61 (1995) (Breyer, J., dissenting) (describing the significance of education in today's global economy). *But cf.*, BILL WATTERSON, THE CALVIN AND HOBBES TENTH ANNIVERSARY BOOK 25 (1995) (asserting that anyone who "seriously believes in the value of education" is, "needless to say, . . . an unhappy person").

81. Reich, *supra* note 62, at 733; *cf.* Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (reasoning that the "brutal need" facing welfare recipients warranted a hearing before the state could terminate benefits).

82. Reich, *supra* note 62, at 737; *cf.* Plyler v. Doe, 457 U.S. 202, 221 (1982) ("Public education . . . . [is not] merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."). *But cf.* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359-60 (1991) (rejecting the "sweat of the brow" approach to ownership in copyright law and, with it, a significant expression of the value theory of property in American law); International News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting) ("Property, a creation of law, does not arise from value . . . .").

83. *See, e.g.*, Martin v. Helstad, 699 F.2d 387 (7th Cir. 1983), *on remand*, 578 F. Supp. 1473 (W.D. Wis. 1983).

ing a potential property interest.[84] Although "a mere subjective 'expectancy'" is not protected by due process, an applicant "must be given an opportunity to prove the legitimacy of his claim [to an] entitlement in light of 'the policies and practices of the [educational] institution.'"[85] (Conversely, the Supreme Court's refusal to recognize a constitutionally protected liberty interest in reputation as such[86] explains why claims of stigmatization carry relatively little persuasive weight in debates over affirmative action.)[87]

Before focusing on educational affirmative action, I wish to stress that my application of the new property concept transcends the limited context of university admissions. In any affirmative action setting, whether public contracting or broadcasting, voting rights or education, the common factor is the use of race in creating a public entitlement. The new property analogy thus helps unify a case law that has "said a lot about contracting and rather little about education."[88]

Nor is the notion of race as new property limited to nonwhites. Although blacks and other nonwhites typically qualify for

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84. *Cf.* Goss v. Lopez, 419 U.S. 565, 573 (1975) (recognizing a "legitimate claim[ ] of entitlement to a public education" arising from state law, which the Court held to limit the suspension of public school students to instances of "misconduct"). *But see Martin*, 699 F.2d at 389 n.3 (holding that a university applicant "can have no property interest" under a state law that "defines a student as a person who is 'registered for study'").

85. Perry v. Sindermann, 408 U.S. 593, 603 (1972) (citation omitted) (rendering this holding in the context of faculty employment rather than admissions); *see also* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (stating that the welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254 (1970), "had a right to a hearing at which they might attempt" to show "that they were, in fact, within the statutory terms of eligibility" for welfare payments).

86. *See* Paul v. Davis, 424 U.S. 693, 711-12 (1976).

87. The Supreme Court's references to the stigmatic effect of affirmative action are fleeting, rarely occur in a majority opinion, and evidently have a modest impact. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in the judgment); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 516-17 (1989) (Stevens, J., concurring in part and concurring in the judgment); Fullilove v. Klutznick, 448 U.S. 448, 545, 552-54 (1980) (Stevens, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978); DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). The Court has an arguably keener sense of stigmatization in voting rights cases. *See* Shaw v. Reno, 509 U.S. 630, 643 (1993); United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part).

88. Amar & Katyal, *supra* note 16, at 1746; *see also* Chen, *supra* note 8, at 1862-63 (arguing that the vast majority of the Supreme Court's affirmative action cases have involved contexts in which the government could claim no legitimate interest in diversity).

preferential admissions,[89] courts grant standing to whites and other nonqualifying individuals who wish to challenge "a barrier that makes it more difficult for members of [their] group to obtain a benefit than it is for members of another group."[90] White standing to contest the racial terms by which others secure governmental benefits—the shadowy mirror image of nonwhiteness as new property—is the same regardless of whether the government is doling out medical school seats,[91] public contracts,[92] or congressional districts.[93] One might even imagine whiteness itself as new property, insofar as a white plaintiff could claim a proprietary interest in the distribution of public benefits according to criteria that are appear race-neutral in form but favor whites in practice.[94]

To visualize how racial identity, especially nonwhiteness, might qualify as property under the Supreme Court's procedural due process decisions, consider the following scenarios. Suppose that a public law school establishes two race-conscious programs: a financial aid program limited to members of certain racial groups,[95] and an aggressive agenda for hiring ten new faculty

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89. *But cf.* 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 (1996) (describing and decrying quotas and other barriers to Asian American enrollment in American universities); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 278 (1995) (noting how limits on Asian American enrollment in universities are often justified by a desire to open more seats for black students).

90. Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).

91. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 n.14 (1978).

92. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (describing the denial of "the opportunity to compete for a fixed percentage of public contracts based solely upon . . . race").

93. *See* Shaw v. Reno, 509 U.S. 630, 641-42 (1993) (recognizing an equal protection claim against "the deliberate segregation of voters into separate districts on the basis of race," without requiring that the injured voters "be white"); *cf.* Hays v. Louisiana, 115 S. Ct. 2431, 2436 (1995) (holding that a plaintiff who lives outside a racially gerrymandered district lacks standing to challenge that district because "he or she does not suffer . . . special harms" flowing from "the legislature's reliance on racial criteria").

94. *See* Harris, *supra* note 71, at 1771 (describing "[t]he idea of merit embodied" in some of the opinions in *Bakke* "ha[s] the character of property" insofar as "the law ratified the settled expectations in a particular definition of merit as MCAT scores and GPAs").

95. *Cf.* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

members of color, on the express understanding that these new professors would help diversify the faculty's intellectual and cultural profile.[96] Eligibility for race-based financial aid is premised on a genealogical fact—whether a certain percentage of the applicant's ancestry can be traced to a particular racial group.[97] At an absurd extreme, the program's administrators might trace an applicant's ancestry across five centuries.[98]

By contrast, the faculty program requires more than ancestry. Affirmative action premised on diversity in experiences and outlooks commits the law school to hiring "culturally authentic" nonwhites, nonwhites not assimilated into the majority white culture.[99] In a perversion of the constitutional instincts underlying *Hernandez v. New York*,[100] the school might insist that any Hispanic candidate prove a certain degree of proficiency in Spanish. At the very least the school might distinguish between the two sons of "'a fourth-generation Irish father . . . and a Salvadoran immigrant mother,'" on the grounds that hiring the brother who "'relates [more] easily with the Anglo side of the family'" over the brother who "'consider[s] himself Latino'" probably would not "serve any of the goals of affirmative action."[101] To put it crassly, this law school has taken up the case

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96. *Cf., e.g.*, UNIVERSITY OF CAL., REPORT OF THE 1990 ALL-UNIVERSITY FACULTY CONFERENCE ON GRADUATE STUDENT AND FACULTY AFFIRMATIVE ACTION (1990) (outlining a "California plan" for a more aggressive course of race-conscious faculty hiring in certain departments of the University of California); Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105 (criticizing the "California plan").

97. *Cf., e.g.*, 25 C.F.R. § 40.1 (1996) (limiting a cluster of federally funded "educational loans and grants" to "students of one-fourth or more degree of Indian blood"), *invalidated by* Malone v. Bureau of Indian Affairs, 38 F.3d 433, 440 (9th Cir. 1994) *and* Zarr v. Barlow, 800 F.2d 1484, 1490-91 (9th Cir. 1986); Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 107 F.3d 667, 671 (8th Cir. 1997) (affirming a Bureau of Indian Affairs decision regarding the validity of a tribal decision to abandon a blood quantum requirement for membership); Price v. Akaka, 3 F.3d 1220, 1222 (9th Cir. 1993) (discussing a referendum "concerning whether the definition of native Hawaiians should be amended to include all people of Hawaiian ancestry and not just those with 50% or more Hawaiian blood").

98. *See In re* Storer Broadcasting Co., 87 F.C.C.2d 190 (1981) (tracing a broadcast license applicant's family history to 1492 in order to conclude that the applicant was indeed "Hispanic"); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES § 8-2.14, at 544 (4th ed. 1993) (calculating that the Hispanic portion of the *Storer* applicant's ancestry was roughly one part in 16,777,216).

99. *See* RICHARD A. POSNER, OVERCOMING LAW 106 (1995).

