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# The Colorblind Lottery

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# THE COLORBLIND LOTTERY

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## INTRODUCTION

In issuing its companion decisions *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Supreme Court has once again sent mixed messages about affirmative action, upholding the use of race by Michigan Law School, but striking down the University of Michigan's undergraduate admissions policies.[1] These cases resolve a growing split among the courts of appeals by endorsing Justice Powell's view in *Regents of the University of California v. Bakke* that student body diversity can be a compelling state interest justifying consideration of race.[2] At the same time, however, the Court retained the basic doctrinal structure it has established for deciding equal protection cases. As laid out in *Adarand Constructors, Inc. v. Pena*, the use of racial classifications by any governmental actor is subject to strict scrutiny.[3] In order to survive strict scrutiny, the racial classification "must serve a compelling governmental interest, and must be narrowly tailored to further that interest."[4]

Despite the apparent stability of this doctrinal structure, the multiple opinions in *Grutter* and *Gratz* reveal deep divisions within the Court about the legitimacy of race-conscious policies and the meaning of equal protection. Although a majority of the Justices clearly approved the use of race—at least in a limited, non-mechanical

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1. Grutter v. Bollinger, 123 S. Ct. 2325 (2003); Gratz v. Bollinger, 123 S. Ct. 2411 (2003).

2. *Grutter*, 123 S. Ct. at 2338-41; *Gratz*, 123 S. Ct. at 2426-27. Prior to these decisions, circuits were split over whether Justice Powell's plurality opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that student body diversity is a compelling state interest, was binding precedent. *Compare* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (holding that Justice Powell's opinion is not binding) *and* Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1248-49 (11th Cir. 2001) (same) *with* Grutter v. Bollinger, 288 F.3d 732, 739 (6th Cir. 2002) (concluding that Justice Powell's opinion is binding) *and* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1201 (9th Cir. 2000) (same).

3. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995).

4. *Id.* at 235 (citation omitted).

way—in the university admissions process,[5] others complained that "the majority cannot commit to the principle that racial classifications are *per se* harmful."[6] At the heart of this disagreement lies conflict over the notion of colorblindness. Although suspicious of race-conscious decision-making, the majority evidences a willingness to "'take "relevant differences" into account.'"[7] As Justice O'Connor put it, "context matters."[8] For Justices Scalia and Thomas, however, colorblindness is an absolute imperative, prohibiting race-conscious decision-making in all but the most dire circumstances, such as when necessary "to provide a bulwark against anarchy, or to prevent violence."[9]

The advocacy groups backing the plaintiffs in *Grutter* and *Gratz* share this absolutist notion of colorblindness. Sharply disagreeing with the Court's decision that race-conscious government action is sometimes permissible, these groups have vowed to continue their fight to enshrine their notion of colorblindness into the law. Within weeks of the *Grutter* decision, opponents of affirmative action announced a new effort to pass ballot initiatives in Michigan and other states to ban affirmative action by state agencies.[10] Other advocacy groups intend to pursue further litigation to pressure schools to move in a race-neutral direction.[11] Michael Greve, co-founder of the organization that litigated the Michigan cases, once explained that their goal is to "put the consideration of race beyond the reach of the state."[12] His rhetoric suggests that the use of race is so odious that any other criteria is preferable, no matter how irrational or arbitrary. As he explained, "We don't have a problem with any admissions system, provided it doesn't use race as a factor, period . . . . *These schools can use a lottery or run applicants around a track if they like, but they can't use race.*"[13]

In *Grutter*, the Supreme Court actually considered, and quickly dismissed, the suggestion that an admissions lottery offered a

5. *Grutter*, 123 S. Ct. at 2338-47.
6. *Id.* at 2361 (Thomas, J., dissenting).
7. *Id.* at 2338 (quoting *Adarand*, 515 U.S. at 228).
8. *Id.*
9. *Id.* at 2352 (Thomas, J., dissenting).
10. *See* V. Dion Haynes, *New Battle on Affirmative Action: Opponents Plan to Seek Ban via Vote in Michigan*, Chi. Trib., July 8, 2003, § 1, at 8; Rebecca Trounson & Stuart Silverstein, *Bid to Export Prop. 209*, L.A. Times, July 8, 2003, at B1; Karen W. Arenson, *Ballot Measure Seen in Wake of Court Ruling*, N.Y. Times, July 10, 2003, at A17.
11. *See* June Kronholz et al., *Race Matters: Court Preserves Affirmative Action*, Wall St. J., June 24, 2003, at A1; V. Dion Haynes, *Bans On Use of Race Get New Scrutiny*, Chi. Trib., June 25, 2003, § 1, at 11; Trounson & Silverstein, *supra* note 10, at B1.
12. Michael S. Greve, *The Demise of Race-Based Admissions Policies*, Chron. of Higher Educ., Mar. 19, 1999, at B6.
13. David Segal, *Putting Affirmative Action on Trial*, Wash. Post, Feb. 20, 1998, at A1 (emphasis added).

reasonable race-blind alternative to Michigan Law School's race-conscious diversity policy.[14] However, other federal courts have seriously suggested that a lottery is a preferable means of allocating scarce educational and employment opportunities, rather than a policy that includes consideration of race. In striking down Michigan Law School's admissions policy as unconstitutional, the trial court in *Grutter* faulted the law school for not seriously considering race-blind alternatives, such as a lottery system, when selecting among qualified applicants.[15] More directly, a federal district court in *Tuttle v. Arlington County School Board* ordered a popular alternative elementary school to stop efforts to promote racial and ethnic diversity, and to institute a double-blind random lottery to determine future admissions.[16] And, in *Taxman v. Board of Education*, where a school system faced the necessity of laying off a teacher, the Third Circuit implicitly required the school board to use a lottery or some other game of chance, rather than invoke its affirmative action plan.[17]

These cases all reflect the underlying premise that a colorblind lottery is inherently preferable to any selection process that considers race. As the Supreme Court made clear in *Grutter*, this preference for chance over race does not follow inevitably from existing law. It is, however, the logical consequence of an insistence on formal colorblindness. If, as colorblindness proponents argue, any consideration of race is inherently wrong, then nothing short of an "emergency rising to the level of imminent danger to life and limb"[18] justifies race-conscious decision-making. Therefore, in the absence of such exigent circumstances, those who insist on colorblindness must prefer *any* alternative—including a lottery—to the use of race.

The *Grutter* Court took a step away from embracing formal colorblindness as a deciding principle. Nevertheless, the current structure of equal protection analysis, which the Court's decision in *Grutter* left intact, lends particular weight to the notion of colorblindness. The Court's three-tiered approach to equal protection review singles out race-conscious decision-making as uniquely problematic, warranting the most exacting scrutiny.[19] By treating race as exceptional, the Court's jurisprudence suggests that any use of race

14. *Grutter*, 123 S. Ct. at 2345.

15. Grutter v. Bollinger, 137 F. Supp. 2d 821, 853 (E.D. Mich. 2001).

16. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999). The district court in *Tuttle* ordered the School Board to conduct a double-blind random lottery in an unpublished memorandum opinion. *Id.* at 701. Although agreeing with the district court's conclusion that the race-conscious policy was unconstitutional, the Fourth Circuit vacated the injunction and remanded the case to permit the School Board to consider other alternative admissions policies. *Id.* at 708.

17. Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996).

18. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring).

19. John E. Nowak & Ronald D. Rotunda, Constitutional Law 638-44 (6th ed. 2000).

is inherently wrong, regardless of the purpose, context, or effects of the policy in question. Because legal doctrine shapes our discourse and our understanding, "colorblindness" is sometimes invoked as a self-evident good, an argument with talismanic force.

This Essay questions the assumed validity of "colorblindness" arguments. It does so by scrutinizing those earlier decisions preferring lotteries to affirmative action, as a way of unpacking the meaning of "colorblindness." Insistence that decision-making should be colorblind is often motivated by basic notions of fairness; persons should be judged according to their individual merit, not some irrelevant, arbitrary criterion over which they have no control. Yet deciding by lot does not necessarily promote these values any more than does taking race into account. Lotteries might appear more attractive than race-conscious processes because they offer neutrality and equal treatment to all participants. However, as argued below, these virtues are often more apparent than real. Lotteries seem neutral because they rely on chance to select winners, but this focus masks the substantive choices that determine who is, and who is not, given a chance to participate.

In focusing solely on the choice between lotteries and race-conscious decision-making, this Essay does not mean to suggest that opponents of affirmative action specifically advocate lotteries as the preferred decision criterion in admissions or employment decisions. Nor does it propose that a lottery is never a fair or appropriate way of making decisions. In certain circumstances, an unbiased lottery may well be a sensible way of allocating unavoidable burdens or of distributing scarce resources.[20] This Essay does not attempt to delineate what those circumstances might be. Rather, it uses the concept of the lottery as a device to tease out what underlies the insistence on formal colorblindness. More specifically, it questions the claim that race-conscious decision-making is so inherently problematic, regardless of the context of the decision or the manner in which race is taken into account, that resorting to a lottery is always preferable. Although a stark choice between race-conscious decision-making versus a game of chance may not often arise in practice, it is worth exploring because of the light it sheds on the logic of colorblindness.

## I. PREFERRING LOTTERIES

After her rejection by the University of Michigan Law School (the "Law School"), Barbara Grutter filed suit, alleging that the school's admissions policies violate the Equal Protection Clause by taking race

20. For a systematic exploration of the possibilities and implications of deciding by lot in a broad variety of contexts, including the legal context, see generally Neil Duxbury, Random Justice: On Lotteries and Legal Decision-Making (1999).

into account. The Law School argued that its use of race in the admissions process was lawful because race is only one factor among many, the school gives each application individualized review, and the policy is necessary to achieve meaningful racial diversity.[21] Although the Supreme Court eventually upheld the Law School's policy, District Court Judge Bernard Friedman initially held it unconstitutional.[22] Of particular relevance here, Judge Friedman faulted the law school for its apparent failure to consider race-blind alternatives to affirmative action, such as "using a lottery system for all qualified applicants."[23] On appeal, Sixth Circuit Judge Boggs, dissenting from the majority opinion, repeated this argument, asserting that a lottery "would insure a student body as diverse as the 'qualified' applicant pool itself."[24] For both these judges, a lottery to allocate places in a law school class seems constitutionally preferable to any consideration of race in the admissions process.

*Tuttle v. Arlington County School Board*[25] did not involve highly selective university admissions, but reviewed the policy for allocating seats in an oversubscribed alternative elementary school. Because applications for kindergarten at the popular Arlington Traditional School (ATS) exceeded the number of available spaces, the Arlington County School Board (the "Arlington School Board") adopted a policy intended to prepare students for "'a diverse, global society'" and to "'serve the diverse groups of students in the district.'"[26] After offering spots to applicants whose siblings already attended the school, the Arlington School Board conducted a weighted lottery to fill the remaining places in the kindergarten class. Weights were assigned based on "low-income or special family background," whether English was a second language, and race or ethnicity, in order to increase the probability of selecting children from certain underrepresented groups.[27] Finding the policy unconstitutional, Judge Bryan ordered the Arlington School Board to conduct a double-blind random lottery instead.[28] Like Judges Friedman and Boggs in *Grutter*, Judge Bryan apparently believed that a random lottery was constitutionally preferable to any race-conscious efforts to promote

21. *See* Brief for Respondents at 3-5, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241).

22. Judge Friedman concluded that a university's desire to assemble a racially diverse student body is not a compelling state interest, and that, therefore, Michigan Law School's admissions policies are unconstitutional. Grutter v. Bollinger, 137 F. Supp. 2d 821, 848 (E.D. Mich. 2001). In the alternative, he suggested that even if racial diversity were a compelling state interest, the law school's admissions policy was not sufficiently "narrowly tailored" to pass constitutional muster. *Id.* at 853.

23. *Id.* at 853.

24. Grutter v. Bollinger, 288 F.3d 732, 808 (6th Cir. 2002).

25. 195 F.3d 698 (4th Cir. 1999).

26. *Id.* at 701 (quoting the admissions policy at the ATS).

27. *Id.*

28. *Id.* at 700-01.

diversity in the student body. On appeal, the Fourth Circuit agreed that the Arlington School Board's use of race violated the Constitution, but vacated Judge Bryan's remedial order, and permitted the Arlington School Board to develop its own race-blind alternatives.[29]

Similarly, *Taxman* presented a choice between race-conscious decision-making and the use of a lottery.[30] Sharon Taxman, a white teacher, argued that her employer had violated Title VII of the Civil Rights Act of 1964 when it chose to lay her off instead of Debra Williams, a black teacher.[31] Under state law, the Board of Education (the "Board") was required to select teachers for layoffs in order of reverse seniority, but the two teachers most recently hired—Williams and Taxman—were tied in seniority.[32] After concluding that the two teachers were equally qualified, the Board chose to invoke its affirmative action policy and retain Debra Williams, rather than resorting to a lottery to break the tie. A majority of the Third Circuit Judges, sitting en banc, held that Taxman's layoff violated Title VII, in essence requiring the Board to use a lottery rather than take racial diversity into account. Of course, nothing in Title VII specifically requires employers to conduct lotteries. However, in this case, the Board had little choice. It had already considered every relevant factor—classroom performance, evaluations, volunteerism, and certifications—and concluded that the two teachers were "'of equal ability'" and "'equal qualifications.'"[33] Because no other criterion, aside from race, remained on which to distinguish the two teachers, the Board's sole remaining choice was to employ a lottery.[34]

In each of these three cases, the use of a lottery presented an alternative to race-conscious decision-making. At least some of the judges confronting that choice apparently preferred chance as a method of allocating benefits, rather than allowing race to be a factor. Before exploring the logic of that choice, two preliminary matters require clarification.

First, a lottery might come into play as an alternative to race-

29. *Id.* at 708.

30. Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996).

31. Although the school district is a public employer whose actions are constrained by the Constitution, Taxman did not raise an equal protection challenge; therefore, the constitutionality of the Board's plan was not before the court. *Id.* at 1552 n.5. Instead, Taxman rested her case on the claim that her layoff violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, which prohibits both private and public employers from discriminating on the basis of race. *Id.* at 1552.

