Articles

The Pimple on Adonis’s Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate

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INTRODUCTION

A respected law school recently held a conference to discuss the future of affirmative action following the Supreme Court’s landmark decisions in Grutter and Gratz. The conference participants ranged in their chosen topics from the Constitution to issues of policy and ethics, and they included several thinkers from outside the legal academy. During a discussion at the back of an auditorium between formal presentations—where some of the most useful insights often come to light—a friendly disagreement emerged between two constitutional law professors over the concept of “merit” in the admissions policies of competitive universities and the role that “merit” should play in the analysis of affirmative action programs. The debate unfolded around the conference’s keynote address, which was delivered by Robert Paul Wolff, a scholar of political and moral philosophy (and, as it happens, the father of one of the aforementioned constitutional law professors). This Article sets forth the insights achieved during these exchanges in order to record them for posterity and make them available to a broader audience.

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2. Any resemblance between the events depicted herein and actual academic conferences, educational institutions, professors of constitutional law, or voyages taken by philosophers who have too much time on their hands is purely incidental.

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Part I of this Article presents two opposing views about the definition of merit in the admissions decisions of competitive universities. Part I.A sets forth the received view that the evaluative criteria that predominate within the classroom setting—where superior ability and performance are rewarded through the conferral of superior grades—must also predominate in the admissions process, where access to scarce educational resources is to be distributed as a reward for past academic accomplishments. Under this view, affirmative action programs operate in derogation of the norms that govern the admissions process. Part I.B challenges this received view, disaggregating the evaluative norms that hold sway in the classroom from the norms that govern the admissions process and demonstrating the lack of any necessary connection between the two. Part II then illustrates the danger of inviting a radical philosopher to deliver a keynote address when he has free time and a travel budget—and, in the process, offers a robust, concrete illustration of the distributive norms debated in Part I. Part III then rejoins the debate. Part III.A explores the limits of the alternative distributive philosophy described in the keynote address, and Part III.B examines the theoretical and doctrinal implications of these insights for the analysis of affirmative action in a post-
Grutter world.

I. THE LAW PROFESSORS’ DEBATE—PART ONE
(TOBIAS)

I wandered around the halls of the conference’s host institution, searching for familiar faces, and was pleased to run into a friend and fellow law professor named Jane. Jane and I both write in the field of constitutional law, and we spent only a little time on pleasantries before launching into a friendly debate. We have long embraced very different views about the proper role of affirmative action in higher education, and the Court’s decisions in Grutter and Gratz have only served to sharpen those differences. As we sauntered into the auditorium where my father was scheduled to deliver his keynote address, our familiar disagreement centered on the role of “merit” in affirmative action.

A. JANE AND TOBIAS FRAME THE TERMS OF THEIR DISAGREEMENT

“You cannot escape the fact,” Jane asserted, picking up the thread of a continuing dispute, “that, in supporting affirmative action, you advocate a policy that derogates from a central tenet in higher education: the neutral evaluation of students according to objective criteria of merit. I understand the social purposes that you are trying to promote in advocating the use of race in the admissions process, and I sympathize with those purposes. But you need to be honest with yourself about the costs that your proposals would impose, even if the Supreme Court now appears to have lent them its sanction.”
“Why don’t you explain to me how you understand the concept of ‘merit’ and its role in defining the costs and equities of affirmative action,” I replied. “We’ve never quite framed our debate in these terms, and I have a hunch that we start from some very different assumptions.”

“I should think,” Jane said, “that those costs would seem fairly straightforward. In selective universities, a large number of qualified applicants must compete for a relatively small number of positions. The only fair way to select among these applicants is to determine which are more deserving of the scarce resource for which they are competing. Hence, we rank their relative merit. Using grades, test scores, and other measures of accomplishment, we measure their native abilities and intelligence, the quality of their training, the level of commitment and creativity that they have demonstrated, and their likelihood of succeeding in college. We award the scarce positions to those applicants who have out-competed their peers and earned the right to a superior education.

“When a university employs race as a factor in its admissions,” she continued, “it acts in derogation of the principle that lies at the heart of that evaluative process. Race, as such, does not correlate to merit one way or the other. Perhaps race may sometimes have some large-scale statistical correlation to the obstacles that applicants faced during the early phases of their education. I don’t deny that there are lingering economic effects of past discriminatory policies in America, and racism continues to be a serious problem throughout the country. Statistically, it may be true that a non-White applicant is more likely than a White applicant to have faced debilitating challenges early on. But affirmative action does not even try to make individual assessments of the influence that such factors exert upon each applicant. It simply gives minority applicants broad advantages that are in no way tied to individual merit.3 This may not be ‘evil’ in the same way that Jim Crow was evil,4 but it is pernicious, precisely because race is used to circumvent the merit-based criteria that inhere in the awarding of scarce educational opportunities.

“While the Gratz and Grutter decisions have imposed some limits on the shape that race-conscious programs can take, those limits don’t eliminate or even mitigate the costs that affirmative action entails; they simply narrow the range of circumstances in which those costs can be imposed. Under Gratz, a university cannot award an across-the-board, lockstep benefit to minority applicants, at least when that benefit will

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3. See Hopwood v. Texas, 78 F.3d 932, 945–47 (5th Cir. 1996) (levying this criticism at University of Texas admissions policies).

4. But see Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (opining that there is a “moral and constitutional equivalence” between Jim Crow laws and affirmative action programs).
prove decisive in the admissions decision. Under Grutter, however, a university can still award admission to minority applicants who are less qualified than their competitors in order to secure the ‘educational benefits’ of a diverse student body, so long as it gives individualized consideration to each application. We can debate the content of those ‘educational benefits,’ if you like—the Grutter majority was obviously convinced that they are substantial, though I am less sure. But, even within the parameters set forth in Grutter, affirmative action derogates from the principle of evaluative fairness that lies at the heart of the educational endeavor.”

When Jane had finished this exposition, I said, “This is, in fact, the source of our disagreement. Specifically, I disagree that the principles of ‘evaluative fairness’ that you have identified are ‘inherent’ in the admissions process. To explain why, let me say a few words about the changes that college admissions have undergone over the years. While we tend to take the current structure of the admissions process for granted, that structure constitutes a relatively recent development.

“For the first three centuries of higher education in America, colleges and universities did not use what we think of today as admissions ‘policies’ to measure the relative ‘merit’ of candidates. Rather, they had entrance requirements—an elementary mastery of Latin and Greek figured prominently—and admission (or rejection) was conditioned simply upon an ability (or inability) to satisfy those requirements. The modern process of admissions selection did not really come into existence until the 1950s, when the numbers of qualified students applying to a handful of prominent schools soared.” When my

5. Gratz, 539 U.S. at 271–72.
7. Id. at 334–39.
8. Id. at 327–32.
9. Professor Peter Schuck, for example, offers a trenchant critique of the argument that a diverse student body produces pedagogical benefits. See Peter H. Schuck, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 160–69 (2003).
10. Several salient examples may be found among the life histories of those who served in the first administrations following the ratification of the Constitution. In David McCullough’s much noted biography of President John Adams, the author describes the difficulty that Adams’s son and future successor, young John Quincy Adams, encountered in gaining admission to Harvard due to an inadequate mastery of Latin and Greek. See David McCullough, John Adams 364 (2001). Ron Chernow tells a similar story about Alexander Hamilton, who encountered difficulty in his attempt to secure admission to the College of New Jersey (later Princeton) as a result of his inadequate mastery of Latin and Greek. See Ron Chernow, Alexander Hamilton 42–43 (2004).
11. Jencks and Riesman give the following account of this process of evolution in American universities, which provides a cogent account of the shift from admissions requirements to admissions policies.

The increased emphasis on selectivity after the middle 1950s led to a change in the framework for discussing admissions policy. A generation ago most colleges spoke about their admissions requirements as if they were based on intrinsic standards of ‘what every freshman should know’ . . . [P]eople mostly talked as if a college set its standards and then
father was applying to Harvard College in 1949, for example, about twenty-six hundred high school seniors applied, sixteen hundred and fifty were accepted, and twelve hundred showed up the next year for the class of 1954. In 2003, in contrast, almost twenty-one thousand men and women applied to Harvard College and fewer than twenty-one hundred were admitted for a class that numbered about sixteen hundred. It was in response to these relatively recent pressures that Harvard and other elite colleges and universities, for the first time, actually formulated coherent admissions policies for the apportionment of limited spaces among candidates.

“When the selective schools first formulated explicit admissions procedures, they obviously had to make policy decisions as to how to distribute their scarce educational resources. You believe that those schools ought to base their admissions decisions on one particular conception of ‘merit,’ measured primarily by superior performance on grades and test scores. So, my question for you is this: What distribution of educational resources results from that policy decision, and why is that a desirable or just distribution?”

“By ‘distribution,’” Jane asked, “are you referring to the racially skewed allocation of wealth and other resources that results from employing merit, which Justice Ginsburg talks about in her Gratz dissent? I admit that, in adhering to standards of merit, a university often selects a group of students who are more affluent, and more White, than the general population. But the Supreme Court has already made it clear that an incidental correlation between affluence or race, on the one hand, and the quality of the education that a group of people receives, on the other, neither constitutes a racial classification nor invalidates a bona

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admitted all applicants who met them. If this led to expansion, so much the better for everyone. To some extent the colleges even acted out this rhetoric. From 1919 to 1929, for example, applications rose almost as fast as from 1956 to 1966. Instead of curtailing enrollment and pushing up admissions requirements, the private colleges in the 1920s kept requirements fairly stable and expanded. It was in this context that students could speak of ‘passing’ or ‘failing’ their College Board exams (i.e. getting a score known to be acceptable or unacceptable to the college of their choice). Today admissions officers in the private sector talk a different language.

12. The precise figures are these: In 1949–1950, 2800 men were “given final approval to take the Board Examinations” (in effect, were given permission to apply, having satisfied the entrance requirements) by Harvard, 1651 were offered admission, and 1173 enrolled in the class of 1954. See HARVARD UNIV. COMM. ON ADMISSION, REPORT OF THE COMMITTEE ON ADMISSION, IN REPORT OF THE PRESIDENT OF HARVARD COLLEGE AND REPORT OF DEPARTMENTS, 173 (1949–1950), available at http://pds.harvard.edu:8880/pds/servlet/PageDeliveryService?id=200753&type=citation (last visited Feb. 2, 2005). In 2002–2003, 20,986 men and women applied, 2,056 were offered admission, and it was anticipated that there would be an 86% yield, producing an entering group of 1650 students for the class of 2007. Telephone Interviews with Harvard College Office of Admissions staff member (Apr. 7, 2003 & May 5, 2004).
fide attempt to organize an educational system.”

“A five to four decision,” I responded, “but never mind—that is not, in fact, my point. For purposes of this discussion, we can leave aside the larger problem of racial inequality in society. Neither do I mean to start a discussion about the racial, cultural and socioeconomic biases that can sometimes skew the SAT and other standardized tests, nor the ways in which the very process of evaluation can disadvantage non-White applicants, whatever the content of the exams.” For the moment, I am willing to assume that ‘merit,’ as you use that term, can be measured in a way that does not suffer from any of these forms of racial, cultural, or socioeconomic distortion. The question that I am posing is more basic: By using the criteria of ‘merit’ that you’ve described as the touchstone for admission to a competitive university, to whom are you distributing these scarce educational resources?”

“The answer to that question seems relatively straightforward,” Jane responded. “Using merit as the basis for admission to an elite institution distributes those scarce positions to the most qualified applicants.”

“That’s not really an answer, it’s a tautology,” I said. “The only basis you’ve offered for designating an applicant as ‘qualified’ is excellence in the particular measures of ‘merit’ that you’ve embraced. It’s those very metrics that I’m asking you to explain.”

Jane frowned at this but then said, “Fair enough. Let me offer a more rigorous answer. Employing merit as the touchstone for admissions in a competitive university has the effect of reserving educational opportunities to those applicants who have already made effective use of such opportunities in the past and demonstrated a high likelihood of

14. See San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–38 (1973) (upholding state’s assignment of school districts based on district wealth despite disparate impacts upon poor and minority residents); see also Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (challenge to facially neutral policy must include robust showing that discriminatory results were intended result of policy; mere evidence that policymakers were aware that disparity would occur does not suffice); Washington v. Davis, 426 U.S. 229, 242 (1976) (challenge to facially neutral policy must include evidence of discriminatory purpose; evidence of disparate impact, standing alone, does not suffice).


being able to do so again.”

“Exactly,” I said. “And how do you defend the policy decision to distribute scarce educational resources in that fashion?”

“I defend that distribution as a necessary reflection of the principles that govern all educational institutions,” Jane responded. “We use that same concept of ‘merit’ to evaluate the accomplishments of students once they are admitted, rewarding superior performance in the classroom by conferring superior grades. In order for the principles governing the institution to be consistent, we also reward a past history of strong performance in the admissions process. Admissions policies are thus designed to ensure that scarce educational opportunities will go to those applicants who demonstrate the greatest ability to make use of them.”

“I actually agree with that last sentence,” I replied, “though not in the way that you intend. Here is the basic structure of the situation, as I see it.”

B. Tobias Suggests an Alternative Philosophy for University Admissions

“In defining its mission, a university makes decisions about its fundamental educational goals or purposes—its reason for existing as an educational institution. On the basis of those decisions, the university draws conclusions about the sort of student body that it seeks. It then devises an admissions process suited to produce that sort of student body. As should be clear, ‘the greatest ability to make use of’ the institution’s scarce educational opportunities can only mean ‘the greatest likelihood of fulfilling the educational goals that the institution has set for itself’—that is, the institution’s reason for offering those opportunities in the first place.” The Grutter majority appears to acknowledge this basic observation when it refers to Michigan Law School’s ‘educational judgment that [racial and ethnic] diversity is essential to its educational mission’ and expresses a willingness to defer to that judgment.

“But once we characterize the situation in this fashion, it becomes
obvious that there are any number of plausible and defensible goals that a college or university could set for itself, each of which would in turn require for its fulfillment a different admissions policy. I am not merely referring to the debate over racial and ethnic diversity here. As a general proposition, the concept of ‘merit’ in the admissions process is necessarily dependent upon the purposes for which that process is devised—that is, the goals that the institution has set for itself.¹⁹

“The most visible goal of an educational institutional—and perhaps the most central—is a pedagogical one: We seek to give our students knowledge and develop their critical thinking. In service of that pedagogical goal, we evaluate our students in the classroom according to criteria of merit like those you have described. On this issue, we have no disagreement. Where you go wrong is in assuming that these purely pedagogical goals are the only ones that an educational institution may legitimately embrace; or, alternatively, that the evaluative principles underlying a university’s purely pedagogical goals must also govern any other institutional goals that it might seek to pursue. That assumption is clearly flawed.”²⁰ Quite apart from the question of racial diversity, there are any number of institutional goals and purposes that do not adhere to the principles of rewarding past performance that you have identified and yet are widely recognized as legitimate and have been adopted by distinguished colleges or universities.

“One institution might set out to train the most skilled scientists, mathematicians, and engineers, regardless of their social concerns, commitment to public service, or likelihood of becoming respected and valuable members of their civic communities. Many distinguished institutes of technology have adopted some variation on this goal. Such a university will likely pay little attention to an applicant’s ‘extracurricular activities’ in its admissions procedures. It may place minimal weight upon an applicant’s personal statement, not bother with face-to-face interviews, and even ignore an applicant’s academic performance in non-technical subjects.

¹⁹. Professor Banks makes this point succinctly in his discussion of college admissions: “Merit is a functional concept—no quality or characteristic is inherently meritorious. Merit is necessarily defined with respect to particular contexts, goals, and values.” R. Richard Banks, Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions, 79 N.C. L. Rev. 1029, 1034 (2001); see also Richard H. Fallon, Jr., To Each According to his Ability, From None According to his Race: The Concept of Merit in the Law of Antidiscrimination, 60 B.U. L. Rev. 815, 825 (1980) (“A human quality can be excellent or meritorious only so far as it satisfies valued human purposes.”).

²⁰. Professor Fallon makes a similar observation:
Perhaps because of the feature of temporal precedence, some critics seem to have assumed that merit claims based on past acts must possess a logical or moral priority over merit claims based on future potential. The opposite is more nearly true. Merit cannot be judged apart from human interests and desires. And human interests are characteristically forward-looking, seeking satisfaction in the present and in the future.