100. 500 U.S. 352, 371 (1991) (suggesting that "for certain ethnic groups and in some communities, . . . proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis").

101. Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L.

for professors who do not think white.[102] Minority professors are fit to serve as role models[103] only if they are equipped to guide their students through the travails of living as racially conscious nonwhites in a white-dominated, racist society.[104] To be "[a]uthentic leader[s]," these professors should be "culturally similar to [their student] constituency base."[105]

Now suppose that the school denies race-based financial aid to a student for want of a certain degree of nonwhite ancestry—in effect, for being too white as a matter of genealogy. The law school then refuses to hire a nonwhite faculty candidate for want of adequate cultural commitment to a minority community—in effect, for being too "white" as a matter of ideology. Should either, neither, or both of these disappointed applicants be entitled to a hearing? What if the school not only denies these benefits but also publicizes the grounds for denial? Be it known by all presents that Homer Plessy is one-eighth black and seven-eighths white,[106] that Suzy Wong is a "Gunga Din" among Chinese-Americans, willing to succeed personally by "undermining the social and political progress of [her] communit[y]."[107] Although

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REV. 855, 875 (1995) (quoting Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 10 (1994) (footnotes omitted)). I must note, if only in passing, the deep irony of equating "Irish" with "Anglo." *Cf., e.g.*, N.Y. EDUC. LAW § 801 (Consol. 1996) (ordering all public schools in New York to provide a "course of instruction . . . with particular attention to study of . . . the mass starvation in Ireland from 1845 to 1850").

102. *See* Ian Haney López, *Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White*, 1 RECONSTRUCTION 46 (1991).

103. *But see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion) (rejecting the desire for minority role models as a compelling governmental interest under strict scrutiny of a racial classification in faculty hiring); *see also* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991) (casting grave doubt on the desirability of being a minority role model in higher education); *cf.* Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1467-68 (1996) ("The popularity of the [role model] concept has been inversely related to its clarity.").

104. *Cf., e.g.*, Farmer v. Farmer, 439 N.Y.S.2d 584, 586-87 (N.Y. Sup. Ct. 1981) (applying criteria of this sort in custody proceedings involving a child of mixed race); *In re* Davis, 465 A.2d 614, 626-27 (Pa. 1983) (same); Ward v. Ward, 216 P.2d 755, 756 (Wash. 1950) (same).

105. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1103 (1991).

106. *Cf.* Plessy v. Ferguson, 163 U.S. 537, 538, 541 (1896) (identifying the aggrieved Louisiana railroad passenger as one-eighth black and seven-eighths white); CHARLES A. LOFGREN, THE PLESSY CASE 41, 55 (1987) (same).

107. Frederick Dennis Greene, *The Resurrection of Gunga Din*, 81 IOWA L. REV. 1521, 1528 (1996).

the Supreme Court has declined to recognize "every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause,"[108] an accusation of race treason or even merely "unauthentic" nonwhiteness might be actionable as libel.[109] Even a simple case of genealogical misidentification, not compounded by any questions of cultural authenticity, might give rise to a cause of action under state tort law. In a stunning reversal of the traditional rule that imputing black ancestry to a white person is libelous,[110] one might be liable today for mistakenly calling a black person "white." In an affirmative action setting, any official defamation is coupled with a change in legal status—namely, loss of eligibility for a benefit.[111]

To engage in affirmative action, then, invites claimants to use nonwhite racial identity in establishing their entitlements to new property. Notwithstanding the myriad "practical and constitutional" difficulties that attend "the task of defining members of racial groups,"[112] affirmative action programs rest squarely on a claimant's membership in a favored race. It matters not whether race is defined in genealogical terms, in ideological terms, or in a mixture of both. Put in a somewhat different and legally decisive way, a needy student or aspiring law professor's claim under these programs depends on membership in the "right" racial group. Nonwhite racial identity is the bedrock on which these new property interests are built. Since government has defined eligibility for the loan or the faculty appointment according to race, the applicant has a property interest in his or her race.

The real question in university admissions—often couched as whether Allen Bakke, Cheryl Hopwood, or some other disap-

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108. Paul v. Davis, 424 U.S. 693, 702 (1976).

109. *See* Chen, *supra* note 8, at 1616 n.60 (suggesting that accusations of this sort may be actionable under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)).

110. *See, e.g.*, Bowen v. Independent Publ'g Co., 96 S.E.2d 564, 565 (S.C. 1957); Harris, *supra* note 71, at 1735-36.

111. *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (recognizing a liberty interest when injury to reputation is coupled with a ban on liquor purchases). *See generally* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986) (describing historical shifts in the treatment of reputation under the law of defamation as property, as honor, and as dignity).

112. Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting). *See generally* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994).

pointed applicant has satisfied the university's stated admissions criteria—is how much process is due.[113] Every law school applicant, for instance, has completed an undergraduate degree and endured the prescribed aptitude test. Even if these qualifications do not secure a statutory entitlement to a seat in the entering class, there may be a material issue whether a "mutually explicit understanding" commits the law school to considering an application without dispositive resort to race."[114] What the disappointed applicant is saying can be understood in terms of procedural due process; in effect, she seeks some sort of hearing "at a meaningful time and in a meaningful manner,"[115] where the admissions committee can deliver a coherent explanation of the grounds for denial or perhaps even offer an opportunity to revisit the admissions decision.[116]

At this point *Bakke*'s requirement that race be treated as a "plus factor" complicates the picture.[117] Unlike a welfare program that entitles a claimant to a stream of payments upon proof of inadequate wealth and income, race-based affirmative action in university admissions relies on many factors, none dispositive and all with the potential to "highlight and add nuance" to an applicant's file.[118] The problem is that educational affirmative action programs tend to adopt race-based preferences as "rule[s] of conduct appli[cable] to more than a few people."[119] Although quasilegislative presumptions favoring applicants of certain races and disfavoring applicants of other races can bring individual

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113. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976).

114. See Perry v. Sindermann, 408 U.S. 593, 601 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); Martin v. Helstad, 699 F.2d 387, 389-90 (7th Cir. 1983).

115. Armstrong v. Munzo, 380 U.S. 545, 552 (1965); *accord Mathews*, 424 U.S. at 333.

116. This is not to suggest that the Constitution requires public universities to provide trial-type procedures in the admissions process. *See, e.g.*, Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) (declining to "formalize the academic dismissal process"); Ingraham v. Wright, 430 U.S. 651, 680-81 (1977) ("Teachers, properly concerned with maintaining authority in the classroom, may well prefer to rely on other disciplinary measures—which they may view as less effective—rather than confront the possible disruption that prior notice and a hearing may entail."); Goss v. Lopez, 419 U.S. 565, 580 (1975) ("The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed.").

117. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978) (opinion of Powell, J.).

118. Olivas, *supra* note 3, at 1121.

119. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

applications "to the point of ruin," it is "impracticable" to give each student "a direct voice in [the] adoption" or rejection of the racial preference.[120] At the same time, every application *is* different and, under *Bakke*, must be considered in light of multiple factors besides race.[121] The very flexibility of the admissions process threatens to vest "purely arbitrary and unconstitutional power" in university officials.[122]

Affirmative action in university admissions falls somewhere between these two extremes. Although racial preferences are adopted initially as though they were rules, they are applied in an ad hoc, adjudicative fashion as each student application arrives in the admissions office. University admissions "involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment" on the applicant's likelihood of success in school and beyond.[123] The "presence of general or broad . . . criteria" for admitting students, however, does not defeat a disappointed applicant's due process claim.[124] The type of "discretion" exercised in university admissions is not unfettered will, but rather the circumscribed freedom to "'use judgment in applying [preset] standards.'"[125] In sum, race is a foundation of university admissions as new property, and disappointed student applicants may legitimately contest the process by which a university confers the entitlement to study.

III. ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DIVERSITY

This panoramic overview of the new property and procedural due process invites a more focused look at race-conscious university admissions. At a subconstitutional level of abstraction, we can quite easily examine educational affirmative action as a garden-variety form of administrative lawmaking. Its defenders often hint that educational affirmative action should receive minimal, if any, judicial supervision,[126] as though university

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120. *Id.*

121. *See Bakke*, 438 U.S. at 315, 318 (opinion of Powell, J.).