32. *Id.* at 1551.

33. *Id.* (quoting the Vice President of the Board of Education); *see also id.* at 1568-69 (Sloviter, C.J., dissenting).

34. When confronted with such decisions in the past, the Board had broken seniority ties through "'a random process which included drawing numbers out of a container, drawing lots or having a lottery.'" *Id.* at 1551 (quoting the Board of Education).

consciousness at different points in the decision-making process. In *Taxman*, for example, the Board first considered the seniority, qualifications, and experience of the two teachers before looking for a method to break the tie.[35] In such a situation, the decision-maker resorts to a lottery only after all relevant criteria for selection have been exhausted. Factors relevant to the decision, such as experience or qualifications, determine most outcomes without resorting to a lottery. The lottery acts as a tie-breaker, only operating at the margins.

Alternatively, a lottery might be used as the sole, or at least the primary, decision criterion for allocating a benefit. For example, in *Tuttle*, the double-blind lottery was proposed as the primary method for allocating spots in the kindergarten class at ATS. Aside from the sibling preference,[36] the Arlington School Board was not to use any criteria other than chance to determine admissions. Although they represent points on a spectrum rather than two distinct types,[37] the situations in *Taxman* and *Tuttle* respectively illustrate use of the lottery as tie-breaker and as primary decision criterion.

In criticizing Michigan Law School's admissions policies, Judge Boggs (dissenting) and Judge Friedman suggested the use of a lottery as a primary decision criterion, not merely a tie breaker. According to Judge Boggs, the Law School could have "conduct[ed] a lottery for all students above certain threshold figures for their GPA and LSAT,"[38] rather than following its existing policy, which takes account of race. Applicants with minimally qualifying numbers would be eligible for the lottery pool. Beyond that, the Law School could allocate places in the incoming class entirely by lot. Interestingly, neither judge

35. *Id.*

36. Although the sibling preference was not specifically upheld, the plaintiff's suit did not challenge this aspect of ATS's admissions policies nor did it seek to enjoin it. Presumably, then, the order requiring a "'double-blind random lottery without the use of any preferences,'" Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 703 (4th Cir. 1999) (quoting the district court), was intended to replace the Board's weighted lottery, leaving the sibling preference in place.

37. The lottery as tie-breaker and the lottery as primary decision criterion might appear to represent two distinct types of decision-making tools. On closer examination, however, the distinction between the two is not so sharp. A lottery may appear to operate as a tie-breaker, but only because the decision-maker failed to use additional relevant criteria that could distinguish among claimants. Conversely, the lottery as primary decision criterion might be recast as a tie-breaker if the decision-maker in fact has no other basis on which to select winners. For example, if the School Board could identify no relevant criteria beyond sibling enrollment to distinguish among kindergarten applicants, one could characterize the use of a lottery in the *Tuttle* situation as a tie-breaker rather than as a primary decision criterion. Thus, "lottery as tie-breaker" and "lottery as primary decision criterion" are more akin to points on a spectrum than discrete types. And where along that spectrum a particular lottery falls depends upon one's view of the availability of alternative relevant decision criteria.

38. Grutter v. Bollinger, 288 F.3d 732, 808 (6th Cir. 2002) (Boggs, J., dissenting).

suggested the Law School utilize lotteries as tie-breakers between equally qualified applicants, rather than as the primary decision criterion. In suggesting a lottery, these judges were trying to demonstrate the existence of alternatives "for increasing minority enrollment" or promoting diversity.[39] A lottery that operated only on the margins would do little, if anything, to advance those goals.[40] Moreover, determining the existence of a tie would be difficult, given that the Law School's admissions process does not rely solely on numerical rankings, but utilizes numerous "soft" variables, such as recommendations, rigor of undergraduate education, essay quality, residency, leadership and work experience as well.[41]

A second preliminary matter concerns terminology. Judges typically refer to lotteries as "race-neutral" alternatives to race-conscious decision-making.[42] Although consistent with common practice, this usage of the term is misleading. "Race-neutral" suggests that the alternatives would have no effect on outcomes along racial lines, much as "revenue neutral" policies are understood as not affecting a fiscal bottom line. However, many so-called "race-neutral" alternatives not only would alter racial outcomes, but they are considered true alternatives to race-conscious policies *because* they would have those effects, albeit without mentioning race. For example, in *Grutter*, Judge Friedman pointed to "race-neutral" policies such as increasing recruiting efforts for minority students, or accepting a certain percentage of top graduates from certain schools, as "alternative means for increasing minority enrollment."[43]

Similarly, in its briefs before the Supreme Court, the Bush administration argued that the University of Michigan's admissions policies were unconstitutional because "race-neutral" means existed to achieve the same goals.[44] It pointed to programs such as the

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39. Any assessment of available alternatives turns on the *purpose* of the challenged policy, and the efficacy of the alternatives in achieving that purpose. Judge Friedman characterized that purpose as "increasing minority enrollment," Grutter v. Bollinger, 137 F. Supp. 2d 821, 852 (E.D. Mich. 2001), while Judge Boggs described it as promoting "a diversity of experiences and viewpoints." *Grutter*, 288 F.3d at 807.

40. Even using a lottery as a primary decision criterion, as Judge Boggs suggests, would do little to increase minority enrollment, because so few are in the applicant pool. As the University of Michigan reported in its briefs before the Supreme Court, "The pool of minority applicants is extremely small, and is simply overwhelmed by the raw numbers of white applicants at every level. . . . [For example,] in the LSAT range (164+) from which more than 90% of the admitted white students are drawn, the Law School received only 35 minority applicants compared to 900 white applicants." Brief in Opposition at 8, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241).

41. *See Grutter*, 288 F.3d at 736.

42. *See, e.g., id.* at 806-08; Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999).

43. *Grutter*, 137 F. Supp. 2d at 852-53 (emphasis added and citations omitted).

44. Brief for the United States as Amicus Curiae Supporting Petitioner at 18-21,

University of Texas' policy of admitting high school graduates in the top ten percent of their class throughout the state as examples of such alternatives. Ironically, after touting such plans as "race-neutral," the United States went on to measure their success in terms of the percentage of disadvantaged minority students enrolled under them.[45] As Justice Souter points out, these "'percentage plans' are just as race conscious as [Michigan's] point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it."[46] What makes the percentage plans, and other such proposals, appear to be neutral alternatives to affirmative action is that they do not explicitly mention race. Nevertheless, and often by design, these plans are far from race-neutral in their effects. Thus, throughout this Essay, "race-blind" refers to policies that do not explicitly mention race, and the term "race-neutral" is reserved for policies that actually have no effect on racial outcomes.[47]

## II. RACE V. CHANCE

Although *Grutter*, *Tuttle*, and *Taxman* each dealt with different factual settings, a common question arose in each: when confronted with a choice between race-conscious decision-making and a lottery, which should be preferred? For colorblindness proponents, the answer is easy. Any policy that explicitly takes account of race is objectionable and, therefore, a lottery is always preferable. However, without further elaboration, the colorblindness argument is circular: decision-making should be colorblind because any consideration of race is wrong. What requires explanation is *why* race-consciousness is always wrong. Some forms of race-based decision-making are obviously immoral; for example, laws preventing certain persons from voting or owning property because of their race. To agree that such laws are wrong, however, does not entail the conclusion that *any* form of race-consciousness shares the same evil character.