Fallon, Jr., supra note 19, at 823.
“Another university, in contrast, might set out to recruit applicants who bid fair to be the next generation’s public figures and professional leaders—the Senators, Representatives, and Presidents, the corporate CEO’s. Such a university will place emphasis upon personal statements and face-to-face interviews in the admissions process. It will value a demonstrated commitment to organizational involvement, community service, and civic accomplishments. It will seek a religiously, ethnically, racially, geographically, and economically diverse student body in order to maximize the likelihood that its graduates will become leaders in a wide variety of communities and professions. It will of course set some requirements for purely academic performance—grades and test scores—but it may admit applicants who fall below the ordinary thresholds in those areas if, in other respects, they look especially promising. Harvard has justified its search for ‘geographic diversity’ among students in precisely this manner.21

“A third college might set as its goal the fostering of artistic and literary talent, as Sarah Lawrence and Bennington have done.22 A fourth might seek to keep alive a love for the classical literatures of the Western tradition, as St. John’s has done.23 Each of these schools will craft an admissions process that helps to promote its goals, and each will administer that process in a manner that selects those applicants who have exhibited the greatest merit, as merit is defined by those goals. Since their purposes differ, so will their admissions criteria, and so, in turn, will their definition of what constitutes ‘merit.’24

21. In a speech, for example, Harvard University President Lawrence Summers proclaimed: “Those two missions—developing new ideas and training the leaders of the future—are the two great missions of this University.” Lawrence H. Summers, Speech to the Harvard College Fund Assembly, (Oct. 12, 2002), available at http://www.president.harvard.edu/speeches/2002/collegefund.html; see also David Leonhardt, As Wealthy Fill Top Colleges, Concerns Grow Over Fairness, N.Y. TIMES, Apr. 22, 2004, at A1 (describing efforts by President Summers to achieve more economically diverse student body because “[a]n important purpose of institutions like Harvard is to give everybody a shot at the American dream.”).

Harvard may know something the rest of us don’t. Professor Lani Guinier reports one suggestive set of data concerning the correlation between traditional measures of merit (grades and test scores) and the success of Harvard graduates: “Harvard College did a study of three classes of its graduates over a 30-year period and found that two things predicted success as Harvard measured it: low SAT scores and a blue-collar background.” Lani Guinier, Confirmative Action, 25 Law & Soc. Inquiry 565, 568 (2000).

22. The Web site for Sarah Lawrence College, for example, explains: “Sarah Lawrence recognizes the creative and performing arts as integral to a liberal arts education.” At http://www.slc.edu/about/index.php?pageid=1402 (last visited Apr. 11, 2003).

23. St. John’s College says the following about its institutional mission: “St. John’s College is a community dedicated to liberal education. Such education seeks to free men and women from the tyrannies of unexamined opinions and inherited prejudices. It also endeavors to enable them to make intelligent, free choices concerning the ends and means of both public and private life. At St. John’s, freedom is pursued mainly through thoughtful conversation about great books of the Western tradition.” At http://www.sjca.edu/asp/main.aspx?page=1002 (last visited Jan. 28, 2005).

24. Professor Fallon makes a similar observation in Fallon, Jr., supra note 19, at 822.
“Indeed, one need not look to universities with specialized or idiosyncratic institutional goals for an illustration of this principle. Almost every selective institution uses its admissions criteria to further a range of purposes that have nothing to do with rewarding applicants for past academic success. Legacy policies—that is, preferences for the children of alumni—have proven quite successful in reinforcing institutional loyalty and, hence, encouraging generous donations.\textsuperscript{25} Recruitment of athletes likewise can generate revenue for an institution, and successful sports teams can contribute to the overall campus atmosphere.\textsuperscript{26} Supporters of affirmative action often invoke the ubiquity of legacy and athlete preferences to argue that institutions already employ admissions criteria having nothing to do with ‘merit,’\textsuperscript{27} but that argument misses the point—indeed, it reinforces the misperception that I’m seeking to isolate. The point is that legacy and athlete preferences can be tools for furthering institutional policies in exactly the same way that test scores and grades are. The relevant question is, what policies do those tools promote, and are those policies legitimate or desirable?\textsuperscript{28} We do not permit athletic ability to guide the evaluation of a student’s performance within the classroom—and we call it corrupt when athletes get special grading treatment—because athletic ability has no relationship to the pedagogical principles that guide the evaluation of classroom work. But, for the same reason, those pedagogical principles need not be the sole guide (or even the dominant guide) in deciding who will be admitted to the institution in the first place.

“You are quite correct that the narrow concept of ‘merit’ that you have articulated enjoys broad currency. It serves as a constant counterpoint in debates over affirmative action. It is always the first rejoinder to any suggestion that the race of non-White applicants might play a role in a university’s admission policy.\textsuperscript{29} It is presumed by many to

\textsuperscript{25} See William G. Bowen & Derek Bok, \textit{The Shape of the River} 24, 286–87 (1998) (discussing legacy policies); Schuck, supra note 9, at 143–44 (similar discussion).

\textsuperscript{26} See Bowen & Bok, supra note 25, at 29 (discussing preferences for athletes); Schuck, supra note 9, at 143–44 (similar discussion).

\textsuperscript{27} See Schuck, supra note 9, at 153 (“[A]dvocates of racial preferences maintain that conventional merit standards are routinely violated by other preference practices that bear little or no relation to any defensible conception of merit and that exhibit few if any of affirmative action’s virtues.”).

\textsuperscript{28} As should be clear, our assertion that legacy status and athletic ability can lay claim to the title of “merit” in the same fashion that academic ability can should not be taken as an endorsement of admissions policies that grant special preferences to legacies and athletes. Our mission in this Article is to clarify analytical categories and to pose more refined questions. Here, we clarify the analytical category within which legacy and athlete preferences should be assessed, but we do not claim any special wisdom as to whether those preferences produce desirable institutional results. For one highly critical analysis of the impact of athlete preferences on other institutional goals, see William G. Bowen & Sarah A. Levin, \textit{Reclaiming the Game: College Sports and Educational Values} (2003).

\textsuperscript{29} Conservative critics of affirmative action so completely identify admission to selective colleges and universities as a reward for merit, and hence as deserved, that they often cannot
define the arena within which all admissions decisions must be made.\textsuperscript{30} That presumption, in turn, is the central organizing principle from which affirmative action, and many other efforts at progressive reform, are assumed to derogate.\textsuperscript{31} The ‘harm’ associated with affirmative action, under this received view, is not merely the consideration of race in the abstract. Rather, it is the use of race to distort or displace an evaluative process, the tenets of which are presumed to be an essential element of university admissions. This attitude pervades the opinions in \textit{Bakke}, which characterize the admissions process as a ‘competition’ and frame their analysis by asking how far schools may depart from competitive principles when they select students,\textsuperscript{32} and the Court continues in this mode of reasoning in \textit{Gratz} and, to a lesser extent, in \textit{Grutter}.\textsuperscript{33}

distinguish between the adoption of some alternative principle of selection and the promiscuous rejection of all standards whatsoever. This confusion is present throughout the work of Dinesh D’Souza, for example. See, e.g., \textit{Dinesh D’Souza, Illiberal Education} 229, 246 (1991). Abigail and Stephen Thernstrom take a somewhat different tack, arguing at length that the admission of “unqualified” or “under prepared” minority students to elite institutions is counter-productive, resulting in poorer performance and higher drop-out rates. See, e.g., \textit{Abigail Thernstrom & Stephen Thernstrom, America in Black and White}, 393–97 (1997). Their claims have been painstakingly and thoroughly refuted by Derek Bok and William Bowen. See \textit{Bowen \\& Bok, supra note 25}. Nonetheless, Bowen and Bok operate very much within the same frame of reference as the Thernstroms. They differ principally in their assessment of the effects of the affirmative action policies that they favor and that the Thernstroms oppose.

\textsuperscript{30} See, e.g., Guinier, \textit{supra note 21}, at 570–71 (describing resistance among some opponents of affirmative action in recognizing that the “success” of an institution’s graduates must be assessed in light of that institution’s stated educational goals).

\textsuperscript{31} Professors Sturm and Guinier characterize this narrative as the “stock story” of affirmative action:

\begin{quote}
    The stock story of affirmative action critics in the employment context (and the one that appears most often in the cases) is of the white civil servant—say a police officer or firefighter—John Doe. He scored several points higher on the civil servant exam and interview rating process, but lost out to a woman or person of color who did not score as high on those selection criteria. John Doe claims, along with many public opponents of affirmative action, that he is more qualified for the job, and that it is unfair to allow race or gender considerations to deprive him of what he “deserves.”
\end{quote}

Sturm and Guinier, \textit{supra note 15}, at 660–61 (footnote omitted). It is worth noting that, as will presently become apparent, the important challenge that Sturm and Guinier levy to the definition of merit in their article is a less foundational one than the challenge we offer here. Compare \textit{id. at 957} (“In challenging the way [standardized] tests are used, we are not proposing a critique of merit per se. . . . The approach we develop in this Article links affirmative action initiatives with the project of fundamentally rethinking how we define and practice genuine merit selection.”), with Parts \textit{II, III infra}.

\textsuperscript{32} See Regents of the Univ. of Cal. \textit{v. Bakke}, 438 U.S. 265, 319 (1978) (“No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, [White applicants] are never afforded the chance to compete with applicants from the preferred groups for the special admission seats.”); see also Fallon, Jr., \textit{supra note 19}, at 815 (“A familiar metaphor [employed in \textit{Bakke}] likens life to a race: all are entitled to an equal start, but the swift should not be denied their prize.”) (citing \textit{Bakke}, 438 U.S. at 372 (Brennan, J., concurring in the judgment in part)).

\textsuperscript{33} See \textit{Grutter v. Bollinger} 539 U.S. 306, 338 (2003) (offering fact that “Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants . . . who are rejected” as evidence that consideration of race does not eclipse consideration
“These presumptions,” I continued, “are deeply flawed. There is nothing necessary or essential about your particular conception of ‘merit’ in the admissions process, despite its centrality in the evaluation of classroom work. In admissions, your version of ‘merit’ simply embodies one policy determination, among many other possibilities, for the distribution of scarce educational resources. A university would not lose its essential features as an institution of higher learning if it pursued admissions policies with wholly different distributive consequences. Indeed, an excessive focus on grades and test scores can frustrate an institution in its pursuit of other important institutional goals.”

Lani Guinier has made observations along these lines about Michigan Law School, based on a recent study that documents the effect of affirmative action on that school’s institutional missions.

“In asserting that grades and test scores define the inherent and universal core of ‘merit,’ you aggrandize that term, giving it an unwarranted role as a moralistic counterpoint to arguments about education and social justice. I aim to dislodge you from that mode of thinking. Indeed, scholars have long questioned the a priori assumptions about ‘merit’ that you have articulated, sometimes with particular reference to the defensibility of affirmative action. Yet there remains
widespread conceptual resistance to this basic analytical observation, even among sophisticated thinkers, as your reactions make clear.”

“Well, that ‘widespread resistance’ may be a consequence of the many practical problems with the position that you’ve staked out,” Jane briskly replied. “First of all, none of these observations erases the constitutional problems that arise when a university considers race in its admissions decision, whatever other criteria it may rely upon.”

“I grant,” I said, “that there’s more to discuss where that issue is concerned—”

“But more to the point,” she continued, cutting me off, “although you have suggested several alternative ‘distributions’ of educational resources that one might envision in the abstract, and pointed to a few variations in the missions of actual institutions, you have not provided any convincing illustration of the claim that competition based on merit—that is, ‘merit’ as I, and the majority of people, understand the term—is not an inherent feature of the admissions process in a university with limited space, at least in our present society. Each of the particular institutions that you have discussed—Harvard, Sarah Lawrence and so forth—employs a competitive admissions policy, even if each school places more or less emphasis on particular areas of accomplishment. And even the most aggressive affirmative action programs (or legacy or athlete preferences, for that matter) do not replace merit-based admissions wholesale, nor do they claim to.37 Perhaps the reason that there’s such ‘widespread resistance’ to this keen analysis of yours is that, in practice, all elite institutions basically conform to the same competition-based norms in distributing their scarce resources. I happen to subscribe to Holmes’s assertion that ‘[t]he life of the law has not been logic, it has been experience.’38 If you want me to give serious consideration to the notion that merit-based competition—defined by quantifiable, objective measures of superior individual accomplishment—is not the key element in the fair distribution of scarce educational resources in America today, then you’re going to have to offer me a fully worked out, concrete example.”39

37. Cf. Sturm & Guinier, supra note 15, at 956 (“[A]ffirmative action, as it is currently practiced, supplements an underlying framework of selection that is implicitly arbitrary and exclusionary. It does not challenge the overall operation of a conventional and static selection process; instead, it creates exceptions to that process.”).

38. Oliver Wendell Holmes, Jr., The Common Law 1 (Little, Brown & Co. 1881).

39. Professor Banks captures the force of this received view of the importance of “merit” in his discussion of the “institutional practices” that have arisen around it: Individuals expect to be treated consistent with prevailing practices. Failure to confer such treatment violates reasonable expectations. In the admissions context, if a selective university has established the practice of evaluating applicants on the basis of their absolute level of academic achievement, then applicants deserve to be evaluated on that basis, and the highest-achieving applicants deserve to be admitted before lower achieving applicants.
As I began to formulate my response, the Dean of the host institution called for quiet and my father approached the podium. Jane and I looked up, looked at each other, and tacitly agreed to suspend our debate. “I haven’t spoken with my father about the issues that he’ll be addressing,” I whispered to Jane as the crowd grew still, “but, based on the title of his talk, I have a hunch that his remarks may go a long way toward answering the challenge you’ve just posed. Let’s continue our discussion after my father finishes his address.”

My father seemed somewhat apprehensive as the room quieted. He explained apologetically that, when first invited to deliver an address at this convention, he had announced that he would speak on the topic of “Contradictions in the Distribution of Resources in American Medicine and Higher Education,” drawing upon an essay that he had written for a South African audience some years ago.40 But, he went on, “As the day approached for my presentation, I realized that I had simply not produced the paper I promised. I thought about canceling my appearance altogether, but, since my son the law professor was planning to attend, I thought it would be bad form for me to fail to show up.” He took a moment to locate me in the audience and then pointed at me and waved jauntily. “So, in place of the academic discourse that I promised, I would like to entertain you with an account of a trip that I took recently. I hope you will find it amusing, and that you will not be too disappointed.”

I began to wish that I could leave quietly, but Dad had nullified that option when he identified me for the audience. There was nothing to do but put a serious, thoughtful “conference expression” on my face and hope for the best. This is what my father said.

II. The Philosopher’s Tale

(Robert)

Last summer, finding myself with enough time on my hands for a brief overseas vacation, I asked an agent at the local travel bureau to find me someplace completely new and out of the way to visit. He sifted through a dusty pile of brochures shoved to the back of a drawer and came up with the tiny Republic of Invertia, almost exactly halfway around the world. An island nation with a population of slightly more than four million, Invertia has no history, art, music, or natural landmarks of any note and hence has been virtually ignored in the modern travel boom. I agreed forthwith and told him to book me a

Banks, supra note 19, at 1042; see also Sturm & Guinier, supra note 15, at 964-65 (discussing similar ideas in terms of “notice and detrimental reliance”).

round-trip flight, together with reservations at what appeared, from the brochure, to be Invertia’s sole tourist hotel. Three days later, I was on my way.

We touched down in the capital city of Invertia and I arrived at my hotel shortly thereafter, suddenly realizing that I had four days to fill and no idea what there was to do. Fortunately, the National Tourist Bureau (such as it was) occupied the building next to the hotel, and I presented myself at the information desk and asked the clerk what Invertia had to offer.

“You must surely visit our national hospital, and also our national university,” he replied. “We in Invertia are enormously proud of both institutions, and no visitor to our island should fail to see them. I will telephone the Ministries of Health and Education and arrange the entire matter.” Later that evening, I found a message at the hotel from the Travel Agent: The next day, I would be given a tour of the leading hospital of Invertia; the following day, I would see the university.

As I came down to the lobby of my hotel on my second day in Invertia, I found the Minister of Health herself waiting for me. Apparently tourists were rare enough to warrant the red carpet treatment, no matter how unimportant they might be. We got into the official limousine at the curb and set out for the National Invertian Center for Health, or NICH, as the Minister called it.

Approaching the NICH, I was powerfully impressed by the size and elegance of the building, gleaming with marble facade and surrounded by carefully maintained lawns and gardens. Clearly, the government of Invertia put health care very high on its agenda. I assumed I would be driven to the rather imposing front entrance for an official tour, but instead the Minister directed the driver to pull up in front of the Emergency Room. As she explained to me, the ER was the heart of any hospital, and I would get the best possible idea of how Invertians handled their medical services by observing its activities for a while.

Walking through the automatic sliding doors into the Emergency Room of the Invertian National Hospital, I was struck immediately by how quiet, clean, and orderly everything was. My own experience of hospital emergency rooms—not to mention the images from countless movies and television series—had led me to expect a chaotic swirl of patients, nurses, and interns, with weary family members slumped in chairs along the wall staring blankly at out-of-date magazines. Instead, I could easily have mistaken this ER for the reception area of a big law office or corporation.

For a moment, I simply stood and looked around, trying to adjust my perceptions to my expectations. Then the sliding doors opened again and two men came into the Emergency Room. The first was a man in
obvious distress. He looked to be in his sixties, was quite overweight, and bore the distinct, musty scent of a heavy smoker. He staggered more than walked into the ER, calling out in pain as he lurched toward the reception desk. “Please,” he said in a gasping, feeble voice, “help me! I think I’m having a heart attack!” With that he slumped to the ground, clutching his chest.

The second man was a tall, handsome youth—a veritable Adonis—who walked with an easy, athletic stride. He wore an elegant suit and tie, had smoothly tanned features, and appeared to be in perfect, robust health. These impressions, I must admit, are somewhat reconstructed from subsequent reflection, because my attention was entirely seized by the poor man writhing on the floor.

As I stood there frozen, watching what seemed to be the last moments of a dying man, the ER erupted into movement. The attendant behind the reception desk spoke a few quick words into the phone at his elbow, and moments later the swinging doors flew open as an intern hurried into the room pushing a wheelchair. I prayed that they would be in time to save the man on the floor, who was now straining for breath with great, raking gasps.