122. Southern Ry. v. Virginia, 290 U.S. 190, 197 (1933).

123. Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 8 (1979).

124. Board of Pardons v. Allen, 482 U.S. 369, 375 (1987).

125. *Id.* (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 32 (1977)).

126. *See, e.g.*, Wallace D. Loh, *Diversity*, ASS'N AM. LAW SCHS. NEWSL., April

admissions were committed to educational discretion by law.[127] Professor Olivas stresses educational independence to pursue race-conscious admissions as a matter of "the First Amendment, . . . academic freedom, and . . . the four tenets of autonomy, which include the freedom to choose students."[128] Call it the "Dukakis defense" of race-driven educational policies: affirmative action, like the 1988 presidential election, is a question of competence, not ideology.

The strongest support for educational freedom to adopt race-based remedies action may stem from the Supreme Court's elementary and secondary school desegregation cases, which described rules prescribing a certain "ratio of Negro to white students" as the domain of "educational policy . . . within the broad discretionary powers of school authorities."[129] In the legally distinct realm of public postsecondary education,[130] at least one Justice has urged the "ill-equipped and poorly trained" federal judiciary to defer to "the special competence" of "academicians[,] . . . administrators and the [admissions] specialists they employ."[131] Indeed, the case for judicial deference to expert educational judgment may strengthen "as one advances through

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1996, at 1, 1 ("[Law school administrators] need to explain why universities need to retain their freedom to decide who to admit as students and who to hire as faculty.").

127. *Cf.* 5 U.S.C. § 701(a)(2) (1994) (withholding judicial review of administrative lawmaking "to the extent that . . . agency action is committed to agency discretion by law").

128. Olivas, *supra* note 3, at 1121; *see also* Michael A. Olivas, *Reflections On Professorial Academic Freedom: Second Thoughts on the "Third Essential Freedom,"* 45 STAN. L. REV. 1835 (1993) (expressing Professor Olivas's views on the First Amendment rights of teachers); *cf.* Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result) (defending the freedom of a university "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") (internal quotation marks omitted).

129. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); *see also* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 479-80 (1982) (stressing the importance of a "local [school] board's discretion" to "determine . . . [its] district's educational needs—including programs involving student assignment and desegregation"). On the federal courts' equitable powers in school desegregation cases, see generally John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

130. *See, e.g.*, United States v. Fordice, 505 U.S. 717, 729 (1992) ("Unlike attendance at . . . lower level schools, a student's decision to seek higher education has been a matter of choice."); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 262 (1934) (same).

131. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 404 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part).

the varying regimes of the educational system, and the instruction becomes both more individualized and more specialized."[132] A close cognate of this argument arises in cases alleging defective prison management. The Supreme Court has repelled most procedural due process claims in this context, seeking to minimize judicial entanglement in "the ordinary incidents of prison life."[133]

Equating schools with prisons, however tenuously, is hardly the most attractive normative vision of affirmative action, academic freedom, or constitutional law.[134] Even the most "important, delicate, and highly discretionary functions" of state educators are subject to "the limits of the Bill of Rights" and subordinate to the "Constitutional freedoms of the individual."[135] Academic freedom as "a special concern of the First Amendment"[136] "thrives not only on . . . autonomous decisionmaking by the academy," but also "on the independent and uninhibited exchange of ideas among teachers and students."[137] It is now

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132. Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978); *cf.* Sweezy v. New Hampshire, 354 U.S. 234, 261-62 (1957) (Frankfurter, J., concurring in the result) (describing university departments of "anthropology, economics, law, psychology, sociology and related areas of scholarship" as ways of "dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities"). *But cf.* Sweatt v. Painter, 339 U.S. 629, 634 (1950) ("The law school . . . cannot be effective in isolation . . . . [N]o one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is connected.").

133. Sandin v. Conner, 115 S. Ct. 2293, 2295, 2299, 2300 (1995); *see also, e.g.*, Greenholtz v. Inmates of the Neb. Penal Inst., 442 U.S. 1, 13-14 (1979); Meachum v. Fano, 427 U.S. 215 (1976); *cf.* Bishop v. Wood, 426 U.S. 341, 349 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.").

134. It is therefore dangerous to read too much into prison cases such as *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997), for purposes of analyzing educational affirmative action. *But compare, e.g.*, Turner v. Safley, 482 U.S. 78 (1987), Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977), *and* Pell v. Procunier, 417 U.S. 817 (1974), *with, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), *and* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). Read together, these cases stand for the broad proposition that prisoners and public school students have few free speech rights worth protecting.

135. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

136. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); *accord* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985). *See generally* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989).

137. *Ewing*, 474 U.S. at 226 n.12; *see also* Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) ("[T]he discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."); Tinker

clear that academic freedom cannot shelter educational administrators' race-based decisions from judicial scrutiny, especially when those decisions infringe upon the competing claims of students and teachers to academic freedom.[138]

Without ignoring the obvious legal distinctions between private and public universities, we may fairly describe this Symposium's glance at educational affirmative action as an exercise in the rhetoric of administrative law. Although the Equal Protection Clause governs only public actors, private universities may face a similar sort of liability under Title VI[139] or 42 U.S.C. § 1981[140] when they render admissions decisions on

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v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (noting that students do not "shed their constitutional rights . . . at the schoolhouse gate").

138. *See* University of Pa. v. EEOC, 493 U.S. 182, 197, 198 & n.7 (1990) (rejecting "academic freedom" as a basis for immunity from antidiscrimination laws unless an educational institution claims that race, ethnicity, or gender *per se* constitutes "academic" grounds for favoring a particular student or professor); Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 1002-03 (1993) (same); *cf.* Paul D. Carrington, *Comment on Derrick Bell's Diversity and Academic Freedom*, 43 J. LEGAL EDUC. 380, 384-85 (1993) (arguing that an American Bar Association rule requiring racial diversity in the composition of law faculties would ironically "impede . . . academic freedom in the same name of diversity").

139. Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1994). *Bakke* interpreted Title VI as limiting only the type of conduct that would violate the Equal Protection Clause if the defendant were a public institution. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); *id.* at 328 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) ("Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies."); *accord* Fullilove v. Klutznick, 448 U.S. 448, 492 n.77 (1980) (plurality opinion of Burger, C.J.); *id.* at 517 n.15 (Powell, J., concurring); *id.* at 517 n.1 (Marshall, J., concurring in the judgment); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 610-11 (1983) (Powell, J., concurring in the judgment); *id.* at 612-13 (O'Connor, J., concurring in the judgment); *id.* at 639-43 (Stevens, J., dissenting); United States v. Fordice, 505 U.S. 717, 732 n.7 (1992). Department of Education regulations have codified the apparent legality under Title VI of some forms of voluntary affirmative action. *See* 34 C.F.R. § 100.3(b)(6)(ii) (1996); Washington Legal Found. v. Alexander, 984 F.2d 483, 484-85, 488 (D.C. Cir. 1993); Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1518 (N.D. Cal. 1996), *vacated on other grounds*, 110 F.3d 1431 (9th Cir. 1997).

140. Title 42, § 1981 provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws

racial grounds. In most universities, race-based affirmative action raises the same cluster of policy and process problems.[141] In university admissions, as in many other regulatory programs, a putatively expert panel, with no direct accountability to the electorate or other constituencies, exercises substantial authority affecting private entitlements. When Professor Olivas and others invoke academic freedom in defense of affirmative action, they are stressing educators' institutional superiority vis-à-vis reviewing judges. As with every other problem of public policy, affirmative action thus becomes a question of comparative institutional competence.[142]

Just as Justice Blackmun used the rhetoric of *McCulloch v. Maryland*[143] to urge judicial restraint in *Bakke*,[144] Professor Olivas answers this question of competence in favor of educational administrators. His tour of the university admissions labyrinth[145] reminds us that judicial review of sufficiently complex administrative decisions can trap unelected, nonexpert

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and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (1994). A private educational institution may violate § 1981 when it discriminates among applicants for admission on racial grounds. *See* Runyon v. McCrary, 427 U.S. 160, 172-73 (1976); Phelps v. Washburn Univ., 632 F. Supp. 455, 459 (D. Kan. 1986); *cf.* McAdams v. Regents of the Univ. of Minn., 508 F. Supp. 354, 356-57 (D. Minn. 1981) (granting summary judgment against a disappointed white applicant who failed to prove that a public law school had rejected him on racial grounds, but on the implicit understanding that a § 1981 claim would lie upon presentation of supporting evidence).