Often, colorblindness is simply shorthand for a broader set of arguments. Some of these arguments are legal, such as the claim that government decision-making ought to be colorblind because the

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Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241).

45. *See id.* at 14-17.

46. Gratz v. Bollinger, 123 S. Ct. 2411, 2442 (Souter, J., dissenting); *see also id.* at 2445 n.10 (Ginsburg, J., dissenting) (arguing that calling the percentage plans "race-neutral" is disingenuous).

47. Determining whether or not a policy has any impact along racial lines entails comparing alternative policy outcomes against some existing baseline, but choosing the appropriate baseline is often controversial. In the context of higher education, an implicit assumption is that "merit" admissions—based on test scores and grades—constitute the baseline. However, very few, if any, highly selective college or graduate programs rely solely on such quantitative measures.

Constitution demands it.[48] Of course, many scholars vigorously contest this interpretation, arguing that both the text and the history of the Equal Protection Clause permit race-conscious policies that are designed to benefit disadvantaged groups.[49] Other arguments for colorblindness are prudential in nature; for example, the assertion that the use of race is inherently divisive, or that it promotes negative racial stereotyping.[50] Yet once again, these prudential concerns are counterbalanced by evidence of the benefits of promoting racial mixing and expanding opportunities for previously excluded groups.[51] Scholars and commentators have explored the legal and practical arguments for and against affirmative action exhaustively, and so I will not address them further here.

The focus of this Essay is the moral intuition—deeply held by some—that taking account of race, whatever the purpose or effect of doing so, is inherently wrong. Putting aside arguments about the meaning of the Constitution or practical considerations, why is race-conscious decision-making inherently objectionable? What more basic notions of fairness underlie the insistence upon colorblindness?

### A. *Merit*

One argument frequently made for colorblindness is that taking account of race undermines meritocratic values.[52] In this view, scarce educational and employment opportunities ought to be distributed on the basis of merit, as measured by individual abilities and achievements, without regard to an arbitrary characteristic such as race. Those with superior qualifications are said to be more deserving, and therefore, entitled to those opportunities in preference to those less qualified. Taking race into account can frustrate these

48. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775 (1979) (opposing the use of racial classifications).

49. *See, e.g.*, J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313 (1997); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985); Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410 (1994).

50. *See, e.g.*, Stephan Thernstrom & Abigail Thernstrom, America in Black and White: One Nation, Indivisible (1997).

51. *See, e.g.*, William G. Bowen & Derek Bok, The Shape of the River Long-Term Consequences of Considering Race in College and University Admissions (1998).

52. *See, e.g.*, Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 Harv. L. Rev. 1312 (1986); Terry Eastland, *The Case Against Affirmative Action*, 34 Wm. & Mary L. Rev. 33 (1992); Antonin Scalia, *The Disease as Cure*, 1979 Wash. U. L.Q. 147 (1979).

legitimate expectations.[53] However, such claims have been broadly criticized. Philosophers challenge the notion that superior qualifications create moral entitlement.[54] Other commentators question the empirical basis for merit-based claims, arguing that test scores do not correlate closely with on-the-job productivity or future academic performance, and fail to accurately measure individuals' potential.[55] Some critics reject the very notion of "merit" as merely a reflection of existing power hierarchies that serves to reinforce underlying structures of privilege.[56]

All these arguments are beside the point when the alternative to race-consciousness is a lottery. For example, in *Tuttle*, concerns about merit offer no reason for preferring, let alone mandating, a double-blind admissions lottery, rather than a process that promotes racial diversity. In fact, merit was explicitly disclaimed as a basis for admission to ATS,[57] and the notion of sorting and ranking pre-kindergartners by "merit" would strike most as offensive, if not absurd. Arguments about merit are also largely irrelevant in *Taxman* because the Board's alternative to considering race was not merit, but chance.[58] Sharon Taxman and Debra Williams were equal in seniority and equally qualified in every respect relevant to their job performance. The Board considered the affirmative action plan precisely because it had exhausted all merit criteria.[59] Given the choice confronting the Board—utilizing its affirmative action plan or a game of chance—merit principles offered no basis for choosing one decision-making procedure over the other.[60]

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53. This argument assumes that an objective, well-defined metric exists by which to measure merit, and that jobs and schooling opportunities are in fact ordinarily distributed according to these criteria.

54. *See, e.g.*, K. Anthony Appiah & Amy Gutmann, Color Conscious: The Political Morality of Race 118-38 (1996).

55. *See, e.g.*, John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. Cal. L. Rev. 2129, 2219 (1992); Richard Delgado, *Rodrigo's Chronicle*, 101 Yale L.J. 1357, 1364 (1992); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 Iowa L. Rev. 313, 333-34 (1994); Yxta Maya Murray, *Merit-Teaching*, 23 Hastings Const. L.Q. 1073, 1075 (1996); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 955 (1996).

56. *See, e.g.*, Patricia Williams, The Alchemy of Race and Rights 103 (1991) ("Standards are nothing more than structured preferences."); Calmore, *supra* note 55, at 2219.

57. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 701 (4th Cir. 1999).

58. Taxman v. Bd. of Educ., 91 F.3d 1547, 1567 (3d Cir. 1996) (Sloviter, J., dissenting).

59. *Id.* at 1568-69.

60. In fact, the affirmative action plan at issue in *Taxman* expressly embraced the primacy of traditional merit criteria. It required that "in all cases, the most qualified candidate will be recommended for appointment." *Id.* at 1550. Only when candidates were of equal qualification would the consideration of minority status come into play. Thus, no violation of merit hierarchies was even contemplated under the School

Similarly, concerns about merit cannot explain Judges Friedman's and Boggs' suggestion that an admissions lottery would be preferable to Michigan Law School's diversity policy. Assuming for the moment that test scores and grades are an accurate and complete measure of "merit," then meritocratic values would argue for maximizing these quantitative indices in assembling a class. If, however, Michigan Law School utilized a lottery as a primary decision criterion as suggested, the resulting class would likely have lower LSAT scores and grades than the class actually admitted.[61] Under a narrow view of merit, the admissions lottery works a more substantial disruption of meritocratic values than the Law School's race-conscious admissions policy.[62] Given the choice between using a lottery as the primary decision criterion and Michigan Law School's policy of promoting racial diversity among other factors, a strict meritocrat should, if anything, prefer the latter.