To my astonishment, the intern rushed past the stricken man and instead approached the young Adonis, whom he gently guided into the wheelchair. Then, solicitously settling a blanket about the young man’s feet, he made a detour around the body on the floor, glancing at it somewhat irritatedly, and carefully pushed his new patient to the reception desk. As I watched, too horrified to speak, the man on the floor gave a last cry and stopped moving.

Throughout these events, the Minister of Health stood beside me calm, unperturbed, a satisfied smile on her face as if to say, “Well, that is how things are done here. Isn’t that splendid?” Meanwhile, the receiving attendant was taking the young man’s medical history and inquiring as to his needs. Mesmerized, I drew closer to listen to the interview.

So far as I could make out, this was the first time the Adonis had ever found it necessary to seek medical assistance. What had brought him to the hospital was a small pimple on his nose, just to the right of center. He was greatly concerned that the pimple spoiled his otherwise exquisite profile, and he wanted to know whether there were specialists in the hospital who could remove it without leaving an unsightly scar.

As he said this, the Minister of Health, with a great air of self-satisfaction, held up her hand, as though to say to me, “Watch this!” The attendant spoke again into the phone, and immediately a distinguished looking doctor appeared, introducing herself as a plastic surgeon. She assured the young man that every facility of the hospital would be put at his disposal, and she expressed herself as absolutely
confident that her team could remove the pimple with no visible scar whatsoever. She had removed many such pimples, she said, and had never lost a patient. With that, the intern rolled him through the swinging doors and disappeared, followed by the surgeon. A short while later, two orderlies brought in a large waste bin, unceremoniously loaded in the body of the heart-attack victim, who had finally expired, and exited again.

I was so appalled by what I had witnessed that I had trouble finding the words with which to give voice to my thoughts. Most mysterious of all was the obvious satisfaction with which the Minister of Health had observed the events. Her pride at the treatment of the young man’s pimple, and her utter unconcern for the dead man, bespoke an attitude, a moral framework, a world view, so different from mine that I could scarcely imagine where to begin my questions.

“Well,” she said, breaking into my troubled stream of thoughts, “now you have seen us at our very best. What do you think of the Invertian health care system? How does it compare with that of your own country?”

Very quietly, with great self-control, I undertook to discover some explanation for what I had witnessed. “Let me start,” I said, “with the man who died of a heart attack on the floor before us. Why did no one try to help him? Why wasn’t he immediately taken into an examination room, given emergency treatment, put on oxygen, given drugs? Is your hospital not equipped to handle such cases?”

“Oh, we are more than adequately equipped to handle a heart attack, but what would have been the point? He was clearly close to death when he came through the doors of the ER.”

“But with quick action, you might have saved him! He died at our feet!”

“Exactly,” she said, as though I had proved her point. “Over a period of years, we have kept quite careful records of patients admitted while suffering massive heart attacks, especially those who exhibit aggravating factors like obesity and cigarette addiction. Our experience shows that such patients have a very poor prognosis for recovery. A considerable number—almost half, I believe—actually die during our efforts to save them or shortly thereafter, and a majority of those who do live through the first days or weeks of treatment emerge from the hospital in a compromised state of health. Many need further medical treatment, a number have subsequent heart attacks, and, taking all in all, the prospects of heart-attack patients for full recovery and healthy, happy post-attack lives are quite poor. So you see, it makes very little sense to devote our splendid medical resources here at NICH to treating what can only be considered marginal patients.”
In order to grasp the utter callousness of this speech, you must understand that it was not delivered apologetically, or hesitantly, or with an embarrassed awareness of the inadequacies in the Invertian health system thereby revealed, but with a sort of self-satisfied assurance, not to say smugness. The Minister of Health clearly was a woman supremely pleased with the performance of those under her command and confident that I would share her pleasure once I understood the marvelous efficiency of NICH.

“Do you never treat anyone suffering from a heart attack?” I asked.

“Of course we do,” she replied, “but only when we determine that the patient has a very good chance of complete recovery. Before we will admit a heart-attack patient, we require an extensive physical examination, a complete medical history, and letters from the patient’s previous physicians explaining why they believe that the patient’s heart condition is not an accurate indication of his or her general health. If, in light of the entire medical dossier, we decide that the patient can reasonably be expected to recover from the heart condition quickly and live a long, healthy, productive life without further medical intervention, then we are quite prepared to make an exception. Indeed, our admitting attendants are specifically instructed to keep an eye out for promising patients who might, in the ordinary course of events, be overlooked because of apparently contraindicated previous conditions.”

“And the handsome young man with the pimple on his nose?” I asked. “He does not seem to have gone through an elaborate background check or a series of admissions tests.”

“Quite true,” she replied. “Ordinarily, any patient seeking admission to the hospital must go through the entire procedure of medical evaluations; but, every so often, we see a patient who is obviously bursting with good health and natural physical gifts—fit, vigorous, strikingly attractive. When such a patient comes along, needing only the very slightest medical adjustment to emerge in perfect condition, a patient with whom our chance of success is virtually one hundred percent, we are prepared to waive the normal procedures and speed the admission process. That young man was one of the most promising patients I have ever seen. Our Cosmetic Surgery Department’s success with superficial pimples is close to perfect. As soon as I saw him, I was sure he deserved admission to the hospital. When he is released, he will be an outstanding specimen of Invertian youth. I would hazard a guess that he will never need medical attention again.”

I was struggling to find my bearings in what seemed more and more to be a Kafka-esque hall of mirrors. “Let me be absolutely sure I understand what you are saying,” I said. “You operate this hospital on the general principle that patients will be admitted only if they have
relatively minor ailments which you can be virtually certain of curing. When someone is desperately in need of medical attention, such as the man who died here only a few minutes ago, you deny it on the grounds that such people have a poor chance of being totally and completely cured. But when young Adonises or Venuses present themselves to have a pimple removed, a hang nail trimmed, or a slight headache treated symptomatically—in short, when patients appear who do not need medical care in order to survive, but merely want it so as to become even healthier and more attractive than they already are—then you lavish the full resources of this magnificent modern hospital on them. Do I have that right?”

“Just so,” she said. “I think you are now beginning to understand how the Invertian medical system works.”

“But men and women are dying every day, some of whom could be saved by your hospital. And in return, all you get is the satisfaction of knowing that your healthiest, most attractive young men and women are pimple and hangnail free! How can you possibly justify devoting all your medical resources to such frivolous ends?”

“Oh, dear,” she replied, obviously distressed that I understood so little of what she had been saying. “I am afraid you have things quite upside down. If we were to do as you suggest, and admit to our hospital patients with heart attacks, cancer, internal injuries from automobile accidents, and heaven knows what else, we should be swamped! We might manage to handle a few, though it would mean turning away thoroughly qualified patients like that young man who was just admitted. To let them all in would be impossible!

“Indeed,” she went on, “we couldn’t do it even if we wanted to. Our medical staff is not trained to deal with life-threatening ailments, save for a handful of specialists in the Trauma Center. What would all our supremely well-trained Plastic Surgeons, Podiatrists, and Dermatologists do to keep busy? Besides, we haven’t the physical facilities to treat such patients. In this hospital, there are four entire wards of Plastic Surgery, each completely staffed and outfitted, including a Nasal Reconstruction center. But there are only two physicians with any experience of major heart ailments, and neither of them has the capacity to treat more than three or four patients at a time.

“All that is entirely secondary, however, for what is at stake here is a matter of fundamental principle. Invertian society needs an elite core of superbly healthy men and women whose every last imperfection or blemish has been meticulously removed by the most modern techniques of medical science. In an ideal world, where there are infinite resources, we could, I suppose, build endless hospitals to treat unhealthy patients suffering from heart disease, cancer, severe internal injuries, and other
life-threatening problems. But resources very definitely are not infinite,
and, as I am sure you will recognize, it requires considerably greater
resources to treat each dying patient than it does to correct the
imperfections of healthy patients. When you consider that many of the
really sick patients simply die despite our best efforts, you will concede
that it would be utterly quixotic of us to turn our entire medical system
upside down, all for the purpose of trying to save the lives of men and
women who, even if they do live, will never play a set of competitive
tennis, run a respectable marathon, or grace our city with their good
looks.”

I am a philosopher by profession, and argument is my stock in trade,
but the image of that poor man dying in agony at my feet blotted out all
thought of logical byplay. I listened to the Minister’s arguments with a
heavier and heavier heart. When she had finished, I asked meekly
whether we could leave, and I returned to my hotel without seeing
anything more of the NICH. I was slated to visit the university the next
day, and I could not even imagine what I would find there. Nazi-style
experimentation on human subjects? Lock-step courses in Invertian
ideology? A Department of Astrology and Dianetics?

I spent a troubled night.

The next afternoon, it was the Minister of Education who appeared
at my hotel to conduct me on a tour of the Invertian National University.
The Minister was a short, corpulent, energetic man who perspired freely
in the warm midday sun. My mind was still filled with the images of that
poor heart-attack victim, dying on the floor of the ER, utterly ignored by
doctors, orderlies, and the Minister of Health herself. I am afraid I was
only half listening as the Minister of Education poured out statistics on
the way to the University. I did manage to gather that the University had
a full complement of departments in the Arts, Humanities, Social
Sciences, and Natural Sciences, as well as small but well-staffed Law,
Medical, Engineering, and Business Schools. Even before we arrived at
the university, I began to feel more at home.

The Central Administration Building was a large, nondescript,
functional structure—the sort of building one could see on any of a
thousand American campuses. After parking in a place especially
reserved for the Minister’s car, we entered and went first to the Student
Admissions Office. The Minister explained that this was the best place to
get a feel for how the University operated.

The Admissions Office looked just like any college admissions office
in America. There were racks with copies of application forms, class
schedules, literature promoting one or another of the various degrees
offered at the university. A bulletin board had sprouted with the usual
hand-printed notices of rooms to share, typing services, furniture for sale,
secondhand textbooks and the like. There were several admissions officers waiting to greet prospective students. All rather familiar and comforting, I thought to myself, especially after the disorienting visit to the hospital.

As I stood there with the Minister and his aide, looking about the large room, the door opened behind us and two young people walked in. First through the door was a neatly dressed young woman whose face and manner bespoke a practiced intelligence and self-confidence. As she approached the desk of one of the admissions officers, I edged closer in order to overhear their conversation.

She introduced herself forthrightly, in a cultivated voice, and said that she wished to enter the university to pursue a degree in Mathematical Physics. She explained that she was a straight-A student at her secondary school, had achieved perfect scores on the Invertian equivalent of the Scholastic Aptitude Test, and in fact had already published several original papers on a rather recondite branch of Mathematical Physics in Invertian and foreign journals. She was, she added, a champion swimmer and tennis player, and also had given public concerts as a pianist. In her spare time, she said, she worked with learning-disabled children and took inner-city girls on nature walks. Needless to say, I was tremendously impressed. This was just the sort of outstanding student I had encountered at Harvard, Yale, Stanford, Swarthmore, and the other top colleges and universities in America. She had that pulled-together look of someone who knows her own abilities, has worked hard to develop them, and has acquired thereby a justifiably high sense of self-worth. At the University of Massachusetts, where I have taught for the past three decades, we see precious few such students—by and large, they have been wooed away by the Ivy League. But we cherish them when they appear. They make up for the tedium of ordinary teaching. How fortunate for Invertia, I thought, that such students simply walk through the door of their Admissions Office!

As she spoke, the admissions officer grew visibly more impatient, fidgeting with his pencil and rather ostentatiously leafing through some paperwork on his desk. When the young woman had finished, he looked up. “Well, that’s very nice,” he said, in a perfunctory tone of voice. “You’ve obviously accomplished a great deal. Take an application form and fill it out. We will contact you if we can find room for you.” With that, he dismissed her and turned his attention to the second applicant.

My first thought was that the young woman had stumbled upon a small-minded bureaucrat who resented young people manifestly more talented and accomplished than he. But as I stood there, wondering what might happen next in this topsy-turvy country, I heard the young woman saying to an older couple who were apparently her parents, “I knew I wouldn’t get in.” The looks on their faces confirmed that she would
indeed be denied admission to the university.

The Minister of Education had observed all this with apparent approval. Didn’t he care that so supremely well qualified an applicant had been summarily turned away from the National University without so much as an interview? How on earth could he explain to the faculty of the university that the very best students were being denied admission? At that moment, the second potential student stepped up to the admissions officer’s desk, and the Minister, with much the same gesture that his colleague had used the day before, motioned to me to watch how this applicant was treated.

Standing before the desk was a young man who, in every conceivable way, contrasted totally with the young woman who had just been sent packing. He was carelessly dressed, slouched rather than stood, and seemed bewildered by his surroundings, as though a university were entirely *terra incognita* to him. Well, I thought, they shan’t waste too much time on him.

Even before the young man started to speak, the admissions officer’s manner changed completely. He put down his pencil and visibly gave the applicant his complete attention. “How may I help you?” he asked solicitously, his voice friendly and inviting.

“I wanna go to school here,” the young man said, in a manner both belligerent and insecure. “But, I didn’t get good grades in high school or nothin’. I mean, it took me six years to graduate and all.”

“Can you read?” the admissions officer asked.

“Sure I can. I mean, I don’t read a lot of books or stuff like that, but I can read the sports pages well enough to know which team’s ahead.”

“And how about writing. Have you ever written an essay of, say, three pages in length?”

The young man looked about suspiciously. “Say, what’s the idea of the third degree? I just said I wanted to go to school here. I didn’t say I wanted to be one of the damned teachers.”

“Of course, of course,” the Admissions Officer answered in a tone intended to calm the young man’s anxieties. “We quite well understand. Would you wait just one moment?”

With that, he picked up the phone and said a few words too softly for the young man, or me, to hear. Almost at once, a door at the rear of the reception room opened, and a group of distinguished-looking men and women entered, wearing full academic regalia, as though on their way to a commencement. They gathered around the young man, took him gently in tow, and led him off through the rear door.

“What’s going on?” I asked the Minister, who had been teetering back and forth on his heels throughout these events, hands in pockets,
with a broad smile across his face. “Were those senior members of the faculty? What are they doing here in the Admissions Office? Why are they wearing their ceremonial robes? Where are they taking that young man? And why on earth was that extraordinary young woman denied admission to your university?”

The Minister was somewhat taken aback by this rush of questions, but he motioned me to a chair, and undertook to explain what I had just witnessed. He sat down in a chair opposite me and gave a tug at his vest, as though to settle himself for a lengthy discourse.

“Let us take your questions in reverse order,” he began, “inasmuch as the young lady’s case was dealt with before that of the young man. The young lady was denied admission to our university because she is highly intelligent, superbly well-trained, already quite accomplished, and powerfully motivated to continue her studies.”

“You denied her admission because she is intelligent, accomplished, and highly motivated. But surely she is an absolute certainty to do well at university. I would imagine the probability that she will graduate, indeed graduate with honors, is just about one hundred percent.”

“I’m glad you saw that,” he replied, apparently pleased that I was catching on. “I thought perhaps, this being a somewhat unfamiliar setting, that you might not have recognized it as soon as we, who are more practiced at the ins and outs of admissions. I was half sure before she even opened her mouth, and as soon as she said she had published original papers in Mathematical Physics, I knew there was no point in letting her in.”

“But think how much she can profit from a university education,” I protested, feeling as I did so that I was rapidly losing my grip on reality. “With her background and preparation, a university education will bring her to the very pitch of intellectual perfection. By the time she leaves, she will be operating virtually at the same level as some of your most senior faculty. And think what a delight it would be for them to have such a student in their courses. Why, they could present the very latest results of their own research for her consideration and critique, instead of plodding through the elements of basic Physics and Mathematics.”

“Well,” the Minister answered, “you have just made the case for rejecting her—as good a case as I could have made myself. That young woman is already so well developed intellectually that she does not need what an elite university can offer. Her abilities and motivation ensure that she will obtain the training she needs at any educational institution that she attends, and will probably excel thereafter. Indeed, even without the benefit of a university education, she would obviously do well in life. She is already quite capable of securing a position in one of our nuclear power plants; with a bit of on-the-job training, she would be a productive
and successful member of society. To spend the scarce educational resources of our top university on her would be wasteful and inefficient."

“And that young man,” I said, rather more belligerently than I intended, for I was growing very frustrated indeed. “You have admitted him to the university despite the fact that he can barely read and write. Judging from that flock of professors who shepherded him out of here, he will be getting the most expensive education Invertia has to offer. Yet I will bet my airfare home that he won’t make it through four years of university education. Everything is against him! He needs remedial reading, remedial writing, no doubt remedial math as well. Out of every hundred such students you admit, you probably won’t see more than fifteen of them on Commencement Day.”

“Oh, I agree with everything you say,” the Minister replied. “But what would you have us do? You saw him when he entered. Educationally speaking, if I may put it this way, he was in extremis when he walked in. If we had turned him away, I am absolutely confident that any hope of rekindling an interest in learning would have been lost in him before too long. He would have died, intellectually. At this very moment, our team of professors is working with him, starting the painful, difficult process of developing his intellect, challenging his mind, helping him work through the shame and self-doubt of semi-literacy. As you say, we lose quite a few young men and women like him, but we save quite a few, as well. Imagine the thrill we all feel when one of those young people, whose mind had all but ceased to exhibit curiosity and creativity, begins to read, to write, to think, to argue, to question a world that has, until then, been closed to him.”