141. Historically black colleges and universities are a striking exception, *see* United States v. Fordice, 505 U.S. 717 (1992), *on remand*, Ayers v. Fordice, 879 F. Supp. 1419 (N.D. Miss. 1995), *aff'd without opinion*, 99 F.3d 1136 (5th Cir. 1996), and I make no effort to address them here. I shall be content to repeat my belief that the constitutional status of publicly supported, historically black colleges and universities is a "monstrous legal knot, which no one has successfully unraveled." Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1323 (1995).

142. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INST-ITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 50 (1994) (arguing that "the implementation of all [social] goals" depends on "the characteristics of available alternative institutional decision-makers").

143. 17 U.S. (4 Wheat.) 316 (1819).

144. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407-08 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part) (stressing "precepts of breadth and flexibility and ever-present modernity"—"[t]he same principles that governed *McCulloch's* case in 1819"—in support of a rejection of "Bakke's case in 1978").

145. *See* Olivas, *supra* note 3, at Parts II & III.

judges "in making legislative policy determinations alien to [their] true function."[146] When the underlying substantive issue is sufficiently complex, a narrow judicial focus on "efforts [to] strengthen[ ] administrative procedures" may be the better part of valor.[147]

But there is a fatal flaw in this portrait of affirmative action as an intricate, presumptively unreviewable task entrusted to expert regulators. Admissions decisions are not rocket science. University administrators, professors, and even students routinely pass judgment on applicants.[148] Even at its most baroque, graduate school management scarcely resembles the lavish state-law functions that gave rise to the *Burford* abstention doctrine in the law of federal jurisdiction[149] or the similarly outlandish federal decisions thought to be "committed to agency discretion by law."[150] Implicit in strict judicial scrutiny of race-based admissions and financial aid decisions[151] is the belief that

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146. Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir.) (en banc) (Bazelon, C.J., concurring), *cert. denied*, 426 U.S. 941 (1976); *see also* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 (D.C. Cir. 1973) (Bazelon, C.J., concurring) ("Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to [review] the government's approach to these matters . . . .").

147. *Ethyl*, 541 F.2d at 67.

148. *See* Hopwood v. Texas, 861 F. Supp. 551, 560 (W.D. Tex. 1994) (describing how a law school admissions committee included administrators, professors, and students), *rev'd on other grounds*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996); Davis v. Halpern, 768 F. Supp. 968, 971 (E.D.N.Y. 1991) (same).

149. *Compare* Burford v. Sun Oil Co., 319 U.S. 315, 332-33 (1943) (endorsing the equitable restraint of federal jurisdiction in cases raising difficult questions of state law and public policy the importance of which transcends the result in any particular case), *with* New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361-62 (1989) (holding that *Burford* abstention was inappropriate in a dispute between a local ratemaking agency and the Federal Energy Regulatory Commission).

150. 5 U.S.C. § 701(a)(2) (1994); *see, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831 (1985) (noting that agency enforcement decisions "often involve[ ] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise"); Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317 (1958) (reserving to an agency's "exercise of informed discretion" the series of complex "problems of statutory construction and cost accounting" underlying toll determinations for the Panama Canal); Hahn v. Gottlieb, 430 F.2d 1243, 1249 (1st Cir. 1970) (concluding that "courts are ill-equipped to superintend economic and managerial decisions of the kind involved" in public housing rent determinations).

151. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978); *Hopwood*, 78 F.3d at 940; Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

university administrators do *not* know best, that judges charged with the mission of safeguarding constitutional guarantees can legitimately and productively second-guess educational experts.

However limited their expertise, judges can—indeed, must—"foray into the technical world to the extent necessary to ascertain" whether the distinctions drawn in an affirmative action program are "reasoned."[152] Review of administrative decisions routinely requires judges to "acquire the learning pertinent to complex technical questions in such fields as economics, science, technology and psychology."[153] Even the application of race theory to race-conscious legal measures—reputedly an elaborate discipline that should be off-limits to dilettantes who do "not recognize the epistemological limits of [their own] experience[s]" and "write without attention to [technical] detail"[154]—ought not forestall thorough judicial review. Judges "should not automatically succumb" to educators' "acknowledged expertise . . . overwhelmed as it were by the utter 'scientificity'" of the admissions process.[155] "Restraint, yes, abdication, no."[156] Professor Olivas's contrary assumption—that technical complexity and the administrative *carte blanche* implicit in academic freedom counsel extreme judicial restraint in challenges to educational affirmative action—ironically echoes the arguments that Reagan-era conservatives used to defend judicial deference to statutory interpretation by administrative agencies.[157]

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152. Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 434 (D.C. Cir. 1973); *accord* Natural Resources Defense Council, Inc. v. United States Envtl. Protection Agency, 655 F.2d 318, 328 (D.C. Cir.), *cert. denied*, 454 U.S. 1017 (1981); American Meat Inst. v. United States Envtl. Protection Agency, 526 F.2d 442, 453 (7th Cir. 1975).

153. Ethyl Corp. v. EPA, 541 F.2d 1, 69 (D.C. Cir.) (en banc) (Leventhal, J., concurring), *cert. denied*, 426 U.S. 941 (1976); *cf.* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981) (plurality opinion) (expressing a willingness to invalidate "marginally" effective and "substantially" obtrusive state laws despite state officials' claimed expertise over regulations designed "to promote the public health or safety"); Queensboro Farms Prods., Inc. v. Wickard, 137 F.2d 969, 975 (2d Cir. 1943) (describing agriculture as a field "so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government").

154. Neil Gotanda, *Chen the Chosen: Reflections on Unloving*, 81 IOWA L. REV. 1585, 1605 n.92 (1996).

155. *Essex*, 486 F.2d at 434.

156. *Ethyl*, 541 F.2d at 69 (Leventhal, J., concurring).

157. *See, e.g.*, Laurence H. Silberman, Chevron—*The Intersection of Law and*

In practice, university admissions officers use a variety of tools, none of them dispositive. Colleges, graduate schools, and professional schools do not rely exclusively on a rigid, unyielding set of purely "quantitative" criteria such as standardized test scores and grade point averages ("GPAs"). Nor do they resort to an intensive, individualized process devoid of quantifiable measures of performance. The former approach might radically reduce the number of certain nonwhites in American universities.[158] The latter approach would bury universities beneath a crushing administrative burden. Not surprisingly, virtually every university in the United States has compromised between these two extremes. After consulting test scores and GPAs and giving these factors presumptive weight, admissions officers then turn to "plus factors" such as race, ethnicity, athletic or musical ability, and preferences for alumni children.[159]

Nevertheless, it is not clear that this compromise is acceptably coherent under a system of review resembling the Supreme Court's approach for invalidating agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

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Policy, 58 GEO. WASH. L. REV. 821 (1990); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986); *cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (conceding that a textualist approach to statutory interpretation actually leads to less rather than more judicial deference to administrative interpretations of law). For those who are more familiar with affirmative action than administrative law, Judges Silberman and Starr were prominent Reagan appointees to the D.C. Circuit, and *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), was the celebrated decision that putatively revolutionized judicial receptivity to administrative interpretations of statutes. *But see* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) (collecting empirical data suggesting that no *Chevron* revolution took place).

158. *See, e.g.*, Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1497-98 (N.D. Cal. 1996) (predicting that an end to affirmative action could slash black enrollment within the University of California system by 40% to 50%), *vacated on other grounds*, 110 F.3d 1431 (9th Cir. 1997); McLaughlin v. Boston School Comm., 938 F. Supp. 1001, 1008 (D. Mass. 1996) (noting that abandonment of a racial set-aside at an elite public high school "would, within the next six years or sooner, convert [the school] into an overwhelmingly white and Asian American school with . . . [low] black and Hispanic enrollment"); Brest & Oshige, *supra* note 101, at 858 ("[A]n end to affirmative action would leave many of the nation's law schools—especially the most selective ones—with a largely white and (increasingly) East Asian student body, and with few African American, Latino, and Native American students." (footnote omitted)).