Although Judges Friedman and Boggs did not suggest it, the admission process might incorporate a lottery solely as a tie-breaker between equally qualified candidates. A school could make offers of admission in rank order starting with the most qualified applicants,[63] and resort to a lottery only when unable to distinguish between equally qualified candidates at the margin. Assuming for the moment that some uncontroversial measure of "merit" exists that would permit rank ordering, this use of a lottery appears fully consistent with meritocratic values. However, in such a situation—where all relevant criteria have been exhausted—using race as a tie-breaker would be equally consistent with meritocratic values. Of course, Grutter argued that Michigan Law School used race as much more than a tie-breaker, but because the school's admission process relied on numerous non-quantitative factors, this assertion cannot be proved. Michigan Law School admitted some white applicants with lower GPA and LSAT

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Board's plan.

61. The majority in *Grutter* rejected a lottery system as a workable alternative in part because of the recognition that it "would require a dramatic sacrifice of . . . the academic quality of all admitted students." Grutter v. Bollinger, 123 S. Ct. 2325, 2345 (2003).

62. The anti-meritocratic effects of a lottery have been noticed before. Duncan Kennedy proposed an admissions lottery for law schools as a means of overcoming "illegitimate hierarchy." Duncan Kennedy, Legal Education and the Reproduction of Hierarchy 121-22 (1983) ("There should be a test designed to establish minimal skills for legal practice and then a lottery for admission to the school; there should be quotas within the lottery for women, minorities and working class students.").

63. This suggestion assumes that some uncontroversial method exists for rank ordering applicants from most to least qualified and determining when a tie has occurred. Michigan Law School, however, like most institutions of higher education, does not rely solely on grades and test scores in making its admissions decisions. Important factors such as rigor of undergraduate education, essay quality, and strength of recommendations are not easily quantified and converted into rank orderings.

scores than Grutter.[64] If it considered those candidates more qualified, despite their lower grades and test scores, it is quite possible that the Law School found some of the African-American and Mexican-American candidates with lower numbers than Grutter to be as qualified as her, and used race merely as a tie-breaker.

Under some circumstances a lottery may be a reasonable decision-making tool, but not because it promotes meritocratic values. Conversely, concerns about merit may be pressing in some circumstances, but they cannot be the reason for categorically opposing all forms of race-consciousness. Merit considerations may be wholly irrelevant, as in *Tuttle*, or entirely indeterminate, as in *Taxman*. If utilizing a lottery entails ignoring altogether relevant, individual characteristics, meritocratic values may argue *for* some types of race-conscious policies—those that take account of race as one factor among many—rather than a wholly random decision-making process. Thus, if proponents of colorblindness prefer a lottery to race-conscious decision-making in cases like *Grutter, Tuttle* and *Taxman*, it cannot be because of concerns about merit.

### B. *Respect for Individuals*

Colorblindness proponents also fault race-conscious policies for failing to treat persons as individuals. They contend that people should be judged according to their unique attributes, abilities, and achievements. Taking account of race offends these values, they argue, because it treats persons as members of a group, overlooking relevant individual differences between them. Moreover, race is something over which we have no control, and so it seems unfair to distribute important benefits based on a characteristic we cannot change. Because race is so rarely relevant to important decisions like hiring and school admissions, utilizing race as a factor is arbitrary.

These arguments, however, cannot explain why a lottery is preferable to race-conscious decision-making, because each objection applies to chance-based decision-making processes as well. Using a lottery as a primary decision criterion entails abandoning the effort to differentiate among candidates based on their unique characteristics. In a lottery, candidates are not judged by their individual abilities and achievements. What matters is only whether or not one is in the pool of legitimate claimants. Like race, chance is something over which we have no control. Finally, lotteries, by definition, rely on a random selection process, rather than attempting to identify factors relevant to the decision at hand.

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64. In the year Grutter applied, Michigan Law School accepted thirty-five white applicants with a lower GPA, lower LSAT score or both. Deposition of Kinley Larntz, Ph.D. at 38 of Ex. 68, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928).

Consider Judges Friedman's and Boggs' proposal that Michigan Law School conduct an admissions lottery among all qualified applicants. Under such a system, all that would matter is whether an applicant's grades and test scores met the minimum numerical requirements for inclusion in the lottery. All other potentially relevant individual factors—the personal statement, letters of recommendation, family background, leadership potential, and unique experiences of the applicant—would be ignored.[65] Instead, selection for admission would be based on chance, a factor entirely beyond individual control. Such a process hardly seems respectful of persons as unique individuals.

Alternatively, the lottery might be used only as a tie-breaker, avoiding these criticisms. The admissions process might treat each applicant as an individual by carefully considering all available personal information, resorting to a lottery only in the case of a tie between candidates. Such use would not preclude consideration of each individual's unique abilities and experiences. However, if such a system fully respects the human dignity and individuality of each applicant, so too does a system like Michigan Law School's, which considers every applicant's file in its entirety, gives serious consideration to individual qualities not captured by grades and test scores, and takes account of race merely as a "plus" factor in close cases.

This individualized consideration made a critical difference in how the Supreme Court viewed Michigan Law School's admissions policies in contrast to the undergraduate program. In an effort to achieve a diverse student body, the undergraduate admissions policy automatically awarded twenty points to each applicant from an underrepresented minority group, as well as points for other nonacademic factors such as state of residence, alumni relationships, personal achievement, public service, or athletic ability.[66] Finding that this inflexible, mechanical point system failed to assess each applicant as an individual, a majority of the Court in *Gratz* struck down the policy as not narrowly tailored.[67] By contrast, the Court upheld the Law School's policy, finding that it "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."[68] As the Court recognized in *Grutter*, an admissions process that treats each applicant as an

65. The Supreme Court majority in *Grutter* noted that a lottery would render impossible the sort of nuanced, individualized judgments that are made under the Law School's existing practices, thereby defeating its efforts to assemble a student body "diverse in ways broader than race." *Grutter*, 123 S. Ct. at 2345.

66. *See* Gratz v. Bollinger, 123 S. Ct. 2411, 2419-20; *id.* at 2440-41 (Souter, J., dissenting).

67. *Id.* at 2428-31.

68. *Grutter*, 123 S. Ct. at 2343.

individual, taking account of race as one factor among many, is fully respectful of persons as individuals.[69] Such a policy is more respectful of the potential contribution of each individual than a colorblind lottery that "would make that kind of nuanced judgment impossible."[70]

The lottery itself, as a decision tool, is "blind to talent, need, and desert."[71] Although colorblindness proponents criticize race-conscious decision-making for ignoring merit-based claims and failing to respect persons as individuals, lotteries are vulnerable to the same objections. They do not allocate scarce opportunities according to individual merit, nor do they take account of relevant individual differences between claimants. Like race-conscious decision-making, lotteries entail decision-making based on a factor beyond individual control.

Perhaps the shared flaws of race-conscious and chance-based decision-making processes should not be surprising, because race itself is largely a matter of chance. It is mere happenstance that we are born to particular parents, in a particular social context, with a particular genetic heritage. We have no control over any of those factors. Yet that constellation of factors determines the race of most individuals, and constrains the possibilities for racial self-identification for all. This assertion does not entail resurrection of any essentialist notions of race. Genetic inheritance does not define the individual. However, precisely because race is socially constructed, one's ancestry, together with a particular social context, has a determinative influence over one's racial definition.