I have to admit that I was beginning to feel just a trifle less sure of myself, but I decided to press on nevertheless.

“Look,” I said, trying hard to find some common ground on which the Minister and I could achieve a meeting of the minds. “Your motives are no doubt admirable. I sympathize entirely with what you are trying to accomplish. But how on earth can you use a university faculty to do the most basic remedial education? Where do you find students able to take your advanced courses in literature, philosophy, physics, or chemistry? How can students like that young man even begin to handle the sophisticated intellectual materials presented in advanced seminars?”

“Our faculty are able to help the educationally most wounded of our students—if I may put it that way—because we have for some time been recruiting faculty specifically for that purpose. We require that professors in every department be trained in what I might call emergency educational procedures. The handful of advanced courses we offer are quite adequately enrolled, but we take care to offer few enough of them so that there is no problem in wasted resources. All our facilities are
designed to serve the needs of the educationally disadvantaged. We have even devised a system of icons to guide our poorer readers about in the library.

“As for the drop-outs—of whom, as you suggest, there are many—you must not suppose that our efforts with them are wasted. Not every student who enters our university completes a degree or goes on to advanced study, but even those who are with us for only a semester or two have clearly benefited from the experience. Some who could barely read when they entered are able, for the first time, really to enjoy a daily newspaper. Others have acquired numerical skills that will earn them more challenging and rewarding jobs. Most, I think, acquire some sense, however incomplete, of the life of the mind. And those with whom we completely fail—whose minds die before we can save them—well, they are the price we must pay for the chance to help so many others.

“We could restrict our university to that young lady and her sort. There aren’t many quite that promising, but Invertia has its share of gifted young men and women. What would we accomplish, were we to do so? Our population would consist of a small number of superbly educated people whose already magnificent talents and abilities had been brought to the pitch of perfection by an expensive and exclusive education, and a large population of inadequately educated men and women whose lives are stunted, whose perspectives are narrowed, whose capacity for intelligent self-government diminished, because we denied them admission to our university.”

I was finding this conversation increasingly frustrating, for what the Minister of Education said ran deeply against every ideal and principle to which I had devoted my professional life. I tried one more time to show him the utter absurdity of the educational system over which he presided.

“Look,” I began. “You speak easily of retooling our elite educational institutions so that they can serve the remedial needs of the poorly educated. But you seem not to have asked yourself what it is that makes those institutions so outstanding. We judge Harvard, Stanford, Yale, and Michigan to be ‘elite’ precisely because they search the world for those professors who are skilled at research and theoretical innovation and because they admit just those students who can make the best use of an opportunity to learn under the guidance of world-class scholars. Would these institutions still be elite were they to change their mission to one of remediation? Would the faculty who had joined a Harvard or Stanford precisely in order to have top-flight research facilities and the very best students remain there in order to provide remediation to the underprepared? Would these great universities not be transformed very quickly into Community Colleges?”

“What is more,” I went on, “the United States already has a great
many Community Colleges and branch campuses of state college systems where even students scarcely better prepared than that young man can receive an education through instruction that is at least partially remedial, whatever its nominal classification may be. Why do you not leave the elite institutions to do what they do best—educating students like that splendid young woman?"

The Minister was not fazed by these words, although I spoke them with a rather unscholarly heat. “Like most of your fellow Americans,” he replied, “you unthinkingly confuse two quite separate issues, one pedagogical, the other economic. If by an ‘elite’ university you mean a university at which the top research scholars teach the best prepared students, then I have no objection at all to the existence of elite universities. Indeed, there are several here in Invertia, and I have no doubt that the young woman with whom you are so taken will find her way to one of them. But if by ‘elite’ you mean a university on which lavish resources are showered, with well-designed, handsomely furnished buildings, comfortable common areas, well-endowed libraries, and highly paid professors—a university supported by public funds and accorded special rights and privileges by the State—well, then you must ask whether the educational mission of such an institution can justify its share in the allocation of social resources. We carried out just such a debate in Invertia and concluded that, when spending the people’s money, we had an obligation to apportion it according to need. You, by contrast, are quite content to see your nation’s educational resources gathered into huge concentrations that are then reserved for the least needy young men and women that an energetic Admissions office can locate.

“I cannot tell you whether the faculties of your ‘elite’ universities would remain at their posts were the missions of their institutions to become more complex. You are a better judge of that than I. But under the Invertian system, were they to leave, the resources that provide for their well-paid and comfortable existences would not leave with them. Those funds would be available for the remediation that so many young men and women so desperately need, even in America.”

“But what you are describing would be the death of something noble and splendid—the gathering together of talent and intelligence in a Great Conversation across centuries and cultures.”

“I can see,” the Minister replied, “that despite having spent a lifetime in the Academy, you really have very little faith in the life of the mind, unless it is cosseted and pampered with resources that are badly needed elsewhere. Need I remind you that what we now call

41. Our thanks to the editors at the Hastings Law Journal for encouraging us to address this issue more fully, and for suggesting some of the language that we use in this discussion.
“universities” began in the twelfth century as groups of wandering scholars and students who did not even have permanent residences to call their own? Somehow, I do not think the conversations of students with Abelard and Occam and Albertus Magnus were inferior to those that now take place between students and faculty in the Philosophy departments of Columbia or Cornell or Chicago.

“Always, we come back to the same question, which you really must force yourself to confront: When the collective resources of a society are being allocated, should they go first to those who need them most, or to those who need them least?”

I was by now thoroughly confused. I felt an overwhelming need to make sense out of the experiences of the past two days, to place my visits to the NICH and to the Invertian National University into some sort of coherent framework. Somewhat desperately, I proposed a meeting at which I could talk informally with both the Minister of Health and of Education. The Minister of Education immediately agreed and assured me that it would be no trouble setting up such a meeting for the following day, which was to be my last in Invertia. With that, we returned to my hotel, and he left me until the next afternoon.

On my last day in Invertia, I met as promised with the Minister of Health, the Minister of Education, and members of their staffs. We sat on the porch of my hotel, in the late summer sun, and talked for hours.

I spoke at length about my puzzlement and distress at what I had witnessed, both at NICH and at the university. I told them I was appalled by the callous disregard of the man who had died in the ER of the hospital. Invertians, I said, seemed to be friendly, sensitive, caring people, and yet the staff of the hospital exhibited no anger at what had happened. I went on to talk about the mystifying events at the university, and confessed myself utterly unable to understand why the brilliant young student of Mathematical Physics had been summarily turned away while a barely literate young man, manifestly unready for university work, had been so solicitously received and admitted.

When I had finished, both Ministers sat quietly for a while, taken aback, I think, by the vehemence of my remarks. Finally, the Minister of Education made a gesture deferring to his colleague, and she began their reply.

She started with a question.

“Tell me,” she said, “since you clearly find our Invertian medical policies so alien: How are such things managed in the United States? Had we visited the emergency room of an American hospital, what would we have seen?”

“In the emergency room of any American hospital,” I replied, “the response to that desperately ill man who staggered into the ER of the
NICH would be completely different from the reception that Invertia gave him. He would be given immediate emergency medical attention, and every effort would be made to keep him alive. Specialists would be called to the ER; if necessary, the patient would be hurried into an operating room. The entire medical team—specialists, residents, interns, nurses, technicians—would work together to arrest the heart attack, stabilize the patient, and give him the best possible chance for survival.

“If, at the same time, a healthy young man were to present himself with a pimple and ask for treatment, he would be told to wait until someone could see him. In all likelihood, he would be sent packing with some sardonic advice about over-the-counter skin creams and a warning not to waste the time of the ER with cosmetic problems. Were the doctors in the ER actually to examine him, they would quickly conclude that he was not in need of medical care, and he would be advised to go home.”

“And how do these meticulously cared-for patients fare?” the Minister of Health asked me. “Do they all recover and go on to lead long, healthy, productive lives?”

“Of course not,” I replied. “Many of them die despite the best efforts of the hospital, and even those who do recover are required to follow a careful regimen of diet, exercise, and periodic check-ups. The point is that the American medical profession considers its job to be the saving and prolonging of life, not the cosmetic improvement of those who already enjoy excellent health.”

“And your educational system?” the Minister of Education asked, breaking into the discussion. “Does it operate on these same principles? Are the neediest attended to first, as in our Invertian university? I was, I confess, very puzzled by your reaction to our admissions procedures, in light of the reports I had heard of your concern about the operation of our National Hospital.” At this point, I became aware of a certain uneasiness. In retrospect, I realized it had been growing in a corner of my mind since my visit to the university the previous day, and my conversation there with the Minister of Education. As I answered his question about the American higher educational system, I began to feel more and more that there was some sort of incompatibility between my reactions on the first and second days of my visit. But all of this, as I say, became clear to me only in retrospect. When the Minister asked me about American higher education, I plunged into my reply with an air of self-confidence.

“To begin,” I said, “I must explain that higher education in the United States is not under the unified control of the central government, as it is in so many European, Asian, and African nations, and as it appears to be here in Invertia. There are thousands of institutions of
higher education in America, including private universities and liberal arts colleges, state universities and colleges, community colleges, junior colleges, and so forth. These institutions vary dramatically in size, in quality, in cost, in level of funding, and in mission. Some are vocationally oriented; some were founded, and are still run, by religious sects; some are devoted as much to research as to teaching; and others are entirely teaching institutions.

“The very best colleges and universities have many times as many applicants as they have room for, and their admissions policies are highly selective. Such institutions spend hundreds of thousands of dollars a year processing applications, interviewing applicants, and making sure that they select the most qualified young men and women who wish to enter. But there are also a considerable number of colleges that have trouble filling their classrooms, and they, despite their best efforts to be selective, may be forced to admit students who are not a great deal more qualified than the young man we saw yesterday.

“The system has serious defects, needless to say—defects of which I am a harsh critic. Nevertheless, I think it is fair to say that the overwhelming majority of professors, admissions personnel, and academic administrators genuinely seek to select applicants for their institutions who are well-prepared for higher education and capable of benefiting from the faculty assembled there.

“Every one of those colleges and universities would be simply delighted to receive an application from that young woman whom your university rejected. Indeed, if you will give me her name and address, I think I can guarantee to arrange a full scholarship for her at any one of scores of outstanding institutions in the United States.”

“So,” said the Minister of Education, not as impressed as I might have hoped by this effulgent speech, “your answer is ‘no.’ The American university system does not operate on the same principles as does our Invertian system. If I may venture an observation, it would appear that you run your universities in much the same manner that the Minister of Health here runs our hospitals.”

“What on earth are you talking about?” I said, astonished by his remark, and stung by it as well. “With all due respect to the Minister, who is, I recognize, a dedicated public servant, your hospitals do cosmetic surgery on fundamentally healthy young men and women while allowing heart attack victims to die on the floor of the emergency room. What possible connection is there between that bizarre distortion of medical values and the way in which the American system of higher education operates?”

“Well,” the Minister replied, in a patient, measured tone, as though explaining things to a child, “our medical system selects only the
healthiest patients, on the basis of the probability that they will respond positively to treatment and leave our hospitals as close to physical perfection as nature and medical science can make them. We reject patients who are too sick, too weak, whose general physical condition is too poor, to make them promising candidates for treatment.

“Your university system selects students, by your own account, in exactly the same manner. The closer a student is to being in perfect educational health, if I may speak in that fashion, the more eagerly your colleges and universities compete to enroll that student in their entering class. You yourself told us that the young Invertian woman with the extraordinary preparation in theoretical physics and the arts could, without difficulty, secure a scholarship at any of your very best colleges or universities. The young man we saw yesterday, on the other hand, was, educationally speaking, the equivalent of the heart-attack victim at the hospital. He came seeking educational assistance that he needed, desperately and soon, if his mind was to have a chance of survival. So our most senior professors rushed to his side and took him into the university, where they are already beginning the long process of remediation and development from which he may—I say, may—emerge a reasonably well-educated, independent, literate, thoughtful citizen. Your colleges and universities, if I understand you correctly, would shrink from such an applicant, admitting him only if forced to by a shortage of, as you put it, ‘better qualified’ candidates.

“Your colleges and universities are engaged, educationally speaking, in the removal of pimples from the faces of intellectually beautiful young people. The only visible difference between those young men and women on their first and last days of college, I would imagine, is a slightly higher sheen, a bit more of a glow of perfection. Is it not the proudest boast of such institutions that virtually all who enter their Freshman classes graduate with distinguished records and go on to achieve great success in later years? How does that differ from my colleague’s claim that the Invertian medical system has produced a small but select cadre of beautiful people who are free of every blemish and in perfect physical health? You are disturbed that this island of perfection is purchased at the price of a sea of physical neglect. Yet your educational system accomplishes the very same result. Your Harvards, Yales, Swarthmores and Amhersts graduate perfect educational Adonises and Venuses, while all about them the minds of countless men and women are dying for lack of educational care.”

“You cannot expect Princeton or Chicago to admit students who cannot properly read or write,” I protested. “That is not their function. They do not have the resources for the enormous task of remediation that such an admissions policy would impose on them. To assign scholars of Renaissance poetry or Quantum Physics the task of teaching remedial
writing or math would be an unconscionable waste of the extraordinary
talent gathered in those centers of learning. Their job is to take the most
promising, the brightest, the most talented young people in America and
bring them to such a pitch of intellectual excellence that they will be able
to extend the scholarship, the exploration of nature, the cherishing and
elaboration of the arts even further than previous generations.”

“As for the absence of appropriate resources for remediation at your
best institutions,” the Minister responded, “that is precisely, as I
understand it, the point made by my colleague here with regard to the
NICH. The medical policies of Invertia being what they are, the NICH
has over the years built up a world-class cosmetic surgery department
while neglecting its coronary, oncology, and trauma departments.
Naturally, the NICH is not now well-suited to treat heart-attack victims.
If the policy were to be changed, it would no doubt take some time and
even a good deal of money to convert the NICH into something resem-
bling your Massachusetts General Hospital. But the change could be
made.

“In exactly the same way, Harvard, having for more than a century
labored hard to make itself the very model of a modern German
university, would indeed be ill-prepared to deal with an influx of
genuinely needy students whose lack of skills and preparation demanded
immediate, high-quality remediation. No doubt, it would cost Harvard
some time, and some money, to retool. But, just as you seem unwilling to
accept such considerations as an excuse for allowing that poor man to die
in the ER, so, in all consistency, you can hardly offer the existing
structure of your institutions of higher education as an excuse for allow-
ing potential students like that young man in our admissions office
yesterday to die, educationally speaking, outside the walls of your most
distinguished colleges and universities.”

“You are completely ignoring the enormous social benefits that flow
from the graduates of our very best colleges and universities,” I argued.
“It doesn’t do Invertia as a whole any particular good to remove pimples
from the faces of otherwise beautiful young people. But that young
woman, were she to receive the benefits of an advanced university educa-
tion, could do more than merely hold down a job. She might make
discoveries that would lift all of Invertian society to a new height of
material or intellectual well-being.”

“Let me consider the supposed benefits of a system of education
designed to serve the least needy—or, as you would prefer to put it, the
best prepared—applicants,” the Minister responded. “Despite what I
believe to be a vast exaggeration of the effects of elite university
education on students who are already superbly well-prepared, I am
quite willing to grant that lavishing the most expensive resources on
those who need them least will result in some significant benefits that
might otherwise fail to materialize. In that respect, your educational system is distinct from the medical system here in Invertia. But that hardly settles the question, for we must still ask, as your economists like to do, what the opportunity costs are of that educational policy. What is foregone, what is lost, when scarce resources are concentrated on the least needy, rather than being allocated to those who will benefit from them the most?

“Are you quite prepared to insist that the total well-being of American society would diminish if some portion of the wealth devoted to the education of the best-prepared students were redirected into programs for remedial help to the educationally neediest? If the students gathered at Harvard, Yale, or Chicago were forced to attend the University of Massachusetts, Dade County Community College, or Chico State, would the social loss thereby inflicted on America really be greater than the benefit resulting from bringing all those young men and women who are now simply excluded from the entire higher educational system to a higher level of educational accomplishment?

“Perhaps you will say yes. I don’t know. But has the thought ever crossed your mind? Has it even occurred to the educational establishment in America to attempt a serious confrontation with the question?”

“This is simply pointless,” I burst out. “You seem to have an answer ready to hand for every objection I raise. Let us stop arguing. You have been more than patient with a newcomer to your land, and this is, after all, my vacation! Yet there is one final question I must ask.”

“By all means,” the Minister of Education replied, not at all put out by my excitable temperament.

“I will not quarrel with your educational policy,” I said, “for all that it contradicts everything to which I have devoted my adult life. But surely you can see, can you not, that there is an extraordinary contradiction between Invertia’s method of allocating its educational budget and its method of allocating its medical budget? In the one case, you treat the healthiest and let the neediest fall by the wayside. In the other, you lavish attention on the neediest and force the ablest, best prepared to make their own way. And yet neither you nor your colleague here seems to feel the least sense of inconsistency, to experience the slightest mental cramp at this manifest contradiction. How on earth do you explain this strange Invertian insensitivity to logic?”