159. *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315-19, 321-24 (1978) (appendix describing the Harvard College Admissions Program).

with law."[160] The logic of attacks on the predictive validity of standardized testing[161] dictates a wholesale abandonment of these criteria for *all* applicants, white or nonwhite, male or female. In the law school context, either the LSAT says something meaningful about all aspiring law students and something relevant to the law school's mission, or the school's admissions officers had better explain why they use the test at all. To take but one vivid and high-profile example, Lani Guinier cannot be heard both to champion LSAT scores and undergraduate GPA as predictors of female performance in law school[162] *and* to decry the same criteria in her defense of race-based affirmative action.[163] Her use of LSAT scores and undergraduate GPAs to argue "that men in coeducational [law] schools . . . dominate the classroom" is "flatly inconsistent" with her apology for race-conscious law school admissions.[164]

Current practice in law school admissions has no good answer to the reform proposal that Justice William Douglas advanced nearly a quarter-century ago in his "angry," "vehement," and "often cited" attack on affirmative action:[165] "Abolition of the LSAT."[166] Instead, law school admissions committees have been using LSAT scores and undergraduate GPAs in a most

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160. 5 U.S.C. § 706(2)(A) (1994). *See generally* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

161. *See, e.g.*, Derrick A. Bell, Jr., *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364, 366-67 (1970); James C. Hathaway, *The Mythical Meritocracy of Law School Admissions*, 34 J. LEGAL EDUC. 86 (1984); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1062 (declaring "impossible" the mission of producing objective standards that measure with certainty the capabilities of an individual to perform in law school and succeed as a lawyer"); Olivas, *supra* note 3. As a factual matter, these attacks may be misplaced. Standardized tests evidently tend to overpredict black performance. *See* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 92-94 (1991). If so, their use operates as a modest form of affirmative action for blacks. *See id.*; *see also* Farber, *supra* note 33, at 922.

162. *See* Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 21-32 (1994) (comparing LSAT scores, undergraduate GPAs, and incoming college ranks for men and for women to measures of male and female performance in law school).

163. *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968-97 (1996).

164. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982).

165. Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay on Parallel Universes*, 42 J. LEGAL EDUC. 103, 110 n.35 (1992).

166. DeFunis v. Odegaard, 416 U.S. 312, 340 (1974) (Douglas, J., dissenting).

arbitrary and capricious way. 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. Reliance on quantitative factors in distinguishing among white applicants "works in *favor* of, not *against*," reliance on the same factors in resolving all other applications.[167] Because educators are unable to explain away the fatal methodological inconsistency between racially conscious and race-neutral admissions decisions—and I have yet to encounter a prestigious American university that does not render decisions of both sorts—race-based affirmative action in university admissions must fail "a thorough, probing, in-depth review."[168] Dispositive reliance on quantitative criteria for some applicants, coupled with profound suspicion and disrespect for those very criteria as applied to other aspiring students, is "contrary to the evidence" marshaled by supporters of affirmative action.[169] At best, the American academy's incoherent use of test scores and GPAs is based on "explanation[s] so implausible that [they] cannot be ascribed to any view of the facts or to [educational] expertise."[170]

The prevalence of this internally inconsistent practice strongly suggests that "all or nearly all accredited law schools today[ ] use[ ] a system of race norming" in admissions.[171] Though race norming of aptitude tests is banned as a discriminatory employment practice,[172] no federal law bans race norming in education.[173] But being lawful is not the same as being right.

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167. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 54 (1983).

168. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

169. N.Y. Council, Ass'n of Civilian Technicians v. FLRA, 757 F.2d 502, 508 (2d Cir. 1985). By "evidence" in this context, I am speaking of Professor Olivas's survey of the social science of university admissions. *See* Olivas, *supra* note 3, at 1080-89.

170. *N.Y. Council*, 757 F.2d at 508.

171. Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. LEGAL EDUC. 97, 100 (1992).

172. *See* 42 U.S.C. § 2000e-2(l) (1994) ("It shall be an unlawful employment practice for [an employer], in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." (as amended by Pub. L. No. 102-166, § 106, 105 Stat. 1071, 1075 (1991))).

173. *See, e.g.*, H.R. REP. NO. 103-425, at 722 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2807, 2890 (supplemental minority views) (decrying the "unanimous[ ]

Race normed university admissions are repugnant in a constitutional culture whose foundational texts define civil rights by reference to "the same right[s]" that are "enjoyed by white citizens" and the same "punishment, pains, penalties, taxes, licenses, and exactions" borne by whites.[174]

Nor do Professor Olivas's arguments resonate with the logic of procedural due process, the most obvious constitutional manifestation of administrative law. In all fairness, Professor Olivas's emphasis on the discretionary nature of admissions policies may simply reflect an obvious truth about new property in all of its permutations: it is principally, perhaps exclusively, legislative in its origins.[175] Procedural due process is ill-equipped to patrol the process by which rules of legislative or quasi-legislative origin and broad impact are created.[176] But we are talking about the administration, not the creation, of race-based new property. If the demise of the right-privilege distinction in constitutional law means anything,[177] a university may not evade judicial review merely by asserting that the entitlements it confers are products of governmental grace. The Supreme Court has squarely rejected the "bitter with the sweet" theory of procedural due process.[178] Once a legislative or executive authority creates a state-law entitlement to racially influenced decisionmaking, power passes to the judiciary to define the terms by which that entitlement is withdrawn.[179] Under most public

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reject[ion] [of] an amendment to ban race-norming of educational tests" and interpreting this congressional action as "an attempt to leave open the option to discriminatory testing inconsistent with American principles").

174. 42 U.S.C. § 1981(a) (1994).

175. *See* Reich, *supra* note 62, at 739-46.

176. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

177. *See generally* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

178. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (noting that it is "settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee" of procedural due process); *cf.* Arnett v. Kennedy, 416 U.S. 134, 154 (1974) (plurality opinion of Rehnquist, J.) ("[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a [claimant] . . . must take the bitter with the sweet.").

179. *But cf.* William W. Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 470 (1977) ("Having navigated successfully between the Scylla of legislative ingenuity and the Charybdis of hostile judicial interpretation, one may then arrive in the land of 'due process of law'—only to discover that it is a veritable desert.").

universities' admissions systems, "the legislature of a state" has "commit[ted] to some subordinate body the duty of determining" who shall have the right to study.[180] "[D]ue process of law requires that at some stage of the proceedings, before the [admissions decision] becomes irrevocably fixed, the [applicant] shall have an opportunity to be heard."[181] Due process, after all, "'is conferred, not by legislative grace, but by constitutional guarantee.'"[182]

Admittedly, the procedural due process analogy does have its limits. To state the abstract proposition that the judiciary must decide how much process is due does not tell us what the law requires in most real-world situations. Merely to recognize that nonwhite racial identity has become new property gives no clear guidance to a frustrated law school applicant who feels she was rejected for being a member of the "wrong" race, as in *Hopwood* or *Bakke*, or to university administrators who wish to scale back or even abandon race-based affirmative action, as in California today. As did the Third Circuit in a recent case, we find ourselves trying yet again to decide, on purely metaphysical grounds, whether diversity as a governmental interest is strong enough to justify reliance on a racial classification.[183] Once again the quest for diversity has traveled the road to hell. The "unjust law" of affirmative action has done nothing more than "reflect" the "values of [this] unjust society."[184] "In Hell there will be nothing but law, and due process will be meticulously observed."[185] Fire and damnation.

IV. FAR FROM AN IMMACULATE CONCEPTION

Yet despair may be premature. In its many incarnations, constitutional law as American civil religion promises salvation.[186] For the Framers gave us a Constitution, "not in

180. Londoner v. City of Denver, 210 U.S. 373, 385 (1908).

181. *Id.*

182. *Loudermill*, 470 U.S. at 541 (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)).

183. *See* Taxman v. Piscataway Twnshp. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996) (en banc) (answering "no"), *cert. granted*, 117 S.Ct. 2506 (1997).

184. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

185. *Id.*

186. *See generally, e.g.*, AMERICAN CIVIL RELIGION (Russell E. Richey & Donald G. Jones eds., 1974); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); H.

order to condemn the land, but that the union through [constitutional law] might be saved."[187] Just as "there is one story in the world, and only one,"[188] there is one Constitution in this land, and only one. In affirmative action and other matters of racial justice, "there is, after all, only one Equal Protection Clause,"[189] coexistent with broader notions of due process that permeate the Constitution.[190] If all constitutional principles eventually converge at the same level of abstraction, we might as well start looking for unifying themes—that is, seeking constitutional redemption—at a reasonably manageable level of specificity. We have already professed the essential article of faith,[191] that

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JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION (1993); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

187. Chen, *supra* note 8, at 1843 (citing *John* 3:17).

188. JOHN STEINBECK, EAST OF EDEN 413 (1952).

189. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2122 (1995) (Stevens, J., dissenting); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 514 n.5 (1989) (Justice Stevens, concurring in part and concurring in the judgment); Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring); *cf.* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2499 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("There is, after all, only one Establishment Clause, one Free Speech Clause, one Fourth Amendment, one Equal Protection Clause.").

190. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) (requiring "decision[s] to impose [a] deprivation of an important liberty be made" at a "level of government" comparable to "Congress and the President," or at least to "be justified by reasons which are properly the concern of" the official decisionmaker); New York City Transit Auth. v. Beazer, 440 U.S. 568, 609 n.15 (1979) (White, J., dissenting) (arguing for more searching judicial scrutiny of decisions that are "not the result of a reasoned policy decision" and are made by a governmental body "not directly accountable to the public [or] . . . the type of official body that normally makes legislative judgments of fact"); *Croson*, 488 U.S. at 503-04 (requiring local governments to document the bases on which it has decided to use a racial classification and refusing to permit local governments to rely on nationwide findings made by Congress); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309-10 (1978) (requiring "a governmental body [to] have [adequate] authority and capacity" to establish the case for a racial classification and noting that "isolated segments of our vast governmental structures [generally] are not competent to make those decisions"). Not unrelated is the Supreme Court's bizarre decision, made early in the modern constitutional era, to incorporate Fourteenth Amendment equal protection into Fifth Amendment due process. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the States from maintaining racially segregated schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."). *See generally* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977).

191. *But cf.* Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (suggesting that differences of opinion on "the divinity of Christ" need not erect

nonwhite racial identity in the administrative state can be, and should be, viewed as new property, even as whiteness served as old property in the *ancien régime*. All that remains is to invoke the proper source of constitutional inspiration—to pray, if you will, to the appropriate patron saint in America's constitutional hagiology.[192]

To recognize nonwhite racial identity as property was only the first step, you see. We have yet to invoke the appropriate constitutional principle. Such are the pitfalls of "incompletely theorized" legal solutions—no immediate answers in matters of "fundamental principle," and no "large[ ] or . . . abstract explanations."[193] In certain key respects, affirmative action entitlements are not the new property of procedural due process, but rather the old property of the Takings Clause.[194] The Supreme Court's "ad hoc, factual" approach to Takings Clause inquiries is pliable enough to support an argument that an end to affirmative action would effectively confiscate valuable property interests in nonwhite racial identity.[195] There is no doubt that such a change would have a profound "economic impact";[196] university administrators are panicking over dramatic declines in minority enrollment in systems that have abandoned race-based affirmative action.[197] Most significantly, defenders of affirmative action can appeal to judicial solicitude for "reasonable investment backed

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religious divisions among "men and women who belief in a benevolent, omnipotent Creator and Ruler of the world").

192. *Cf.* United States v. Thompson/Center Arms Co., 504 U.S. 505, 516 n.8 (1992) (debating the appropriate degree of reverence for the "St. Jude of the hagiology of statutory interpretation, legislative history"); *id.* at 521 (Scalia, J., concurring in the judgment) (same).

193. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995).

194. *Cf.* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (recognizing a relationship between the definition of property for procedural due process purposes and the role of "'existing rules or understandings'" in just compensation questions).

195. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (declining to announce "any 'set formula' for determining when 'justice and fairness' require" just compensation); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (observing that takings claims depend "upon the particular circumstances" of each case). The Takings Clause provides that "private property [shall not] be taken for public use without just compensation." U.S. CONST. amend. V.

196. *Kaiser Aetna*, 444 U.S. at 175.

197. *See* cases cited *supra* note 158.

expectations."[198] Affirmative action has become so entrenched that any significant retreat from it would severely disrupt private expectations and public institutional arrangements.[199] This is true not only in education but also in business; it was, after all, the white-dominated business community that stalled the Reagan administration's offensive against affirmative action.[200] The stalemate over affirmative action has, in effect, created "a group 'entitlement'" to preferential legal treatment for some by race.[201]

Put coarsely, now that a generation of nonwhites has come to rely, and reasonably so, on a stream of race-based governmental benefits, that generation and its heirs have prescriptively acquired a valuable interest in their race as new property. Like welfare, government jobs, and other entitlements embraced by the concept of new property, affirmative action today is "no longer regarded as [a] luxur[y] or gratuit[y]," but rather as an "essential[ ], fully deserved, and in no sense a form of charity."[202] "Affirmative action as bourgeois boondoggle"[203] has become a middle-class entitlement.[204] As with Social Security, that Mother

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198. *Kaiser Aetna*, 444 U.S. at 175; *accord, e.g.*, Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993); Hodel v. Irving, 481 U.S. 704, 714 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980). *See generally* Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91 (1995). On this point, progressive property scholars agree with the relatively conservative Supreme Court: the state should protect reasonable reliance interests and similar expectations as property. *See, e.g.*, Harris, *supra* note 71, at 1729 ("[T]hose expectations in tangible or intangible things that are valued and protected by the law are property."); john a. powell, *New Property Disaggregated: A Model to Address Employment Discrimination*, 24 U.S.F. L. REV. 363, 374 (1990) ("Expectations are an important part of modern property theory.").

199. *See* Nathan Glazer, *The Affirmative Action Stalemate*, 90 PUB. INTEREST 99, 111 (1988).

200. *See* Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 354-55 (1989); Note, *Rethinking* Weber: *The Business Response to Affirmative Action*, 102 HARV. L. REV. 658, 662 (1989).

201. Farber, *supra* note 33, at 917.

202. Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965); *cf.* Frank A. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 677 (describing wealth and the advantages it secures—"health and vigor, presentable attire, and shelter"—as "the universal, rock-bottom prerequisites of effective participation in democratic representation").

203. Chen, *supra* note 8, at 1893.

204. *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 115-16 (1987) (finding that most benefits

of All Entitlements, any attempts at repeal will court political death.[205] Strangely enough, in a legal culture that seeks to limit judicial interference with the democratic process to instances of incurable political impotence, the very strength of the reliance interest in affirmative action may decrease the legitimacy of judicial intervention in case of legislative attack.[206]

Even within the class of judicially redressable injuries, not every diminution in property value constitutes a taking. The Supreme Court's "test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property."[207] Perhaps the most "critical question[ ] is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"[208] This facet of takings jurisprudence clarifies one of the standard rhetorical maneuvers in the affirmative action debate. Defenders of affirmative action typically stress the primacy of race as an element of personhood; opponents denigrate race as a subordinate, even irrelevant characteristic.[209] The more race "counts" as property, the more unacceptable its devaluation at the hands of those who would end affirmative action. How ironic indeed that debates over the public use of race at the dawn of America's third century should be conducted along the same lines as the controversy that yielded one of the original Constitution's most degenerate provisions, the three-fifths compromise.[210] How ironic, too,

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from affirmative action flow toward members of the middle class rather than members of the minority underclass).

205. *See* Farber, *supra* note 33, at 917 & n.146.

206. For one perspective on affirmative action in an age of judicial sophistication on positive political theory, see Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685 (1991).

207. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978) (stressing that takings jurisprudence "focuses . . . on the nature and extent of the interference with rights in the parcel *as a whole*" (emphasis added)); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

208. *Keystone*, 480 U.S. at 497 (quoting Frank A. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

209. For two cynical views of this rhetorical divide, see Chen, *supra* note 8, at 1844-45; Farber, *supra* note 43, at 159.