Ironically, while race itself is merely a matter of chance, some argue that chance is a better decision criterion than race. Why should the arbitrariness of chance be preferable to the arbitrariness of race? The preference for chance over race suggests that race is *worse* than arbitrary. If this is so—and this notion accords with our intuitions—it is not because of anything inherent in the category of race itself, but because of our particular history and the meaning that our history has invested in the use of racial categories. The outlines of that history are well-known; from the forced migration of African slave labor early in the process of European settlement, to the legally enforced separation of whites and blacks in the era of Jim Crow, to the internment of thousands of U.S. citizens solely because of their Japanese ancestry during World War II. The victims of these and other injustices were denominated by race, burdening that classification with a social and historical significance far beyond any other conventional grouping of individuals.

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69. *See id.*
70. *Id.* at 2345.
71. Duxbury, *supra* note 20, at 51.

The argument for colorblindness, then, implicitly draws its force from history. The harm inflicted in each of the above historical examples resulted from the *use* that was made of race, not anything intrinsic to the category itself. Colorblindness proponents ignore this distinction, attempting to harness the moral revulsion against slavery and Jim Crow, and direct it against contemporary efforts to ameliorate the effects of racial subordination. In the absence of that history, however, taking race into account appears no more irrelevant or arbitrary than many other decisions by governmental or private actors that are readily tolerated. Apart from history, there is no reason to attribute a special odiousness to race-conscious decision-making.

## III. WEIGHING BURDENS

An awareness of our history rightfully makes us wary of how race may be used. At the same time, the particular facts of that history also motivate race-conscious decision-making in allocating opportunities today. Precisely because oppression and disadvantage have been imposed along racial lines, taking account of race is seen as necessary to reverse generations of subordination and inequality. Colorblindness proponents profess to share this ultimate goal, but insist that the means used must not explicitly mention race. In any other context, it would appear quite odd to insist that a pressing social problem be addressed without reference to the dimension along which it occurs. What, then, justifies the claim that problems of racial inequality should be addressed without mentioning race?

As discussed above, the term colorblindness operates as shorthand for other, more basic fairness arguments. Juxtaposing race and chance, however, reveals that an insistence on colorblindness is not always consistent with the arguments that purportedly motivate it. Concerns about merit or respect for individuals cannot explain why a lottery is always preferable to race-conscious decision-making. Colorblindness proponents, however, raise another objection to race-conscious policies. Although race and chance are both arbitrary decision criteria, taking account of race, unlike a lottery, systematically disadvantages certain groups. They argue that if race-conscious policies are used to benefit previously excluded minorities, whites will suffer as a result.

While this argument has some force, it is crucial to be clear about the nature of that harm. In the typical challenge to affirmative action, white plaintiffs argue that they would have obtained the opportunity in question had it not been for their race. Often, however, it is far from clear that the white plaintiffs would have succeeded if the challenged policy did not exist. This point is obscured by the tendency

to assume that white challengers would have gotten the job or been admitted to the program absent consideration of race.[72] The contingency of this assumption, however, becomes quite clear in cases in which a lottery is the alternative decision criterion.

In *Tuttle*, the white plaintiffs who sought admission to ATS had no established right to attend that school. Even under the double-blind lottery they sought, they faced a strong probability—over seventy percent—that they would not have been admitted.[73] Similarly, in *Taxman*, the fact that Debra Williams had equal seniority and equal qualifications foreclosed any claim that Taxman was entitled to retain her job. If the Board had chosen to ignore diversity considerations, and used a lottery to decide between the two teachers, Taxman still would have had no more than a fifty percent chance of avoiding layoff.[74] In both *Tuttle* and *Taxman*, had the plaintiffs lost the lottery, they would have faced exactly the same consequences—rejection from ATS or loss of a job—but they could not claim to have been harmed. Thus, the burden imposed by taking race into account should not be equated with the lost opportunity, for both plaintiffs might have lost that opportunity through a colorblind lottery as well.

In the context of selective university admissions, it is similarly problematic to assume that white plaintiffs who challenge race-conscious admissions policies would have been admitted in the absence of those policies. That assumption can lead to absurd conclusions, such as the comment that "[I]n order to accommodate a *few* less-qualified black students, the University of Texas Law School, like other leading law schools, must turn down *hundreds or thousands* of academically superior white students every year."[75] Such a proposition is mathematically impossible of course, but it was implicit in the claims of the plaintiffs in *Hopwood v. Texas* that affirmative action deprived them of admission to Texas Law School. In fact, the courts ultimately determined that Hopwood and her three co-

72. The potency of this claim was exploited in a political advertisement aired by Jesse Helms during his 1990 campaign to retain his Senate seat in the face of a challenge by Harvey Gantt, an African-American. The commercial said, "'You needed that job, and you were the best qualified .... But it had to go to a minority because of a racial quota.'" Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 202 (1992). On a theoretical level, Cheryl Harris has captured this assumption of entitlement as a manifestation of an implicitly recognized property interest in whiteness. *See* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1767 n.261 (1993).

73. In 1998, ATS had 185 applicants for 69 available positions. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 701 (4th Cir. 1999). After the Board admitted the 23 applicants with siblings already enrolled at ATS, 46 spots remained to be allocated among the 162 non-sibling applicants. *Id.* at 702. In the absence of any other preferences, these non-sibling applicants each stood a 28.4% chance of being admitted.

74. *See* Taxman v. Bd. of Educ., 91 F.3d 1547, 1551 (3d Cir. 1996).

75. Michael Lind, The Next American Nation 166 (1995) (emphasis added).

plaintiffs "had no reasonable chance of being admitted to the Law School under a race-blind admission system."[76]

Even if white challengers like Hopwood and her co-plaintiffs were unlikely to succeed in the absence of race-conscious policies, standing doctrine nevertheless permits them to sue. In *Northeastern Florida Chapter of the Associated General Contractors of America v. Jacksonville*,[77] the Supreme Court held that a plaintiff challenging race-conscious governmental policies need not allege that he or she would have obtained the benefit in the absence of the policy. Rather, "the inability to compete on an equal footing" is considered an "injury in fact" sufficient for standing purposes.[78] Recognizing such an "intangible injury"[79] may make sense when deciding whether a plaintiff should be permitted to pursue an equal protection claim in court. However, the "inability to compete on an equal footing" is a quite different, and much lesser, harm than the very concrete harms—loss of a job, government contract, or educational opportunity—that are sometimes blamed on race-conscious policies.[80]

How does "the inability to compete on an equal footing" cause harm, if the plaintiff was unlikely to succeed anyway? Here again, the cases that juxtapose race-conscious decision-making and lotteries

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76. Hopwood v. Texas, 236 F.3d 256, 272 (5th Cir. 2000). Hopwood and the other unsuccessful applicants who challenged Texas Law School's admissions policies all had significant weaknesses in their applications. Poor academic records, relatively uncompetitive undergraduate institutions, or missing reference letters meant that none of the Hopwood plaintiffs was likely to have succeeded even absent the affirmative action program. *Id.* at 269-72.