“Ah,” the Minister responded with a smile, “that is a question you are as well equipped to answer as I, for in your country, exactly the same contradiction exists, for all that the incompatible policies are reversed. If you can explain why, in three decades of university teaching, you have never felt the slightest discomfort at your country’s settled practice of
devoting lavish resources to the education of those least in need of them, while at the same time taking it for granted that your country’s medical resources should be concentrated on saving the lives of your least healthy fellow Americans, then perhaps you will be able to understand how we here in Invertia can live comfortably with the selfsame irrationality.”

And with that, he and his colleague rose, shook my hand, and departed, leaving me, as you will imagine, sorely troubled.

In the first few hours after this last conversation, I wondered whether our way of doing things in the United States was as utterly mad as the Invertian way. I even spent some restless hours that night framing proposals for the reform of American higher education.

But the next day was bright and sunny, and I was eager to return home. I paid my hotel bill, thanked the man in the Travel Bureau for his help, and began the long trip back. The closer the airplane brought me to the coast of North America, the less reasonable my feverish schemes for reform appeared to me, and the more I recovered my old sense of the essential rightness of the American way. By the time I had landed, I had entirely regained my senses and was ready to treat my Invertian vacation as nothing more than a good story.

Which, I hope you will agree, I have done.

III. THE LAW PROFESSORS’ DEBATE—PART TWO

The reaction to my father’s story was rather muted. It clearly was not what a group of legal academics expected to hear at a conference, and there were a few muttered remarks about the inadvisability of extending invitations to philosophers who did not enjoy even a passing acquaintance with the forms of legal analysis. Jane was more gracious, remarking on how provocative the talk was, but I could tell that she was nonplussed. We collected up our conference materials and struck off in search of lunch.

A. JANE CHALLENGES THE VALUE-ADDED APPROACH TO UNIVERSITY ADMISSIONS

The hotel restaurant proved the most convenient location to find sustenance, and we sat down and ordered. “So,” Jane began as the waiter left and we picked up the thread of our earlier conversation, “what you’re trying to tell me by bringing me to your Dad’s lecture is that you’ve finally gone Communist, is that it?” I burst out laughing, and Jane pointed her fork at me and continued, “But seriously, how can you reconcile the fantastic tale that your father spun about the ‘Invertian’ education system with the values of a democratic, capitalistic Western society?”

“Well,” I replied, “how can you reconcile our present health care
system with those same values?”

“Don’t evade the question,” Jane said.

“I don’t mean to. But, until we can be confident that we’re sharing a common vocabulary, I’ll need to answer your question with some questions of my own. We can leave health care to one side for the moment, though. Instead, tell me what it is about the ‘Invertian’ education system that you find incompatible with democratic, capitalistic values.”

“Well, for starters, it seems to eradicate completely the idea of personal responsibility. While it may be the case that the talented young woman in your father’s story was gifted with superior natural abilities, she had obviously worked hard to cultivate those abilities. In a capitalistic society, we respond to hard work and accomplishment by offering rewards. Invertia did just the opposite, effectively penalizing the young woman for excelling at her work. And the converse applies to the young man. Perhaps he was not a naturally talented individual, but he still had a responsibility to strive for success and to develop his talents as best he could. It seems likely that his desultory performance in high school was the product of a lack of serious effort, at least in part. In a democratic society, each of us is entitled to equal opportunities, but we must also be held accountable when we fail to take advantage of those opportunities. If, as I suspect, the young man’s poor record was largely the result of his own poor work ethic, then he didn’t deserve the extravagant devotion of educational resources that the Invertian system offered him.

“And don’t you chastise me for being unsympathetic to the young man’s upbringing and circumstances,” Jane added quickly. “A purely merit-based admissions policy is perfectly capable of taking those factors into account. Your father’s story didn’t give any hint that such differences accounted for the gap between the two hypothetical students. For purposes of discussion, the only fair assumption is that the young man’s ‘educational crisis’ was in part a crisis of his own making.”

“First off,” I responded, “it would be a mistake to suggest that our present admissions process rewards ‘effort’ simpliciter—or perhaps even at all. Consider a simple hypothetical. Two high school students form the ambition of attending Harvard. The first student is a boy of limited abilities but great determination and energy. He is, we might say, a

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42. This observation is, in essence, the negative converse of the aphorism that the Equal Protection Clause guarantees equality of opportunity, not equality of results. See, e.g., United States v. Virginia, 518 U.S. 515, 530 (1996) (“Women need not be guaranteed equal ‘results,’ . . . but the Equal Protection Clause does require equal opportunity . . . .”) (quoting United States v. Virginia, 52 F.3d 90, 93 (1995) (Motz, J., dissenting from denial of rehearing en banc)).

43. See, e.g., Banks, supra note 19 (arguing that merit-based competition in higher education should make extensive adjustments for relative social advantage or disadvantage).
natural C student, but by dint of enormous effort over a number of years, he manages to achieve a straight-B academic record. Lacking any musical, athletic, or other such talents, he never makes any of his high school teams nor plays in the school orchestra. Despite coaching, his SAT scores are only decent. His dedication and effort, however—and the qualities of character that accompany those virtues—are superb. The second student is a girl who achieves a straight-A record while barely cracking a book. She has a brilliant mind and an astounding memory—a sort of ‘Good Wilhelmina Hunting.’ While she spends time on her studies, that time is more self-indulgent than diligent, for she can outshine her peers without really trying, and often does. To top it off, she is a natural at soccer and plays the violin like a dream, and she spends much more time on those pursuits than on her studies, even developing a rather insouciant attitude toward the idea of a work ethic at school. So far as academic effort is concerned, the boy is the clear winner. If justice requires that we take no account of natural endowments in distributing social goods, as John Rawls suggests, then simple fairness appears to require that he be given the nod at Harvard. But we all know what will actually happen. The girl will have her choice of schools, and the boy may, if he is lucky, find one elite institution willing to take a chance on

44. Rawls explores this and related issues in *A Theory of Justice*. Early in his exposition, he writes:

[S]ome will think that the person with greater natural endowments deserves those assets and the superior character that made their development possible. Because he is more worthy in this sense, he deserves the greater advantages that he could achieve with them. This view, however, is surely incorrect. It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of natural endowments any more than one deserves one’s initial starting place in society.

John Rawls, *A Theory of Justice* 103–04 (1971). Rawls reaffirms this assertion, and elaborates upon it, in the restatement of his thesis that he published near the end of his life:

Do people really think that they (morally) deserved to be born more gifted than others? Do they think that they (morally) deserved to be born a man rather than a woman, or vice versa? ... Do they think that they deserved to be born into a wealthier rather than a poorer family? No.


45. This observation is similar to, but distinct from, the position that Banks adopts in describing his “relative achievement approach” to admissions in higher education. Banks, supra note 19, at 1033. Banks offers a strong defense of class-based affirmative action. That defense is grounded, in part, on the observation that applicants from different social classes have differential access to “achievement-related resources.” *Id.* Banks argues that true fidelity to meritocratic values would require institutions to measure the progress that applicants attain in relation to the resources they are given to work with, rather than merely rewarding “absolute achievement.” *Id.* at 1034. He concludes that institutions should reward contextually adjusted achievement, rather than seeking to maximize end-state performance. *See id.* at 1041 (“A relative achievement approach that corrects for environment, but not for ability, comports with notions of reward as well as, if not better than, the absolute achievement approach.”).

Our example, above, takes the argument one step further, calling into question the morality and social utility of making greater resources the reward for superior performance at all, whether that superior performance is the result of class advantage or natural endowment.
“More broadly, your apparent assumption that capitalism demands the rewarding of ‘deserving’ behavior in the distribution of scarce resources is demonstrably false. Let me take the observations that you’ve just made about the Invertian educational system and apply them to our present health care system. When a person develops a serious medical condition, the core ethic of our health care system holds that the seriousness of her condition should make her treatment a priority. Complicated problems obviously arise when a person is unable to pay for her own care—I don’t mean to engage with those issues at the moment. I think I can say without fear of contradiction, however, that most medical professionals would consider medical need—that is, the seriousness or criticality of a condition—to be the primary consideration in determining who constitutes the highest treatment priority.

“Now, people can affect the quality of their own health in all kinds of ways. People who smoke, drink too much, or deliberately ingest other toxins can subject themselves to vastly higher risks of heart disease, lung disease, liver disease, cancer, or any number of other maladies. Diet and exercise also affect health—and significantly so, in extreme cases. In fact, if you’ll permit me a broad generalization, I would venture to say that bad health habits can ruin a naturally strong constitution to an even greater degree than bad study habits or work ethic can ruin a naturally powerful mind. Common experience tells us that health care professionals spend a significant amount of time trying to cajole their patients into taking better care of themselves. And yet, when a life-long smoker who never exercises and eats Big Macs five times a week gets rushed to the hospital with his second heart attack, we don’t refuse to treat him—either in the emergency room or in the hospital thereafter—on the grounds that he has brought his health problems upon himself. Sure, we might chastise the man for squandering his own chances for good health, and properly so. But we make him a high priority for treatment nonetheless, expending extravagant medical resources to keep him alive and give him the best quality of life that we can.

“Let’s relate these observations to my father’s address. Naturally, you would have shared the outrage of my father’s narrator had you witnessed the heart attack victim going untreated in the Invertian emergency room.” Jane nodded. “Would your reaction have differed in any fundamental way if you knew that the man was a heavy smoker with

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terrible eating habits, this was his second heart attack, and he had made no serious effort to improve his health after his first coronary incident?"

“Well, I would have less sympathy for him on those facts,” Jane replied. “But would I think that the hospital should let him go untreated in favor of the pimple on Adonis’s nose? No, of course not. When a person is in serious physical distress, we treat him first.”

I nodded. “I think that most people would agree. And we set our priorities that way, I take it, because we recognize the intrinsic value of human life and physical vigor. While we acknowledge the importance of teaching people to be responsible for their own health and well being, the ‘harsh medicine’ of denying medical care to ‘undeserving’ recipients is not an acceptable way of enforcing those values. It might even be the case that people would actually take better care of themselves, on average, if they knew that their bad habits might later result in a denial of medical care. Even so, we have concluded that the social and moral cost of allowing ‘undeserving’ patients to wither and perish from their own bad choices is simply too high a price to pay for a better incentive structure. As a result, we expend vastly more medical resources upon those who do not ‘deserve’ them, at least according to the democratic and capitalistic values that you have articulated.47 For those with serious health problems that are congenital, rather than self-inflicted, the contrast is even starker. We would find abhorrent the suggestion that an inferior natural constitution should result in an exclusion from medical treatment—in other words, that only the genetically gifted should receive care. Such an approach to medicine would partake of the worst forms of eugenics. We don’t even talk about whether a young girl with cystic fibrosis is less ‘deserving’ of medical care by virtue of her congenital condition. We simply treat her, hoping to offer her the best quality of life that we can.”

“The analogy that you’re drawing here is far from perfect,” Jane responded. “For starters, an emergency room forms only one component of our system of medical care, and your observations about resource distribution in the emergency room may not translate to the rest of the system. Wealthier patients unquestionably have access to superior medical treatment, regardless of their level of need.”

“Granted,” I said, “but the fact that our system of medical care does not embrace a single, unitary philosophy of need-based distribution does not qualify the power of the analogy as a critique of our higher education system. Rather, the fact that the medical community embraces multiple distributional philosophies simply reinforces my point. The distribution

47. See, e.g., A Proven Ex-Smoker Receives a New Heart, N.Y. Times, May 24, 2004, at A20 (reporting on Pennsylvania man who received rare heart transplant despite history of smoking and danger that he might smoke in the future).
of care in an emergency room forms one important component of the allocation of scarce medical resources, and the distributional philosophy that predominates in the emergency room serves as one guiding principle, even if not the only one, in allocating medical resources throughout the health-care system. By the same token, my father’s ‘Invertian’ educators offered their own version of ‘critical care’ as one component of an educational system that embraced diverse purposes and, hence, diverse distributive philosophies. Our American system of higher education, in contrast, usually excludes this distributive philosophy entirely.”

Jane considered for a time. “Just how far do you propose to extend this analogy? Do you think that jobs should be handed out with no regard for past accomplishment?”

“Well, the fact is that American employers often don’t allocate jobs by rewarding past accomplishments through pure ‘merit-based competition.’ It is a matter of common understanding that a job applicant can be ‘overqualified’ for a position. Despite his obvious ‘merit,’ an overqualified applicant might get a cold reception if an employer worries that he will be less productive in a job that does not challenge his abilities, or that he will enter with an unnecessarily high salary because of his earlier levels of compensation. Thus, an applicant who has accomplished too much in his past endeavors might be less well suited to a particular job description, by virtue of those very accomplishments.

“Now, do I think that jobs should be handed out with no regard for past accomplishment? Of course not. The defining characteristic of a job in a capitalist society is the compensation of a worker for the value that he adds to a larger endeavor. It would change the essential features of the employment relationship if people ceased to be selected on the basis of their ability to contribute such value. Neither do I suggest that traditional measures of merit serve no useful function in the college admissions process. There is immense value in gathering a community of talented and motivated students at a prestigious university, both for the faculty and for the larger student body,48 and there is plenty of room for continuing that practice as part of the mission of a university in any realignment of educational resources. What I am suggesting is that the particular benefit that flows from collecting students of proven superior ability is not the only social good that a university can cultivate, even (or perhaps especially) at an elite university. While admissions policies based on ‘merit’ may exhibit an aesthetically satisfying parallelism with the

48. Indeed, those benefits may be material as well as intellectual. See Banks, supra note 19, at 1057 (Under the “social capital-networking model . . . . [p]roductivity gains result . . . from social networking with classmates and alumni or the transmission of informal cultural knowledge. Thus, a school benefits its students simply by assembling a particular group of students.”).
evaluative pedagogy that we apply in the classroom, it is social benefits, not aesthetics, by which we should measure the desirability of particular admissions policies. Thus, if I may anticipate one of your possible objections, somewhat different norms might be desirable for admission to graduate and professional programs, which do not serve the same general educational function that colleges do. But the basic question is the same: What social impact will flow from these different admissions policies?

“The rhetoric of ‘rights’ often confuses clear analysis of these policies. Applicants do not have a ‘right’ to be considered according to criteria that conflict with the mission of the school to which they have applied. They do have a right to be judged fairly by the admissions criteria that the school itself has chosen. But that right is perfectly compatible with a straight-A science prodigy with an 800 SAT in math

49. We do not examine at length the claim that applicants have a substantial and inherent dignitary interest in being rewarded for the excellence of their past performance, an idea sometimes put forward by the more sophisticated defenders of the traditional view of “merit.” An important analysis of the claim that justice demands that persons receive the fruits or rewards of their labor, with attention to the effect on self-esteem, can be found in ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 160 (1974), which includes the much-quoted and discussed Wilt Chamberlain example. The core of Nozick’s position is that any attempt to alter the allocation of rewards and recognitions on the basis of ability and accomplishment—an alteration which Nozick claims is central to John Rawls’s theory of justice—results in patterned distributions for which no rational justification can be found.

In part, of course, Nozick’s claim is in tension with the foundational observation that “merit” is a concept that can be measured only in relation to shifting conceptions of societal and individual good. See Sen, supra note 17, at 6. Insofar as proponents of the Nozickian view argue that there are tenets of individual merit that are epiphenomenal to the human condition itself, we find their claim unconvincing, at least when it is applied to the rarefied matter of deciding which forms of performance to confer rewards upon within an educational bureaucracy.

For a Swiftian satirical attack on the idea of a society governed entirely by principles of merit, see MICHAEL YOUNG, THE RISE OF MERITOCRACY: 1870–2033 (Penguin Books 1961). Young imagines an England in which the total elimination of pervasive class bias, or what we in the United States call “legacies,” leads to an inhuman and hateful social order. Paradoxically, in Young’s view, the very rigor with which principles of fairness are adhered to in his dystopic future England makes failure unbearable, and thus takes a terrible toll on the self-esteem of all but the few who come out on top in the competition for grades, degrees, good jobs, and favored positions in society.

50. Thus, the Grutter majority devotes a significant portion of its discussion to the particular educational functions of a law school and the values that such an institution must consider in assembling a student body.

51. Professor Banks encompasses this notion of fairness within his discussion of the “institutional practices” conception of fairness. See Banks, supra note 19, at 1042.
being turned down by Sarah Lawrence, or a concert violinist being turned down by Cal Tech. It is not ‘unfair’ that Cal Tech does not prioritize the cultivation of artistic talent in its students, and hence does not reward artistic ability in the admissions process—that’s just not what Cal Tech does. The Institute might decide that excellence in musical ability is a useful proxy for scientific talent, but we surely would not be outraged if it chose instead to prefer applicants with training in the subjects that the institution actually emphasizes. Rather than conferring a ‘reward’ for past performance, the admissions process confers an opportunity to work toward a reward—the degree.