210. *See* U.S. CONST. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the Several States . . . according to their respective Numbers, which shall be

that race should once again become a basis for property even as our biotechnologically sophisticated society wields the Thirteenth Amendment as a shield against ownership of genetically engineered humans.[211]

If a decision to end affirmative action is a taking of new property interests in racial identity, the "confiscation" is all the more intolerable in light of the grand normative purposes of the Takings Clause. A sudden, uncompensated end to affirmative action would effectively allow the government to force nonwhites at large, or at least some nonwhite groups, "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[212] Any retreat from affirmative action would "take" race-based new property from the most disadvantaged members of a polity still combating deeply rooted racism. Indeed, the stronger the proprietary dimension in race, as opposed to other badges of personhood, the less acceptable it is to settle for substitutes such as class-based affirmative action.[213] Focusing on

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determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.").

211. *See* Official Notice of Policy on Patenting of Animals, 1077 Off. Gaz. Pat. Off. 24 (1987) (announcing that the United States Patent and Trademark Office will not recognize patent "claim[s] directed to or including within [their] scope a human being" because "[t]he grant of a limited, but exclusive property right in a human being is prohibited by the Constitution."). *But see* Kevin D. DeBré, Note, *Patents on People and the U.S. Constitution: Creating Slaves or Enslaving Science?*, 16 HASTINGS CONST. L.Q. 221, 223 (1989) (declaring the patentability of human genetic information "an unsettled question, both because the PTO [Patent and Trademark Office] did not detail the grounds for its position and because the PTO policy appears to rest on constitutional issues it lacks the authority to resolve" (footnote omitted)).

212. Armstrong v. United States, 364 U.S. 40, 49 (1960); *accord, e.g.*, *Penn Central*, 438 U.S. at 123; Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962); *see also* Kaplow, *supra* note 31, at 605 & n.298 ("Concerns about abuse of power are potentially far more important in the context of takings . . . precisely because takings often single out individuals or groups [as evidenced by] a decision to build a highway through one of two neighborhoods that have different racial or ethnic backgrounds."). Affirmative action as currently practiced is vulnerable to similar criticism. *Compare, e.g.*, Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 500 (1986) (Rehnquist, J., dissenting) (arguing that affirmative action in employment under Title VII should not come "at the expense of innocent nonminority workers") *with, e.g.*, Kang, *supra* note 89, at 43 (decrying the way in which some affirmative action programs force Asian Americans to shoulder a greater burden than whites in remedying discrimination against blacks).

213. Although some leading nonwhite writers have advocated class-based affirmative action in place of the conventional race-based variant, *see, e.g.*, CORNEL WEST, RACE MATTERS 63-67 (1993), opponents of class-based affirmative action are beginning to emerge, *see, e.g.*, Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1129

poverty alone, it is said, fails to address the additional burden of race discrimination.[214] A sudden switch to racial neutrality in law, so the argument goes, "imposes unfairness to the point of financial [and personal] ruin" on vulnerable nonwhites, who would find their fragile hopes "conscripted to national . . . use" in a crusade for formal color blindness.[215]

I do not mean to suggest that there is even a colorable constitutional claim that the Takings Clause obstructs legislative efforts to reform or repeal affirmative action.[216] Nonwhite racial identity as new property, like whiteness as property before it, is rhetorical trope rather than doctrinal truth. Neither whiteness, nor its absence, nor any economic interest embedded in the social and legal construction of race is "private property" within the

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(1996); Frederick A. Morton, Jr., Note, *Class-Based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089 (1993). My own vague sense, corroborated by others' equally impressionistic observations, is that the most strident opponents of class-based affirmative action may be nonwhite supporters of race-based affirmative action. On class-based affirmative action generally, *see* RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996); Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913 (1996); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996).

214. This argument is perhaps most forcefully pressed in the scholarship of Professor john a. powell, who repeatedly stresses the unique social disabilities faced by those at the "intersection of race and poverty." *See, e.g.*, john powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL'Y 337, 344-47 (1996); john a. powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 758 (1996); john a. powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 899, 905 n.79 (1995); john a. powell, *Black Immersion Schools*, 21 N.Y.U. REV. L. & SOC. CHANGE 669, 674, 683 (1994-95).

215. Babbitt v. Sweet Home Chapter of Communities for a Greater Or., 115 S. Ct. 2407, 2421 (1995) (Scalia, J., dissenting); *see also* Christy v. Lujan, 490 U.S. 1114, 1114-16 (1989) (White, J., dissenting from denial of certiorari) (arguing that enforcement of the Endangered Species Act against a rancher who kills a grizzly bear should be analyzed as an uncompensated taking of private property); *cf.* Chen, *supra* note 8, at 1897 (arguing that Justice Scalia's rhetoric in the Supreme Court's patronage cases "offers the most stirring defense of affirmative action as a boost for minority solidarity"). I very much intend to suggest international and domestic laws protecting endangered species as "especially rich source[s] of analogies to affirmative action," *id.* at 1869, but will once again "set aside the endangered species analogy for fear of triggering charges of racism and biological determinism," *id.* at 1870; *cf.* Ford, *supra* note 112, at 1239 (noting that cross-breeding among humans of different races, in contrast with reproductive barriers between "different species," continuously shades "the phenotypical characteristics we traditionally associate with particular 'races' . . . with each successive union").

216. For a reminder that one should not confuse attempts at clever legal scholarship with serious legal arguments, see Daniel A. Farber, *Gresham's Law of Legal Scholarship*, 3 CONST. COMMENTARY 307 (1986).

meaning of the Takings Clause.[217] Even the more doctrinally generous jurisprudence of procedural due process[218] confers no right to advance notice of legislative change.[219] Rather, my point is that the reification of racial identity, no less among nonwhites than among whites, has cloaked the affirmative action debate in the rhetoric of takings jurisprudence. The transmogrification of race from a suspect classification to an accepted, even expected, foundation for the modern state's dazzling array of new property, from a deviant basis for decisionmaking to a quotidian category,[220] bodes ill for real healing in a land so deeply scarred by the curse of race.

At a sufficiently high level of abstraction, we have little to fear and much to gain from reconceptualizing racial identity as new property. An entire branch of law and economics scholarship may be characterized as attacking the very notion of property and promoting in property's stead a more efficient regime of liability rules.[221] Another stream in economic analysis of law stresses the superiority, at least in certain circumstances, of antitrust enforcement and changes in tort law over the regulation of entry and rates on a public utility model.[222] Similarly, in the field of civil rights, affirmative action targets the same ills as do the antidiscrimination laws, only in a more aggressive, preemptive

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217. U.S. CONST. amend. V.

218. *Cf.* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223 (1986) (noting that "it would be surprising indeed to discover" a regulatory taking embedded within a statutory scheme that had withstood a procedural due process challenge).

219. *See* Atkins v. Parker, 472 U.S. 115, 130 (1985).

220. *Cf.* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1807 (1989) ("I simply do not want race-conscious decisionmaking to be naturalized .... I do not want race-conscious decisionmaking to lose its status as a deviant mode of judging people .... I do not want race-conscious decisionmaking to be assimilated into our conception of meritocracy.").

221. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW §§ 3.1-.13 (4th ed. 1992); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); *cf.* Verkuil, *supra* note 64, at 366 ("In a sense, the law and economics movement is a reaction to *The New Property*. It seeks to balance questions of rights against equally hard questions of the allocation of resources to fulfill those rights." (footnote omitted)).

222. *See, e.g.*, STEPHEN BREYER, REGULATION AND ITS REFORM 156-61, 174-77 (1982); *cf.* J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1238 (1993) (book review) (arguing that communications law should be restructured according to "the antitrust laws' goal of maximizing consumer welfare by promoting competition in ... markets for goods and services").

manner.[223] If we accept the rather obvious analogy that affirmative action is to command-and-control regulation as conventional antidiscrimination laws are to antitrust enforcement,[224] the extended metaphor is complete. Just as everyone opposes monopoly and favors competition, everyone detests racism and desires racial justice. The serious debate turns not on ends but on means, on whether salvation lies in the proprietary approach called affirmative action or the tort-like approach called antidiscrimination law.

There is nevertheless cause for concern. Reifying race comes dangerously close to deifying race.[225] In a polity where the "question of race" carries all the gravitational and mystical "power of the moon,"[226] treating race as a form of property

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223. *Cf.* Cohen v. Brown Univ., 101 F.3d 155, 170 (1st Cir. 1996) (distinguishing sharply between "affirmative action statute[s]" and "anti-discrimination statute[s]"), *cert. denied*, 117 S.Ct. 1469 (1997); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 926-27, 932-33 (1996) (distinguishing between "quotas" as the most aggressive practice described as "affirmative action" and adherence to antidiscrimination norms as the least).