Similarly, in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), despite Justice Powell's conclusion that Davis Medical School's special admissions program *caused* Bakke's rejection, it appears highly unlikely that he would have been admitted even in its absence. The Court's order that Bakke be admitted rested on the University's strategic choice not to contest his admissibility, rather than any factual finding that he actually would have been admitted in the absence of the program. In fact, the trial court had concluded he would not have been admitted. *See* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1056-60 (2002).

77. 508 U.S. 656 (1993).

78. *Id.* at 666; *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995).

79. *See* Hopwood v. Texas, 999 F. Supp. 872, 883 (W.D. Tex. 1998).

80. As explained by the district court in *Hopwood*, cases challenging the use of racial preferences involve two types of injury. First, an "intangible injury" may result from the government's discriminatory classification which prevents a plaintiff from 'competing on an equal footing.'" *Id.* at 883 (citing *Adarand*, 515 U.S. at 211). Alleging such an intangible injury is sufficient for standing purposes. "A second, tangible type of injury—an injury in-fact—occurs when a plaintiff is actually denied some right or benefit, such as admission to the law school . . . ." *Id.* In the context of a selective admission process, it cannot be the case that all rejected nonminority applicants, who vastly outnumber accepted minority applicants, were denied admission because of their race. *See id.* at 884. For example, "an applicant who has no conceivable chance of admission cannot possibly show that race was a substantial or motivating factor in the . . . decision to deny him or her admission." *Id.*

illuminate the question. In *Tuttle*, the district court ordered a race-blind lottery to allocate the remaining spots in the kindergarten class.[81] Without a sibling already at ATS, the white plaintiffs in *Tuttle* stood a 28.4% chance of gaining admission through a race-blind lottery.[82] Under the Arlington School Board's diversity policy, their chances of admission fell to 23%.[83] The use of race as a factor was unlikely responsible for even the full 5.4% drop in their chances of admission. Because the Arlington School Board's system also weighed low-income background and English as a second language[84]—factors that correlate with race—their inclusion likely contributed to the white plaintiffs' reduced chances of admission as well. The concrete impact of the Arlington School Board's policy, then, was not to deny the plaintiffs places in the kindergarten class at ATS, but to decrease their odds of admission by something less than 5.4%.[85]

The "equal footing" argument thus amounts to a complaint that race-conscious decision-making changes the odds of success for white applicants.[86] Whether or not altering the odds in this way is fair depends in part upon whether the initial distribution of the probabilities of selection was fair. I will return to this point *infra*, but

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81. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 700-01 (4th Cir. 1999).

82. *See id.* at 702 (stating that 162 non-sibling applicants competed for 46 available positions).

83. *See id.* at 702 n.4.

84. *Id.*

85. One might alternatively characterize the plaintiffs' loss by saying that the percentage reduction in their odds of success was 19%; that is, a 5.4% drop in their odds of success, divided by their expected chance of 28.4%, amounts to a 19% reduction in their overall odds. Although mathematically accurate, this characterization removes from view the expected chance of success in the absence of any race-conscious policy. Particularly when that chance was low to begin with, expressing the loss in terms of a percentage reduction in odds misleadingly suggests a greater absolute loss to white plaintiffs than is in fact the case.

86. Liu argues that in the context of higher education, it is possible to distinguish three kinds of rejected white applicants: (1) those who would have been admitted under a race-blind policy; (2) those who would have been admitted only if they were a member of a preferred minority group under a policy giving racial preferences; and (3) those who had no chance of admission, regardless of whether or not racial preferences were used. *See* Liu, *supra* note 76, at 1081-94. To illustrate this typology, Liu examines the applications of three of the white plaintiffs who brought suit challenging the University of Georgia's undergraduate admissions policies. *Id.* at 1081-92. Because Georgia's undergraduate admissions process utilized cutoff scores to determine automatic admissions and automatic rejections, as well as a quantitative index that took account of race at the next stage of the process, it is possible in that case to identify at least three distinct categories of rejected white applicants as Liu suggests. *See* Wooden v. Bd. of Regents of the Univ. Sys. of Ga., 247 F.3d 1262, 1266-67 (11th Cir. 2001). However, under admissions systems like Michigan Law School's, that do not utilize cutoff scores or give a numerical "boost" based on race, rejected white applicants cannot easily be sorted into these three categories. Conceptualizing the "equal footing" argument as "changing the odds of success" captures white plaintiffs' complaints about race-conscious policies regardless of the particular type of decision-making process used.

it bears emphasis now that the *degree* of burden imposed by "the inability to compete on an equal footing" depends upon how great a change in the odds results from taking race into account. If considering race alters white plaintiffs' odds of success only slightly, that fact ought to influence substantive judgments of a policy's fairness.[87] Where evidence indicates that the plaintiff was unlikely to have succeeded in any case, the burden imposed by race-conscious policies is far less than the loss of the job or opportunity in question.[88]

The impact of race-consciousness in university admissions similarly can be understood as changing the odds of admission. White plaintiffs challenging these policies often point to different rates of acceptance of black and white applicants as evidence that race has a large impact on outcomes. The problem with this argument, however, is that it conflates the benefits of affirmative action to applicants from preferred minority groups with the costs to individual white applicants. In fact, as Goodwin Liu has demonstrated, the basic arithmetic of highly selective admissions indicates that the effect of race-conscious policies on white admissions rates is slight.[89] As Liu explains, the small size of the minority applicant pool and the use of non-objective admissions criteria mean that racial preferences have very little effect on the chance of admission for any individual member of the much larger class of white applicants.[90]

Using data from twenty-eight selective colleges and universities, Liu estimates the effects of affirmative action on white applicants' chances of admission.[91] For a given range of SAT scores, he assumes that the same number of applicants would have been admitted under a race-blind process as were in fact admitted under existing policies.[92] That number, divided by the total number of applicants with scores in that interval, produces "the hypothetical likelihood of admission for an

87. In equal protection terms, the requirement of narrow tailoring entails consideration of the burden imposed on non-minorities. *Cf.* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1985). Similarly, the permissibility of affirmative action under Title VII depends upon the impact on the interests of non-minorities. *See* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

88. Under these circumstances, no particular white applicant can claim that he or she would have gotten the opportunity in question in the absence of a race-conscious policy. Nevertheless, *someone* would have. Thus, one might argue that the somewhat diminished chances of many white applicants in the aggregate constitutes a significant burden. This argument, however, is inconsistent with the constitutional interpretation that equal protection rights are "personal rights," "guaranteed to the individual," rather than to groups. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)); *see also* Adarand Constructors, Inc. v Pena, 515 U.S. 200, 227 (1995) ("The Fifth and Fourteenth Amendments . . . protect *persons*, not *groups*.").

89. *See* Liu, *supra* note 76, at 1063.

90. *See id.* at 1074.

91. *Id.* at 1072-78.