“What my father was articulating, through the device of his story, was what we might call a ‘value-added’ mission for American higher education. That is, he was proposing that a university seek to maximize the educational progress that its students will make during their period of enrollment (weighted for marginal utility), rather than seeking to maximize the quality of their end-state performances. Obviously, if end-state performance is all that an institution cares about, then it will select applicants whose level of accomplishment is already so high that their end-state performances would be outstanding even if they were to learn very little from their college educations. In my experience, the excellence of the students coming out of such an institution is almost entirely a consequence of their excellence going in—and, conveniently, that gilded end-state result also appears to validate the correctness of the admissions criteria that the institution has employed. (“Who can argue with

52. Professor Banks correctly disaggregates “reward” as an instrument for increasing social utility and “reward” as a means of recognizing the dignity of the individual. He observes:
If the reward rationale were primarily future performance-oriented, it would be vulnerable to being weighed against other sorts of consequentialist considerations, including the societal benefits of racial integration, and would cease to function as a potential trump. It is only a trump to the extent it is understood as rights-based, as deriving from something other than a utilitarian calculus.
Banks, supra note 19, at 1039.

53. Professor Fallon would call this the difference between “[m]erit as possession of precisely those qualities of excellence needed to perform a functionally defined task” and “[m]erit as possession of qualities of that are thought to be of general value and are reasonably likely to prove useful in carrying out a specific function.” Fallon, Jr., supra note 19, at 826.

54. Professor Fallon articulates the same distinction in differentiating between “prizes awarded to recognize completed achievements, and offices and benefits bestowed for future use.” Fallon, Jr., supra note 19, at 824 (discussing Joel Feinberg, Social Philosophy 62–86 (1973)).

55. Professor Banks captures a similar distinction in comparing what he calls a “micro-productivity” and a “macro-productivity” approach to assessing the social utility of admissions policies. Banks implicitly endorses a value-added approach to measuring social utility in education (under the heading “macro-productivity”), though he does not devote a great deal of discussion to that choice. See Banks, supra note 19, at 1049–51; see also id. at 1040 (framing utility question as follows: “Does productive efficiency entail maximization of the performance outcomes of the student population of an individual school or maximization of the performance outcomes produced by selective college admissions as a system?”).

56. See Guinier, supra note 21, at 573–74 (describing self-justifying and self-reinforcing features of
success?”) My father’s provocative suggestion is that the maximization of end-state performances as the driving force behind university admissions may constitute a terrible waste of valuable and scarce educational resources, despite its ubiquity as an institutional policy in our current system of higher education.

“If colleges and universities embraced the goal of maximizing the educational skills that they can add to their students by means of the services that they provide, then they would need some way of assessing the potential for applicants to realize such added value. To respond to your earlier point about incentive structures, it is not at all clear that selecting the ‘worst’ students would be the way to go. A student’s demonstrated willingness to devote serious effort to his studies (as with the ‘natural C’ student in my example above) might constitute one of the most important maximizing factors for a value-added education. Thus, students who attempted to game the system by deliberately neglecting their studies might quickly learn that their schemes were misdirected. 57

“More to the point, colleges and universities might choose to make the maximization of added value only one among a number of institutional missions that they embrace. For purposes of illustration, my father’s provocative address posited a university organized primarily along value-added lines, with more familiar educational goals playing only a peripheral role. More realistically, a university might choose to incorporate a value-added approach as one among several coequal goals. 58 A university need not be limited to the pursuit of a single mission in defining its admissions policies. Universities can embrace multiple educational missions, which in turn would call for multiple sets of evaluative criteria—what Lani Guinier has referred to as ‘multiple

“meritocracy’ and conventional definitions of merit); Sturm & Guinier, supra note 15, at 965 (“The stock narrative naturalizes the current yardstick model of merit.”).

57. The Harlem Children’s Zone project, under the leadership of Geoffrey Canada, provides an excellent example of a comprehensive education and services program that combines a value-added mission with a continuing focus on individual accomplishment and accountability. See Paul Tough, The Harlem Project, N.Y. Times, June 20, 2004, § 6 (Magazine), at 44. The program is confronting head-on the problem of how to reach the students who will benefit most from assistance without creating an incentive structure that will discourage individual accomplishment, and it is having success. Id.

58. See, e.g., Guinier, supra note 21, at 579 (suggesting that law schools “use a mix of criteria” and confine admission of students “based on their test scores” according to “the predictive validity of such scores—that is, no more than 20% of the entering class”).

59. It bears noting that Justice Powell’s opinion in Bakke expressed hostility toward this observation, at least where race-conscious admissions programs were concerned. For Justice Powell, the use of multiple sets of evaluative criteria—some employing a “merit” competition open to all applicants, and some granting priority to minority applicants—required the invalidation of an admissions policy. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319–20 (1978) (holding U.C. Davis program invalid for using multiple sets of evaluative criteria); see also, e.g., Hopwood v. Texas, 78 F.3d 932, 963–66 (5th Cir. 1996) (Weiner, J., concurring in the judgment) (explaining that the University of Texas Law School admissions program violates the holding of Bakke in this respect). It remains to be seen whether the Grutter Court’s embrace of Bakke is broad enough to include this
contests. Indeed, as I suggested earlier, it is already the case that universities use their admissions policies to pursue multiple goals. It is only when we treat the rewarding of ‘merit’ as the natural and inevitable policy for distributing educational resources that we lose sight of that fact. If a university chose to embrace a value-added approach as one of its several educational missions, I don’t see how this goal could be considered any less appropriate than the range of social and institutional goals that are now explicitly embraced by America’s system of higher learning.

“But, our universities would look completely different if they attempted to serve the sorts of purposes that you’re suggesting,” Jane protested. “Do you propose the introduction of a ‘track’ system in colleges and universities, putting high-performing students into high-status classes and the ‘intellectual heart attacks’ into some kind of segregated ‘Intensive Care Unit,’ an educational ICU? Wouldn’t that just perpetuate the same kinds of social conditioning that many people fault primary and secondary schools for creating in the first place? There’s plenty of evidence that students suffer from the creation of institutional structures that ‘track’ them into high- and low-status classes.

“What’s more,” Jane continued, “I think that you are underestimating the seriousness of the perverse work-ethic incentives that might arise when an underperforming student can receive superior resources and opportunities precisely because of his failure to excel. Don’t forget, the value of an elite education extends far beyond the quality of the training that it provides. A place at an elite university is also valuable for the prestige and professional opportunities that it principle.

60. Professor Guinier coined this term in private correspondence with the younger Professor Wolff.

61. See supra, text accompanying notes 25–26, for a discussion of legacy and athlete preferences.

62. Professor Banks makes a similar point in critiquing the “institutional practices” approach to individual deservingness: “The problem with the institutional practices approach is that while practices may engender expectations, those expectations cannot then be offered to justify the indefinite continuation of those practices. This form of deservingness derives from existing institutional policies; it does not justify them.” Banks, supra note 19, at 1042–45; see also Fallon, Jr., supra note 19, at 820–21 (both acknowledging and critiquing tendency to adopt “internal point of view” in assessing norms that grow out of familiar cultural patterns and practice).

63. Cf. Fallon, Jr., supra note 19, at 876 (“There is no constitutional right to a system of merit distribution, nor, once merit is embraced as a guiding concept, to a merit system of any particular kind.”).

64. See SAMUEL BOWLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA: EDUCATION REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE (1976) (arguing that “tracking” students by ability results in differential socialization of citizens into the adult work rites that are key to economic success); JAMES E. ROSENBAUM, MAKING INEQUALITY: THE HIDDEN CURRICULUM OF HIGH SCHOOL TRACKING (1976) (exploring effects of tracking policies on distribution of social resources); cf. Banks, supra note 19, at 1057–58 (discussing changes that might result under his more modest “relative achievement approach”).
offers. There is simply no analog to this part of the incentive problem in your medical hypothetical. No one would deliberately provoke a serious heart attack just to be able to say that she received treatment at the Mayo Clinic."

I nodded and said, “I grant you that it would be a radical change—and a disruptive one—for the elite American system of higher education to incorporate ‘critical care’ as one of its central institutional functions. I will not pretend to have simple answers to the practical questions of implementation, any more than there are simple answers to the problems in our health-care system that we continue to grapple with in the United States today. My point, however, is that we are not even having these conversations about our institutions of higher learning at the moment, and indeed never really have. The rhetoric of ‘merit,’ ‘desert’ and ‘reward’ has completely occluded the distributive policies that our educational system currently embodies, making the results that the system produces seem ‘natural’ and, therefore, presumptively just. Perhaps our system could actually prove itself to be the best of all possible alternatives in an arena that made no a priori assumptions about the primacy or definition of ‘merit,’ though I’m skeptical. And I cannot

65. In the past, opponents of affirmative action have based their case on the confident expectation that time and antidiscrimination laws would progressively ameliorate the problems that seemed to justify the policy, leading in an acceptable period to the gradual and natural integration of African-Americans into predominantly or exclusively White residential areas, job categories, public schools, and colleges or universities. One of the most thoughtful and sympathetic opponents of affirmative action, Nathan Glazer, took that position in the 1970s. See Nathan Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy (1975). Twenty-two years later, Glazer ruefully acknowledged that his optimism had been misplaced. See Nathan Glazer, We Are All Multiculturalists Now 121–28 (1997). Glazer observes that, despite the dramatic successes of the Civil Rights Movement and a series of court decisions and Congressional enactments, American Blacks remained isolated from White America. Id. at 122–46. But despite this recognition, he remains pessimistic about the political possibility or probable effectiveness of governmental policies, concluding one chapter with the statement that change will have to be individual and voluntaristic, rather than governmental and authoritative. Id.

The majority in Grutter, of course, has now rearticulated this same reasoning, qualifying its ruling in favor of the law school’s affirmative action program with the expectation that such program will be unnecessary twenty-five years hence. See Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (reaffirming Adarand).

66. As Professor Banks has written: The reflexive equation of merit in college admissions with the highest level of absolute achievement bypasses fundamental inquiries with respect to both individual deservingness and productive efficiency. The need for these inquiries may be obscured by the tendency to treat merit as a unitary entity that resides within people, rather than as a means of furthering distinct values and goals.

Banks, supra note 19, at 1040. Along similar lines, Professor Kimberlé W. Crenshaw offers the following account of the reductive syllogism that flows from the logic of “merit” and stigmatizes African-Americans today: “After all, equal opportunity is the rule, and the market is an impartial judge; if Blacks are on the bottom, it must reflect their relative inferiority.” Kimberlé W. Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1380 (1988).
deny that any radical revision of the admissions policies of elite universities will face significant political resistance, since, as you point out, the status quo gives those institutions control over a significant amount of social capital that they would not easily give up. Nonetheless, ‘merit’ cannot prove its own merit without a critical examination that includes a willingness to explore alternatives.

“And, in fact, we are having discussions of this sort in the medical community. Consider the national debate over managed care. We are now asking serious questions about how best to maximize social welfare in balancing medical judgment against fiscal restraint, or trading broader overall health coverage for constraints on a patient’s choices of doctor or treatment, or abandoning private insurance for a single-payer model as the system’s principal driver. There’s no guarantee that the debate will produce the right result, but it is the right debate to be having.”

“Speaking of debates,” Jane said, “we started ours with a discussion of affirmative action following Grutter and Gratz. The observations that you’ve made are very provocative, but what impact do you think that they have on the analysis of an affirmative action program? I presume you aren’t offering the under-performing sports fan in your father’s story as a representative of all people of color who apply to college.”

“Certainly not,” I responded. “My father’s address was aimed at challenging the general assumption that past accomplishments must inevitably be ‘rewarded’ with further allocations of scarce resources. He

67. Professor (now Dean) Sullivan, for example, expresses great skepticism at the possibility: “There is strong reason to think that [radical revision of admissions policies is] so costly politically as to be unsustainable. . . . [T]he erosion or destruction of traditional indicia of merit risks undermining the privileged status of the university itself and the willingness of political bodies to support it.” Kathleen M. Sullivan, After Affirmative Action, 59 Ohio St. L.J. 1039, 1043 (1998).

68. There is reason to think, however, that common assumptions about the popular resistance to any progressive educational reforms may be overstated. In one recent study, a group of researchers found that half of respondents from a broad array of demographics expressed a willingness to prefer a less “qualified” candidate in the admissions process when it would serve socially useful functions to do so. Carol M. Swain et al., Life After Bakke Where Whites and Blacks Agree: Public Support for Fairness in Educational Opportunities, 16 Harv. BlackLetter L.J. 147, 168 (2000). The authors crafted a hypothetical for their study in which rewarding effort instead of accomplishment, or future potential instead of past performance, were among the policy choices that might justify a departure from traditional measures of merit. See id. at 167.

69. See, e.g., Marcia Angell, M.D., Placebo Politics, The American Prospect, Nov. 6, 2000, at 25 (discussing attempts at health care reform during Clinton presidency and political debates over health care during 2000 presidential campaign).

70. The medical community is not the only arena in which these questions have received serious consideration. In a recent essay, Professor Anupam Chander details the careful attention that corporate law has long given to power relations, minority status, and the impact that different orderings and entitlements have on the goal of capital formation—a form of analysis that stands in sharp contrast to the treatment of ethno-racial minorities in the field of Constitutional Law, where attention to power relations has been rare, even anathema. See Anupam Chander, Minorities, Shareholder and Otherwise, 113 Yale L.J. 119, 153–56 (2003).
wasn’t speaking about the issue of race at all.”

“Right—and we haven’t talked about the issue of race yet, either,” Jane continued. “Your observations about different distributive philosophies have not offered any support for the use of a suspect factor like race in the admissions process. I take it you would agree that a state-run hospital would face serious problems if it started prioritizing patients in the emergency room on the basis of race. Even if you’re correct that our current educational system embodies only one among many legitimate policies for the distribution of its scarce resources, the use of race always marks a policy decision as inherently suspect and provokes strict scrutiny. *Grutter* did not change that fact. So tell me how you think that our discussion bears on the question of affirmative action.”

B. **Tobias Makes the Case for Reframing the Constitutional Analysis of Affirmative Action**

“For starters,” I said, “it’s not accurate to say that any consideration of race by the state requires strict judicial scrutiny, even now. I’ll return to that issue in a moment. As for your broader question, our debate operates to transform the issue of affirmative action on both a rhetorical and an analytical level.

“On a rhetorical level, one of the central features of the present debate over affirmative action—both in the public sphere and in judicial and scholarly circles—is the power of ‘merit’ as an organizing principle for the case against any progressive race-based initiatives. No one seriously argues that White students, as a group, are in danger of experiencing subordination or systematic disadvantage in today’s America, even if the wildest dreams of radical reformers were to be given free rein. Nor, I think, does anyone seriously believe that the subjective dignitary experience of a White applicant who has been ‘victimized’ by an affirmative action program bears any resemblance to the subjective experience of the non-White citizens who were victimized under policies like Jim Crow and the Japanese internment—the experiences that produced the strict scrutiny doctrine in the first place. I honestly doubt that even Clarence Thomas truly embraces such a belief, despite his provocative statement in *Adarand* about the ‘moral and constitutional equivalence’ of the two practices. While the Supreme Court’s decisions in the field could be read to suggest that the ‘stigma’ of racial classification is felt equally by all, even the more uncompromising of those decisions rely heavily upon a larger set of arguments to render

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72. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment).
this ‘colorblind’ approach coherent.73

“At the heart of that larger set of arguments lies the story of ‘merit’—the story, that is, of a separate and independent moral imperative according to which there is one applicant who is objectively more ‘deserving’ of admission, a second applicant who is objectively less ‘deserving’ of admission, and an exogenous consideration, racial diversity, that seeks to derogate from or subvert that natural ordering.74

Once we disaggregate the evaluative principles that govern the classroom from the evaluative principles that govern admissions, then an admissions policy that deviates from the principles of the classroom loses the ethically suspect status that the story of ‘merit’ would attach to it.”

“That’s very stirring,” Jane responded, “but you haven’t yet made the case that your challenge to merit makes race-based admissions any less constitutionally suspect. A person could agree entirely with your fundamental observation about the variety of distributional policies that an institution might embrace in setting its admissions criteria and nonetheless conclude that one criterion—race—would be illegitimate as an element in any distributional policy and hence should remain unavailable.”

“Fair enough,” I replied. “That brings us to the analytical consequences of debunking the story of merit—a story that plays a vital role in propping up the very constitutional argument that you have just described.

“In framing a constitutional claim, the doctrine of standing imposes the familiar requirement that a litigant identify both a legally protected interest that the defendant has violated and an individual injury that the litigant has suffered.75 As to the first, there are several types of legally protected interests—for our purposes, constitutional norms—that an unsuccessful applicant might identify in challenging a college’s

73. See, e.g., J.A. Croson Co., 488 U.S. at 493 (suggesting that affirmative action programs in majority-minority city of Richmond might constitute nepotism or “simple racial politics” rather than good-faith effort at progressive reform); see also Goodwin Liu, The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045, 1096–98 (2002) (demonstrating the flawed nature of arguments about tangible harm experienced by White applicants in affirmative action programs and observing that stand-alone arguments about dignitary harm have been a “non-starter” in such cases).

As we discuss below, Grutter represents a departure from this trend, precisely because it is difficult to characterize the opinion as applying a “colorblind” approach to its evaluation of university admissions.

74. See Guinier & Sturm, supra note 15, at 964 (“The stock narrative’s claim of unfairness builds on . . . assumptions that merit should and, in the absence of affirmative action, does govern employment and educational decision making. To the extent that affirmative action departs from an otherwise fair and valid system of selection, it is unfair.”).