224. The foundational work describing this economic view of discrimination as a preference for nonassociation is GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971). As with the law of economic regulation and the industries governed by it, *see, e.g.*, Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 691 (1954) (Clark, J., dissenting) ("The natural gas industry, like ancient Gaul, is divided into three parts."), the regulatory world of affirmative action *est omnia divisa en partes tres*: (1) those who believe in light enforcement or even nonenforcement of the antidiscrimination laws, *see, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987); (2) those who urge vigorous enforcement of the antidiscrimination laws and hold race-based affirmative action in reserve as a last resort, *see, e.g.*, John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986); Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22 (1991); and (3) those who argue that only comprehensive solutions such as affirmative action can cure a deeply flawed private marketplace, *see, e.g.*, Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659 (1991); Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993). Again for the benefit of those who are more literate in affirmative action law and lore than the law of economic regulation, the corresponding categories among regulatory scholars are those who disdain even modest antitrust enforcement, those who believe in vigorous antitrust enforcement in the first instance, and those who entrust to command-and-control regulation their faint hopes of combating monopoly.

225. *Cf.* Jim Chen, Book Review, 11 CONST. COMMENT. 599, 610 (1994-95) (reviewing POWELL, *supra* note 186) (analogizing "reification of the law," the archenemy of Critical Legal Studies, with "deification of the law," the archenemy of Christian Legal Studies).

226. JAMES MCBRIDE, THE COLOR OF WATER: A BLACK MAN'S TRIBUTE TO HIS

threatens serious, perhaps irreparable, social harm. Reified race as "a moonlit dome," stretched across the legal firmament, "disdains / All that man is, All mere complexities, / The fury and the mire of human veins."[227]

The law of property is the story of power and its prerogatives, the catechism by which society dictates who shall submit and who shall subjugate. Chief among its attributes as property,[228] reified race wields the power to *exclude*. American history teaches all too well how rules defining race can be manipulated either to maximize or to limit membership in a race.[229] The economic and social significance of affirmative action magnifies the potential for abuse. "[T]he 'right to exclude,' so universally held to be a fundamental element of the property right,"[230] has been described as an essential, benign element of a liberating "voice of color."[231] In racial matters, however, the power to exclude is the power to destroy. Although the market for "group status production" through exclusionary racial discrimination has been called the quasi-economic engine of white racism,[232] there is no reason to assume a white monopoly on depravity. Neither virtue nor vice knows any one color; good and evil flow through every branch of

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WHITE MOTHER 94 (1996).

227. WILLIAM BUTLER YEATS, *Byzantium*, *in* YEATS' COLLECTED POEMS, *supra* note 25, at 248, 248 (lines 5-8).

228. *See, e.g.*, Harris, *supra* note 71, at 1731.

229. *See* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 965 (1995); *cf.* Podberesky v. Kirwan, 38 F.3d 147, 158 n.11 (4th Cir. 1994) (noting how the inclusion of a Jamaican in a financial aid program putatively limited to "African Americans" projected "a hemispheric meaning" onto the term "African American"), *cert. denied*, 115 S. Ct. 2001 (1995). *Compare* NAOMI ZACK, RACE AND MIXED RACE 61 (1993) (noting that the "one-drop" rule of African hypodescent was designed to maximize the number of slaves), *with* C. MATTHEW SNIPP, AMERICAN INDIANS: THE FIRST OF THIS LAND 34 (1989) (noting the use of blood quantum requirements, such as those described in cases cited *supra* note 97, to limit Indian tribal membership).

230. Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979); *see also* International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.").

231. *See* Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); *cf.* Chen, *supra* note 7, at 1619 (asking whether "racialist writers have come to believe that they hold a proprietary interest in the narrative technique" of scholarship most commonly associated with some adherents of Critical Race Theory and of radical feminism).

232. *See* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995).

humanity's family tree.[233] Indeed, there is every reason to believe that the demand for group status production through racial exclusion reaches its apex in the most marginalized segments of society.[234] In a word, then, diversity—or more accurately, the distortion of diversity under affirmative action[235]—is the velvet glove on the iron fist of discrimination.[236]

I shall conclude with a proposal, as simple as it is sweeping. In this field as in others, "[m]y complaint" is not that the law is "too Marxist," but that it "is not Marxist enough."[237] Perhaps the early phases of the inevitable historical progression from race struggle to racial equality included multiple dictatorships of the proletariat, first in the racist state that was America, then in the racialist state that is America. But the time has come to witness—indeed, to expedite—the withering away of the race-conscious state. Although "even . . . a society [that] has got upon the right track for the discovery of the natural laws of its movement . . . can neither clear by bold leaps, nor remove by legal enactments, the obstacles offered by the successive phases of its normal development," revolutionaries dedicated to the creation of a Creole Republic "can shorten and lessen the birth-pangs."[238]

As the 2000 Census looms in the increasingly multiracial United States, some of the fiercest turf battles will likely involve the "proper" identification and assignment of mixed-race Americans.[239] Already the Supreme Court has reviewed and repelled

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233. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311 (1978) ("'[T]here [are] no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive.'" (quoting Regents of the Univ. of Cal. v. Bakke, 553 P.2d 1152, 1167 (1976))); United States v. Armstrong, 48 F.3d 1508, 1516-17 (9th Cir. 1995) ("We must start with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." (emphasis in original)), *rev'd on other grounds*, 116 S. Ct. 1480 (1996).

234. *See* McAdams, *supra* note 232, at 1053-55 (explaining how demand for group status production has been highest historically among the white Southerners who lost the Civil War and currently among today's "poorest and least educated" whites).

235. *See generally* Chen, *supra* note 8, at 1900-10.

236. *Cf.* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 8 (1987) ("Difference is the velvet glove on the iron fist of domination.").

237. Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 822 (1995).

238. KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 14-15 (Samuel Moore & Edward Aveling trans., 1906). On the notion of a Creole Republic, see generally Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 149-54 (1994).

239. *See, e.g.*, Carol R. Goforth, *"What Is She?": How Race Matters and Why It*

one racially tinged assault on the government's census-taking methodology.[240] If in fact "[a]ffirmative action in the public sphere . . . represent[s] the only reason the government continues to count us by race,"[241] we can eliminate all racial classifications from the Census without compromising our commitment to curing racial injuries. Effective enforcement of antidiscrimination laws, after all, "require[s] nothing more than proof of the offender's perception of the victim's race."[242] The burden of proving the need to acknowledge race on the Census rests on those who would resort to the prototypical suspect classification in American public law. To codify race as a legal principle, especially as a basis for conferring property, incorporates "[p]rivate biases" otherwise "outside the reach of the law" into public policy.[243]

As a strictly sociopolitical phenomenon lacking any basis in biology,[244] race lives and dies by law.[245] It deserves to die. In this sense, the theory of legal color blindness may be summed up in this single sentence: Abolish race as property.[246]

Shouldn't, 46 DEPAUL L. REV. 1 (1996); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 330 (1995); Ramirez, *supra* note 229, at 964-69; Kenneth E. Payson, Comment, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233 (1996).

240. *See* Wisconsin v. City of New York, 116 S. Ct. 1091 (1996).

241. Chen, *supra* note 8, at 1841-42.

242. *Id.* at 1842; *see* Wisconsin v. Mitchell, 508 U.S. 476, 484-85 (1993).

243. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

244. *See, e.g.*, Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987); John Tooby & Leda Cosmides, *On the Universality of Human Nature and the Uniqueness of the Individual: The Role of Genetics and Adaptation*, 58 J. PERSONALITY 17, 35 (1990).

245. *Cf., e.g.*, Barbara J. Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 112 (1990) (arguing that race as "[a]n ideology must be constantly created and verified in social life [lest] . . . it die[ ], even though it may seem to be safely embodied in a form that can be handed down"). *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

246. *Cf.* KARL MARX, THE COMMUNIST MANIFESTO 68 (Samuel Moore trans., 1888; Frederic L. Bender ed., 1988) ("In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property.").