75. See, e.g., Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (Standing requires that “the plaintiff himself has ‘suffered some threatened or actual injury resulting from the putatively illegal action.’”) (citations omitted).
affirmative action program: (1) the individual interest in not being classified on the basis of race; (2) the collective interest in avoiding the societal harms associated with the use of race in the administration of public policies; and (3) the individual fairness interest in not having admissions criteria applied in a biased manner. Similarly, there are several types of individual injury—that is, material or dignitary harm—that an unsuccessful applicant might identify in challenging such a program: (1) the dignitary and emotional harm that the individual suffers from being classified on an impermissible basis; (2) the material harm that the individual suffers from being denied an opportunity to study at a particular institution; and (3) the dignitary and emotional harm that the individual suffers from being treated unfairly or in a biased manner in the evaluative process.

“Let’s explore two easy examples of discriminatory policies and see how they map out in this scheme. First, imagine that Ole Miss adopts an explicit policy of banning black students and applies that policy to exclude applicant James Meredith. Such a policy implicates constitutional norms— it applies a subordinating racial classification to Meredith; and it reinforces a race-based caste system in the larger community. And it inflicts injuries— it imposes dignitary and spiritual harm upon Meredith, and it systematically denies him and the people with whom he is classified any access to an important material benefit.

“Next, imagine that Ole Miss purports to adopt a non-discriminatory policy under which black applicants are free to compete. In practice, however, it systematically discriminates against black applicants in applying those policies, thereby excluding James Meredith. This policy implicates all three of the constitutional values I’ve identified. In addition to the first two, it also adds the additional insult of purporting to ‘give Meredith a chance’ while in fact applying its policy in a biased fashion for the purpose of excluding him. For the same reason, this policy inflicts injury number 3 as well as numbers 1 and 2. Both policies are clearly unconstitutional, but the second policy inflicts a distinct and additional harm.

“Now let’s explore a more difficult example: The express consideration of race by the University of Michigan Law School for the purpose of increasing the diversity of the student body. The express

76 James Meredith was the first Black student ever to attend Mississippi’s flagship “Ole Miss” campus, desegregating the institution with the assistance of the Fifth Circuit Court of Appeals. Prior to the Supreme Court’s decision in Brown v. Board of Education, Mississippi had operated all of its schools and universities on a segregated basis. See Meredith v. Fair, 298 F.2d 696, 701 (5th Cir. 1962) (taking judicial notice of Mississippi’s segregation policies).

77 See id. at 701–02 (enjoining Mississippi from requiring “alumni certificates” before admitting candidates to Ole Miss as pretext for excluding Black applicants).
nature of the policy will avoid the legitimate objection that would arise if the school were disingenuous about the admissions policies it employed (violation 3, above). As to the core questions, the received view—which, at least in theory, survives Grutter—is that this express policy implicates constitutional violations 1 and 2, just like the Ole Miss policy. The classification of Barbara Grutter on the basis of race violates the ‘color blindness’ norm; and the use of race in the administration of institutional policies threatens to inflict social harms, albeit harms of a different form—racial polarization or resentment, in the case of affirmative action, rather than the caste system that Jim Crow perpetuated. Similarly, the received view is that Grutter experiences individual injuries 1 and 2 under Michigan’s policy: She suffers the dignitary and emotional harm of being classified on the basis of her race; and she suffers the material harm of being denied access to an important and valuable benefit.

“There is good reason, however, to dispute this received view. A wide range of jurists and commentators have levied powerful challenges to the assertion that the racial classifications involved in a good-faith program of progressive reform derogate from constitutional values or inflict dignitary harm in any way that is commensurate with Jim Crow.78 Moreover, while there are important questions to ask about the societal effects of taking race into account for ‘benign’ purposes, those questions are much less sharp and have much less clear answers than the questions surrounding the societal effects of a Jim Crow racial caste system. Finally, the individual material harm that a White applicant suffers from the affirmative action program at the University of Michigan—that is, the statistically reduced chance of gaining admission—is much more speculative and diffuse than the individual material harm associated with a categorical exclusion like Ole Miss’s treatment of James Meredith. In the one case, a given White candidate’s chances of enjoying the material benefit are affected only marginally; in the other case, a given Black candidate’s chances of enjoying the material benefit are reduced to zero.

“In short, one can make a strong argument that the only constitutional value implicated by an explicit affirmative action program

78 See, e.g., Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (“In implementing [the Fourteenth Amendment’s] equality instruction, as I see it, government decision makers may properly distinguish between policies of exclusion and inclusion.”); Sullivan, supra note 67, at 1039 (“[E]qual protection cannot forbid all race-consciousness; it must be understood as forbidding only the singling out of persons for race-based harm.”). In Adarand Constructors, Inc. v. Pena, Justice Stevens wrote:

The consistency that the Court espouses would disregard the difference between a “No Trespassing” sign and a welcome mat. It would treat a Dixiecrat Senator’s decision to vote against Thurgood Marshall’s confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson’s evaluation of his nominee’s race as a positive factor.

is the real but diffuse concern about undesirable societal effects; and that
the only individual injury implicated by such a program is the small,
incremental difference in a White applicant's likelihood of enjoying the
benefits of an elite education.

"Enter the story of merit. The assertion that one set of evaluative
criteria is inherent to the admissions process, such that highly
accomplished applicants enjoy a superior moral status in the evaluative
process, serves a number of key functions in this doctrinal economy.

"First, the story of merit serves to reinforce the 'color-blind'
argument about individual dignitary harm. The assertion that White
applicants are injured by the bare fact of being classified on the basis of
race now becomes confused, or intertwined, or melded, with the
assertion that White applicants are suffering the deprivation of a superior
moral status to which their past accomplishments 'entitle' them. The
story of merit, in other words, draws an implicit connection between the
accomplishments of these applicants and their whiteness. This elision
makes it easier to argue that White applicants suffer a severe dignitary
injury when a racial classification deprives them of the 'reward' that they
have earned for their past accomplishments.79

"Second, the story of merit helps to sharpen the 'societal harm'
argument about the use of race in the administration of state institutions.
If one starts from the assumption that the distribution of goods resulting
from a 'merit-based' admissions policy is both natural and presumptively
just, then it is much easier to characterize the societal effects of
affirmative action as 'polarizing' or generating 'resentment' in a
constitutionally suspect fashion. If merit establishes the baseline of
distributive fairness, then hostile reactions to any deviation from that
baseline enjoy an augmented moral status. The story of merit thus makes
it easier to find constitutionally cognizable 'societal harms' where
otherwise we might simply see acceptable areas of disagreement among
competing interest groups.

"Finally, the story of merit distorts the material harm that the
disappointed White applicant appears to suffer. The chances that
Barbara Grutter or any other White applicant will secure admission to
the University of Michigan Law School would increase by only a tiny
increment if affirmative action were eliminated. That's a real harm, to be
sure, but it's not much of a core around which to construct a compelling
case of individualized grievance. The story of merit permits Barbara
Grutter to claim another type of harm: that she has been denied the
opportunity to be evaluated according to a set of merit-based criteria to

79. See Liu, supra note 73, at 1046–47 ("The causation fallacy reflects white anxiety over the
intensely competitive nature of selective admissions, and it undoubtedly accounts for much of the
moral outrage that affirmative action inspires among unsuccessful white applicants.").
which she is ‘entitled’—a harm akin to the third type of injury that I described in my schema a moment ago. In other words, the story of merit permits Grutter to elide the distinction between two assertions: (1) ‘I am entitled to be evaluated according to criteria that are free from illegitimate considerations’—a fine argument, but one that depends upon diffuse claims about the societal effects of taking race into account in benign racial classifications and entails only weak arguments about individual injury; and (2) ‘I am entitled to be evaluated according to a set of criteria that rewards my past accomplishments’—an argument that allows Grutter to claim the status of an aggrieved victim who has had a vested entitlement taken away from her on the basis of her race. Goodwin Liu captures this dynamic in his discussion of the “causation fallacy” in the affirmative action debate, and the story of merit plays a vital role in perpetuating it.

“I do not claim that this shift of focus responds to every objection that the opponents of affirmative action have raised. There may remain valid reasons for caution (and constitutional scrutiny) in permitting the State to take race into account when setting social policy, even for ‘benign’ or ‘progressive’ purposes—the reinforcement of racially segregated social patterns, for example, or the stigma that non-White students might experience if other people doubt their abilities by making the casual assumption that they have benefited from a race-based preference. At present, however, such concerns are usually offered, not

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80. The “causation fallacy” is Liu’s term for the exaggerated significance that most White applicants attach to affirmative action in assessing their own chances for admission. He explains:

There is strong evidence, as Bakke’s story suggests, that minority applicants stand a much better chance of gaining admission to selective institutions with the existence of affirmative action. But that fact provides no logical basis to infer that white applicants would stand a much better chance of admission in the absence of affirmative action. To draw such an inference, as opponents of affirmative action routinely do, is to indulge what I call “the causation fallacy”—the common yet mistaken notion that when white applicants like Allan Bakke fail to gain admission ahead of minority applicants with equal or lesser qualifications, the likely cause is affirmative action.

Liu, supra note 73, at 1046. Liu captures the moralistic rhetoric of entitlement and reward that surrounds discussions of affirmative action when he describes the capacity of the causation fallacy to magnify those reactions:

Observers of politics will recall a 1990 television commercial that depicted the plight of applicants like Bakke and Gratz by showing a pair of white hands crumpling a letter informing the recipient he had lost a job to a minority applicant. “You needed that job,” the voice-over said. “And you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair?”

Id. at 1047.

81. Stanley Fish offers a much-noted response to this “reverse-stigma” argument:

Some beneficiaries of affirmative action will question their achievements; others will be quite secure in them; and many more will manage to have low self-esteem no matter what their history. Affirmative action is a weak predictor of low self-esteem, and even if there were a strong correlation, you might prefer the low self-esteem that comes along with wondering if your success is really earned to the low self-esteem that comes with never having been in a position to succeed in the first place. At any rate, low self-esteem is at least in part the product of speculation about it.
as independent arguments, but as supplemental illustrations of the evils that attend any derogation from the ideal of ‘merit.’” Such concerns, in other words, inhabit the halo generated by the shining story of the wronged ‘deserving applicant,’ and they appear in sharp relief only by virtue of that halo. To shift metaphors, the story of the deserving applicant supplies the vital core of individualized grievance to what would otherwise be a diffuse set of arguments and speculations about race relations and social dynamics. Following the shift of focus that I propose, those more diffuse concerns will have to stand or fall on their own persuasive force."

“As you might imagine,” Jane said, “I take issue with your conclusions in several respects. First and foremost, we simply disagree about the nature of the primary harms associated with a race-based admissions policy—the dignitary harms that the White applicant suffers, and the societal harms of resentment and racial polarization. You have presented a powerful case for the proposition that those concerns must ‘stand or fall on their own persuasive force,’ but your characterization of them as ‘diffuse’ simply does not comport with my experience. I have taught many talented students at my not-quite-top-ranked institution who know that they would have had a much better chance of admission to the law school of their choice had they been Black or Latino. Those students often feel resentment at that knowledge, and that resentment affects both their individual spirits and the larger atmosphere at the institution. Perhaps, as you have argued, some of that reaction springs from a desire to be rewarded for past achievements that is not analytically sound. But it is clear to me that their resentment also has a purely comparative element: They are told from an early age that race is an inappropriate basis on which to judge their peers, and then they find themselves being judged unfavorably on that very basis. I do not share


82. Justice O’Connor, for example, explains her disapproval of the University of Michigan’s undergraduate admissions policies in the following terms:

Although the Office of Undergraduate Admissions [at Michigan] does assign 20 points to some ‘soft’ variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race.

Gratz, 539 U.S. at 279 (O’Connor, J., concurring). Once again, the underlying assumption is that some factors—superior academic performance, leadership, personal achievement—are inherently “meritorious” and must exert influence in the evaluative process equal to, or greater than, social disadvantage, minority status, or other “non-merit-related” factors.

83. Professor Guinier has argued, for example, that “affirmative action should not be understood simply as a race-based exception to the general admission rule of rank ordering test scores and grades. Instead, it is an experiment that succeeded so well at the University of Michigan Law School it might be used to rethink how that school admits everyone.” Guinier, supra note 21, at 566.
Justice Thomas's view that the experience of these White students is morally equivalent to the oppression of Blacks under Jim Crow, but neither do I think that their resentment can be dismissed as a mere 'area of disagreement' of a type that is inevitable in the distribution of scarce resources.

"What is more, these feelings of resentment are augmented by the very instinct that you have said is so widespread: the belief on the part of students that they are entitled to be rewarded for their past accomplishments. You may or may not be right in arguing that it is analytically unsound to link these two concepts together, but you are surely correct in your observation that many people assume such a linkage. What is the baseline against which we should measure the individual and societal harms of affirmative action, for constitutional purposes—the reactions that people will actually have, even if they are analytically insupportable, or the reactions that people 'should' have in an ideal world? I suspect that you would lean toward the latter formulation, but I am more of a pragmatist."

“That kind of argument has some rather troubling implications,” I replied. “Are you suggesting that we must always take account of the sentiments of the affected parties in weighing the negative or positive consequences of a policy, without regard for the moral appropriateness of those sentiments? I rather doubt that you would embrace that proposition as a general principle of constitutional analysis. Should the pleasure taken by sadists in the pain of others be accorded some weight when we are trying to decide what constitutes appropriate judicial punishment? Should the revulsion of bigots at the sight of interracial couples be a factor in family law policy? Surely some sentiments deserve to be taken into consideration in setting public policy while others do not. What’s more, I must say that I am skeptical that the average White student actually does feel any more resentment when a

84. See, e.g., Furman v. Georgia, 408 U.S. 238, 345 (1972) (Marshall, J., concurring) (“The 'cruel and unusual' language [of the Eighth Amendment] limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.”); Ceja v. Stewart, 134 F.3d 1368, 1375 (9th Cir. 1998) (Fletcher, J., dissenting) (“I believe it to be firmly established that a bare desire to exact blood vengeance from the perpetrator of a crime, harbored and nursed along over the course of years and decades, . . . [does not constitute a] legitimate penological goal.”).

85. See Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (state cannot give voice to private prejudices in crafting family law policy, even where developmental harm to children may be foreseeable).

86. The moral and legal philosopher Joel Feinberg makes a similar point in Joel Feinberg, SOCIAL PHILOSOPHY 41–45 (1973). Writing of the legal notion of an “interest,” and of harms as defined in relation to interests, he says, “[p]eople take perfectly genuine offense at many socially useful or harmless activities, from commercial advertisements to inane chatter. Moreover, widespread irrational prejudices can lead people to be disgusted, shocked, even morally repelled by perfectly innocent activities, and we should be loath to permit their groundless repugnance to override the innocence.” Id. at 43.
non-White applicant receives an extra thumb on the scale than she does when, for example, a legacy enjoys the benefit of that sort of preference. The type of dignitary harm that Jim Crow imposed was not just different in kind from any anti-White ‘stigma’ in affirmative action, it was also a much more patent and broadly acknowledged social phenomenon.”

“Well,” Jane replied, “this is partly a normative question upon which we disagree and partly an empirical question about which I doubt there’s any data. But that’s not all. I think that you are also too quick to diminish the importance of the material harm that White applicants suffer when their chances of admission are reduced. Suppose that White applicants have their chance of admission to an elite institution reduced by one percent as the result of an affirmative action program. You find this an unconvincing figure around which to craft a claim of individualized grievance. In tort law, however, we have a rich vocabulary for discussing actuarial harms. If a manufacturer designs a defective automobile that increases the chance of a fatality by one percent in an accident, that ‘diffuse’ harm could easily translate to hundreds of additional lives being lost in a given year. In that context, we have no problem in recognizing a claim for relief, especially when the claims are aggregated on behalf of an entire class.”

“That’s an unfair comparison,” I objected. “Actuarial tort claims of that sort are concerned with harms that result from a lack of careful behavior and need not have happened at all. Setting an admissions policy, in contrast, is a purely distributive exercise. If the number of applicants exceeds the number of places available at an institution, some of the applicants must always come away disappointed. The question is simply, which ones? I grant you that, at a high level of abstraction, some eminent thinkers would characterize many tort claims as ‘pure’ problems of distributing social benefits, since the additional care that the law requires for the prevention of accidents may result in fewer resources being available to promote social welfare in other areas. 87 But I can be a pragmatist too, and I do not see any reasonable parallel between a claim that one hundred people died in preventable automobile fatalities—a real and tangible harm, despite its actuarial basis—and the claim that one hundred White students failed to gain admission to the Nation’s top ranked institutions and had to attend not-quite-top-ranked institutions, while one hundred non-White students who would have attended those not-quite-top-ranked institutions were admitted in their place.

“When I discuss this issue in the classroom, I often use the example of reserved parking to illustrate how easy it is to overestimate the extent

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87: Guido Calabresi’s text remains the standard in this regard. See Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis (1970). We thank Alan Brownstein for encouraging us to address this argument.
of such allocational ‘harms.’ In the parking lot at my law school, there are several premium spots reserved for special purposes—deans, disabled drivers, what have you—that often sit empty. Given the fierce ‘competition’ in the morning for convenient parking, the natural reaction is to see the empty space and think, ‘Darn it! If they hadn’t reserved that space for some pedestrian dean, I would have a premium spot.’ I catch myself having that reaction all the time. It’s as though the stark presence of that empty space is a personal affront in the morning parking ritual. But of course, that reaction is irrational. If the spot were not reserved for deans, another driver would almost always snatch it up before I ever arrive on the scene—the impact on my parking chances is tiny and incremental. Yet the instinct to personalize the ‘injury,’ and hence to overestimate it, seems pervasive.”

“So, in other words,” Jane said with a wry smile, “increasing the chance of admission for non-White students is important enough to provide a compelling state interest for affirmative action, but the concomitant decrease in the chance of admission for White students is not important enough to form a core of individualized grievance? I think you’re trying to have it both ways.”

“Nice try,” I said, “but that criticism is misplaced, for two reasons. First, it fails to acknowledge the primary justification for affirmative action in education: the pedagogical and societal benefits that flow from a racially diverse student body. If we define the ‘benefit’ at stake narrowly to encompass only an applicant’s personal interest in securing admission, then you’re right to say that those personal interests are largely the same regardless of the applicant’s race. But there are additional benefits at stake here. In an institution with few if any non-White students, diversifying the student body redounds to the benefit of the entire institution. In Grutter, for example, the University of Michigan Law School crafted its case around the assertion that the institution could not secure the pedagogical benefits of a diverse student body without achieving a ‘critical mass’ of non-White students sufficient to create a sense of community. Achieving at least a modicum of racial diversity enabled Michigan to realize an institutional benefit, shared by all students, that was distinct from the individual benefit that each student realized by securing admission in the first place. The Grutter Court embraced a similar argument on a broader, societal level with its remarkable statement that elite institutions like Michigan must remain ‘visibly open to talented and qualified individuals of every race and ethnicity’ if political and social leaders are to have ‘legitimacy in the eyes of the citizenry.’

89. Id. at 332.
would have to be the subject of a different debate. Within the analytical framework set forth in *Grutter*, my treatment of the interests of White and non-White applicants is entirely consistent.

“This observation leads directly to my second response to your quip and, indeed, to a larger conclusion about the doctrinal implications of our debate. The principal doctrinal objection to race-based affirmative action proceeds from the assumption that any consideration of race in the administration of a government policy provokes strict judicial scrutiny. You’ve reiterated that position a number of times during our discussion, and the Supreme Court does likewise in *Gratz* and *Grutter*.90 While this assertion has some grounding in the Court’s early discussions of the issue, it is no longer an accurate statement of the law. In at least one other important sphere of activity—the drawing of voting districts—the Supreme Court has adopted a more flexible approach. Pam Karlan makes this point in a recent essay, tracing the path of evolution that the Court’s jurisprudence on racial classifications has followed.”91 I took a copy of the essay from my briefcase.

“Karlan begins with *Arlington Heights*, where the Court appeared to articulate the kind of ‘zero tolerance’ policy for the consideration of race that you have relied upon in framing your arguments.92 She then explains that, in the context of voter redistricting, the exclusion of any consideration of race in the drawing of district lines is both impossible and inappropriate, since voting patterns often correlate strongly to legitimate communities of interest that identify themselves partly in

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90. Id. at 326 (“[A]ll racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’”) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (“It is by now well established that ‘all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.’”) (quoting *Adarand*, 515 U.S. at 224).


92. The *Arlington Heights* majority writes, in pertinent part:

Rarely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (emphasis added); see also *Karlan*, supra note 91, at 1583. We choose the phrase that the Court “appears to” adopt a zero tolerance policy toward race discrimination advisedly. While *Arlington Heights* purports to disapprove of any state action in which race discrimination is a “motivating factor,” it also adopts a standard of proof under which even enormous racial disparities in the impact of a policy do not suffice, without more, to establish a *prima facie* case of discrimination. *Arlington Heights*, 429 U.S. at 266. This unsympathetic standard imposes a significant obstacle before anyone seeking to challenge a facially neutral policy.
terms of race. The Supreme Court’s gradual acceptance of this reality led it to move away from the use of traditional ‘strict scrutiny’ in its reapportionment cases. Thus, while the Court purported to adopt a ‘strict scrutiny’ standard in its first major opinion on race-conscious redistricting under the Voting Rights Act, it has since concluded that ‘[a] State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests.’ In order to accommodate this recognition of interests, the Court has adopted a ‘predominance’ test in reviewing district plans.

“Karlan then examines the process of distributing educational resources and suggests that a similar judicial approach to race might be warranted in that field, as well. As with reapportionment, there are legitimate pedagogical reasons for being mindful of the racial composition of a university, at least at the margins. What’s more, university officials who do admissions (like legislators who do redistricting) are often unavoidably aware of the race of their applicants—for example, when applicants possess ethnically distinct surnames or come from schools with homogeneous ethnic compositions. ‘If not all awareness and use of race triggers strict scrutiny in the redistricting process,’ Karlan asks, ‘then why should it do so in the admissions process’ so long as it does not subordinate other legitimate

93. But see Schuck, supra note 9, at 23, 141 (expressing skepticism over the desirability of allowing legislators to take cognizance of racially defined communities of interest when drawing district lines).
94. Shaw v. Reno, 509 U.S. 630, 644 (1993) (‘Appellants contend that redistricting legislation that is so bizarre on its face that it is ‘unexplainable on grounds other than race’ . . . demands the same close scrutiny that we give other state laws that classify citizens by race. Our voting rights precedents support that conclusion.’) (quoting Arlington Heights, 429 U.S. at 266).
96. Karlan writes:
In redistricting, courts have expressed a skepticism about strong race essentialism, but they have also recognized that race may in fact be highly correlated with political affiliation, and with the presence of distinct, somehow organic ‘communities.’ When this is so, pluralist polities may suggest . . . taking race into account and drawing majority-nonwhite districts. The redistricting decisions recognize that awareness of race cannot be removed entirely from the process; as long as race does not subordinate other considerations, taking it into account does not trigger strict scrutiny.
Karlan, supra note 91, at 1507–98.
97. Karlan states:
A school, like a legislature, may decide that a variety of other factors beyond standardized test scores and grade point averages will enhance its various missions. In that regard, it might decide, even in the complete absence of racial considerations, to take into account factors such as geographic diversity, choice of specialization, distinctive extra-curricular experiences, nonquantifiable evidence that an applicant’s future promise is not adequately signaled by her past performance, and the like.
Karlan, supra note 91, at 1506.
98. See Karlan, supra note 91, at 1578.
factors or demonstrate an invidious purpose?"

Jane considered a moment and asked, “Are you suggesting that the Grutter Court has adopted a ‘predominance’ standard in its review of race-conscious affirmative action programs? It certainly never says that explicitly. To the contrary, the Court claims to be applying strict scrutiny to both programs.”

“It remains to be seen whether the Court has embraced a ‘predominance’ standard sub silentio in the field of university admissions, but the signs are suggestive. As I mentioned a moment ago, the Shaw Court itself originally claimed that it was adopting strict scrutiny for all redistricting plans that took race into account. It was only in subsequent cases that the Court refined its terms, explaining that such an impermissible ‘classification’ is only present if race ‘predominates’ in the process. Taken together, Gratz and Grutter could certainly be read to define a similar standard. In Gratz, the fatal flaw of the undergraduate program was that it ‘ha[d] the effect of making the factor of race . . . decisive for virtually every minimally qualified underrepresented minority applicant.’ In Grutter, the law school program survived because it did not ‘limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity’ and ‘seriously weigh[ed] many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well.’ It is true that, for now, the Court has explained those results in the language of strict scrutiny, asserting that the law school program was ‘narrowly tailored’ while the college program was not. In practical terms, however, the determinative issue in the Court’s analysis appears to be whether race ‘predominates’ over other considerations in the evaluative process. At the very least, it certainly appears worthwhile to explore the parallels between redistricting and college admissions further.”

101. See supra text accompanying note 94.
102. As the Court put it in Easley, in order to trigger strict scrutiny, “[r]ace must not simply have been ‘a motivation for the drawing of a majority-minority district’, but ‘the predominant factor’ motivating the legislature’s districting decision.” Easley v. Cromartie, 532 U.S. 234, 241 (2001) (quoting Bush v. Vera, 517 U.S. 952, 959 (1996); Miller v. Johnson, 515 U.S. 900, 916 (1995) (alteration in original)).
103. Gratz, 539 U.S. at 272 (internal quotation marks omitted).
104. Grutter, 539 U.S. at 338.
105. See id. at 334 (“We find that the Law School’s admissions program bears the hallmarks of a narrowly tailored plan.”); Gratz, 539 U.S. at 270 (“We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”).
Jane said, “I take it that you would characterize the assignment of applicants to institutions of higher learning as a distributive exercise that is closely analogous to the reapportionment of voters among districts.” She considered for a moment and then said, “The doctrinal parallel is intriguing, but it seems to me to suffer from an important flaw. A voter does not have a personal interest in being assigned to one district over another. When she is assigned on the basis of race, of course, that raises an independent problem. But, so long as the value of her vote is not being diluted, her inclusion in one voting district over another is purely a matter of convenience for the State, not a material ‘benefit’ that she has a right to secure through competition with other voters. A university applicant, on the other hand, has a clear personal interest in gaining entrance to a superior institution. I know that we disagree about how to characterize the injury that White applicants suffer in that process, but you do admit that applicants have a real, personal interest in securing admission to top universities. That interest is lacking in the reapportionment context.”

“Actually, I take issue with both of your observations,” I replied. “As to the first, a voter certainly does have a personal interest in being assigned to a district in which her political views are in the majority, at least in the colloquial sense of the term ‘interest.’ A voter in the majority enjoys a greater prospect of influencing the policies of her elected representatives, whether through participation in party activities or through the mere act of voting in a party primary that will effectively determine the outcome of the general election. I think your real point is that an individual voter does not have any ‘legally protected interest’ in securing assignment to the district of her choice. In that, you are quite correct. It is for this reason, I would venture to say, that the Court

106. See Reynolds v. Sims, 377 U.S. 533, 587 (1964) (requiring Alabama to redraw district lines in order to correct dilution of voting power of urban residents).


108. Professor Issacharoff provides a useful overview of the evolution of the Court’s voting rights jurisprudence, which, as he puts it, rests on “a core understanding in American politics, going back to the evocative imagery of the gerrymander, that geographically districted elections are subject to ends-oriented manipulation.” Samuel Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593, 595 (2002). Issacharoff points out that, despite an evident concern over the potential for abuse in the redistricting process, the Court has generally treated even geographically unusual districts as a matter of convenience to be negotiated by political actors in the absence of racial classifications (as in Shaw) or the subversion of one party’s political influence (as in Bandemer). See id. at 596-98 (discussing Shaw v. Reno, 509 U.S. 630 (1993); Davis v. Bandemer, 478 U.S. 109 (1986)); see also id. at 598 (stating that the Court has found “no partisan harm, regardless of the geographic contortions of the district lines, when the two [political] parties had negotiated a redistricting plan without either of them seeking to exploit the other for legislative gain”).

employs such strident rhetoric in Shaw v. Reno to justify its application of strict scrutiny to majority-minority voting districts. The Shaw Court describes the districts produced under the Voting Rights Act as ‘stigmatiz[ing]’ and calls them ‘an effort to segregate the races’ that ‘bears an uncomfortable resemblance to political apartheid.’ As a description of a federally supervised effort to increase the political influence of historically disenfranchised voters, this language borders on the histrionic. One reason for all this hand waving is the incoherence of the Court’s efforts to account for the standing that different types of voters possess to challenge redistricting plans. After some initial confusion on the point, the Court has held that an individual suffers the “special representational harms” of a racial classification when she resides within a district that has been apportioned using race as a factor, and hence has standing to bring a constitutional challenge.

As Pam Karlan has pointed out, however, even most of the voters who live in a majority-minority district will never be subjected to an individual racial classification, given the process by which legislators typically “fill in” districts with the required number of voters. It is precisely because the Court cannot point to an immediate harm to a legally protected interest that it must blindly deploy the colorful rhetoric of colorblindness.

“As for the nature of the harm that a disappointed applicant suffers in the college admissions process, your framing of the issue captures my point perfectly. We are so conditioned to think that the admissions

Rather they concern the meaning of ‘our system of representative democracy.’” (quoting Shaw, 509 U.S. at 650); cf. United States v. Hays, 515 U.S. 737, 743 (1995) (in voter redistricting case, reaffirming requirement that plaintiff identify a “legally protected interest” that is intruded upon by actions of defendant).

110. Shaw, 509 U.S. at 643.
111. Id. at 642.
112. Id. at 647.
113. Cf. id. at 671 n.7 (White, J., dissenting) (“I borrow the term ‘segregate’ from the majority, but, given its historical connotation, believe that its use is ill advised. Nor is it a particularly accurate description of what has occurred. The majority-minority district that is at the center of the controversy is, according to the State, 54.71% African-American. Even if racial distribution was a factor, no racial group can be said to have been ‘segregated’—i.e., ‘set apart’ or ‘isolate[d].’”) (citations omitted); see also Karlan, supra note 109, at 293 (“The Court’s repeated references to ‘segregation’ obscure the point that the challenged districts are in fact among the most racially diverse districts in the country.”) (footnotes omitted).
115. See Karlan, supra note 109, at 292.
116. See Pamela S. Karlan, Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore, 79 N.C. L. Rev. 1345, 1350–51 (2001) (“The Shaw plaintiffs were not advancing a claim under any [individualized] concepts [of voting rights]. Rather, they were pressing a claim involving what we might call ‘meta-governance,’ that is, a claim about the rules by which the democratic political processes are structured. It was a claim that the very use of race in the process of redistricting was divisive and harmful.”); cf. id. at 1354 (“One might think, from all their invocation of ‘balkanization,’ that the Justices might have noticed that two generations of communist suppression of ethnic and religious tension in Yugoslavia did little to ensure stability, tolerance or integration.”).
process must employ the same evaluative criteria that predominate in the classroom that we unthinkingly elevate a talented applicant’s undeniable personal interest in being rewarded for her past accomplishments to a ‘legally protected interest’ that supports a robust legal claim. To invoke the medical world as a point of comparison once again, there can be no doubt that patients in hospitals ‘compete’ for both the resources and the attention of health care professionals in the colloquial sense of that term. But that fact does not impel us to treat only the healthiest patients and leave those with a poor prognosis to rise or fall on their own. Rather, we make the distributive choices that have the best chance of maximizing the primary social good that hospitals dispense—physical health and well being. The same is true in redistricting—and, I argue, the same is true in college admissions.

“It is only because the issue of race provokes such strong reactions, I think, that it does not normally occur to us to question exactly what ‘legally protected interest’ an applicant with ‘no . . . right to a system of merit distribution,’ much less ‘to a merit system of any particular kind,’ is seeking to vindicate in demanding that a college stop utilizing affirmative action. In the redistricting context, plaintiffs who challenge a racial gerrymander ‘are advancing a shared, individuated right to a Government that obeys the Constitution,’ and it is the shared nature of the right that justifies the use of ‘predominance’ as the standard for assessing whether a legislature has acted consistently with constitutional norms. By the same token, when a disappointed White applicant challenges a college’s use of affirmative action, she is asserting a shared right to the State’s observance of constitutional norms in its apportionment of educational resources. In the absence of a convincing argument about individualized dignitary injury or threats to the social fabric, that is the entirety of the ‘legally protected interest’ that is at stake.

“I know that we disagree about the nature of the dignitary and societal harms that affirmative action imposes. But there is no reason that we cannot reach agreement on the proper way to frame the assessment of those harms. The powerful rhetoric of merit that has grown up around the affirmative action debate, providing the vital core of individualized grievance in judicial engagements with the issue, rests upon the premise that applicants have a ‘right’ to be rewarded in the admissions process for their past accomplishments. Can we agree that this premise, and the analytical assertions that flow from it, are

117. Fallon, Jr., supra note 19, at 876. The first quoted phrase above elides the word “constitutional” (i.e. “no constitutional right”). We take the substance of Fallon’s observation, and its applicability here, to be unaffected by the change.

118. Karlan, supra note 116, at 135 (internal quotations omitted).
fundamentally flawed?"

Jane paused a long moment to consider. Had I succeeded in bringing us closer together on this key issue? Despite our areas of deep disagreement, I have always had the greatest respect for Jane’s intellectual rigor and have long hoped that we might find more areas of common ground.

Just as Jane was about to offer her response, the waiter came around to clear our plates and prepare the way for dessert. The hotel that the conference organizers had chosen employed a renowned pastry chef in its kitchen, and the place was famous for its extravagant confections. We thus put our debate aside for a moment to give the waiter our full attention, and she began to describe the dessert possibilities in exquisite detail. When she finished her recitation and looked to me for a decision, I found that the array of choices was too much for me to process, so I decided to put myself entirely in her hands. “You know the possibilities so much better than I,” I said. “Tell me which of your desserts is the absolute best, and I’ll have that one.”

Jane, who is something of a gourmand, jumped in before the waiter had a chance to respond. “Oh, come now,” she chided, “you’re asking her an impossible question. There is no ‘absolute best’ when it comes to dessert. Which dessert is best will depend entirely upon what you hope to get out of the experience.” Jane then began an animated conversation with the waiter on the relative merits of the different types of dessert as I smiled, sat back in my chair, and prepared for the next round of our discussion.
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