92. *Id.* at 1074.

average applicant" in that SAT interval.[93] Liu then compares this hypothetical likelihood of admission with actual admission rates.[94] His calculations show that while black applicants benefited significantly from affirmative action, white applicants' chances of admission were not significantly affected.[95] For example, 19.3% of whites scoring in the 1200-1249 range on the SAT were admitted, while their expected rate of admission under a race-blind system would be 22.5%.[96]

Barbara Grutter's claim that Michigan Law School's diversity policy harmed her is susceptible to a similar analysis. Grutter's application reported a 3.8 undergraduate GPA and an LSAT score of 161.[97] In her briefs, Grutter alleges that if she were a member of a preferred minority group, she would have been admitted to Michigan Law School.[98] This argument, however, misleadingly magnifies the harm she allegedly suffered by equating it with the benefit afforded underrepresented minority applicants under the diversity policy. Grutter, however, did not seek to be treated as a preferred minority candidate, but to abolish the diversity policy altogether. Thus, the

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93. *Id.*

94. *Id.* at 1075 tbl.1.

95. *See id.*

96. *See id.* Liu suggests that his estimates likely overstate the effect of affirmative action on white applicants, because of differences between racial groups in "yield;" that is, the rate at which accepted applicants actually matriculate. *Id.* at 1076. Because a lower proportion of black candidates accept offers of admissions, more offers are necessary to attain a target class size. *Id.* A plausible assumption is that black yield would rise in the absence of affirmative action, meaning that fewer offers of admission would need to be made and overall acceptance rates would drop. *See id.* Adjusting for the effects of racial differences in yield, Liu estimates that the effect of abolishing preferences would be even less, with white admission rates rising to only 20.6% from 19.3% for applicants with SAT scores in the 1200-1249 range. *See id.* at 1078 tbl.2. Calculating yield-adjusted admissions rates across the spectrum of SAT scores leads him to conclude that "the impact of racial preferences on the odds of admission facing white applicants is remarkably slight." *Id.* at 1077.

97. Grutter v. Bollinger, 123 S. Ct. 2325, 2332 (2003).

98. In the year she applied for admission, only 19.3% of Caucasian applicants, but 100% of African-American and Mexican-American applicants with similar grades and scores were admitted. *See* Deposition of Kinley Larntz, Ph.D. at 37-39 of Ex. 68, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928). This difference in admission rates appears stark; however, isolating these numbers for comparison is misleading. First, the percentages for African-American and Mexican-American applicants are quite unstable. Only 5 African-Americans and 1 Mexican-American fell into this cell. *See id.* at 37 of Ex. 68, 39 of Ex. 68. If one or two admission decisions were made differently, the percentages would change dramatically. In addition, isolating outcomes for a single cell obscures the fact that in many of the cells on the grid, applicants of all races were treated nearly identically. For example, applicants with GPAs of 3.75 and above and LSATs in the 167-169 range were virtually certain to be admitted, regardless of race. *See id.* at 37-39 of Ex. 68. In this cell, 100% of African-American and Mexican-American, and 99% of Caucasian applicants were admitted. *See id.* Similarly, applicants in cells at the opposite corner of the grid—those with low LSAT scores and low GPAs—were also treated similarly in that virtually all were rejected. *See id.*

degree of improvement in her odds of admission under a race-blind policy is the appropriate measure of her harm.

In fact, the impact of Michigan Law School's diversity policy on Grutter's chances of admission was quite small. Utilizing Liu's methodology, one can calculate the likelihood of Grutter's admission under a race-blind policy, by assuming that Michigan Law School would accept the same number of applicants for each combination of GPA and LSAT score. In the year Grutter applied, 29 out of 135, or 21.5% of all applicants with similar GPAs and LSAT scores were admitted.[99] The acceptance rate for Caucasians with these grades and scores under the Law School's diversity policy was 19.3%.[100] Thus, under a race-blind admissions policy Grutter's odds of admission would have been 2.2% higher.[101]

Juxtaposing race and chance reveals that race-consciousness does not necessarily (or even often) entail depriving whites of fixed entitlements to particular educational or economic opportunities. Rather, the impact of affirmative action is more accurately characterized as altering white applicants' odds of success. Understood in this way, the degree of burden imposed by race-conscious policies will vary enormously from one situation to another. Moreover, because white applicants far outnumber minority applicants in many situations, the impact on any given individual may be quite minimal; often a matter of changing the odds of success by only a few percentage points.

## IV. CHANGING ODDS

Although the burden imposed on individual whites is typically much less than claimed by the rhetoric, the fact remains that taking race into account alters the relative odds of success of different racial groups.

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99. *See id.* at 35 of Ex. 68.

100. *See id.* at 38 of Ex. 68.

101. Of course, any estimate of Grutter's chance of admission absent the diversity policy is subject to some uncertainty. On the one hand, Liu's analysis suggests that adjusting for differences in black and white yield would lead to a smaller estimate of the change in her odds of admission. *See* Liu, *supra* note 76, at 1076-78. On the other hand, one might question the assumption that Michigan Law School would accept the same number of applicants at each GPA/LSAT level in the absence of the diversity policy. If the Law School would admit proportionally more applicants at the higher GPA/LSAT ranges under a race-blind admissions policy, then the estimate of Grutter's odds of admission would be somewhat higher. It is, of course, impossible to calculate these adjustments with precision; however, the uncertainties introduced by assumptions about yield and the distribution of admissions offers cut in opposite directions. Perhaps more importantly, discretionary factors would continue to play a significant role in admissions decisions even absent considerations of race. Under existing policy, Michigan Law School does not accept white applicants in rank order according to grades and test scores. So long as discretionary factors remain important, and white applicants far outnumber those from preferred minority groups, the impact of race-conscious policies on applicants like Grutter will be relatively small.

Viewed in this light, lotteries may appear more fair than race-conscious policies, because they distribute the probabilities of success equally among all potential claimants. This argument, however, overlooks two critical points. First, whether changing the odds of success is objectionable depends upon whether or not the initial distribution of the probabilities of success is fair. Second, even if some existing distribution of the odds of success is acceptable, departures from that distribution do not necessarily violate any moral entitlements. In fact, most policy decisions entail "changing the odds" in one way or another, often on a racial dimension.

Consider first the fairness of the initial distribution of odds. The unweighted lottery appears fair because each person in the pool has an equal chance of selection. The lottery may nevertheless produce biased outcomes, however, depending upon how people become eligible to enter the pool.[102] If, for example, information about the opportunity to enter a lottery is not evenly disseminated, or applicants are required to satisfy certain requirements to enter the pool, certain individuals or groups may be more likely to participate in the lottery. In this case, even if the lottery operates in an unbiased manner, unequal chances of entering the pool mean that the use of a lottery as a decision criterion will produce biased outcomes.

The diversity policy challenged in *Tuttle* was likely a response to one such situation. The Arlington County School Board's goal in operating ATS was to make its resources available to "the diverse groups of students in the district."[103] Use of a double-blind lottery could be consistent with that goal, but only if all entering kindergarteners were equally likely to apply to ATS. However, proportionally far fewer lower income, non-native English speaking and Black and Hispanic parents applied for spots at ATS for their children.[104] Perhaps the differing rates of applications across groups reflect different educational preferences. More plausibly, however, informational barriers made it difficult for some parents to learn about ATS, evaluate the educational opportunity it offers, and negotiate the application process. Non-English speakers face obvious obstacles. In addition, racial minorities and low-income families typically lack access to social networks where valuable information about school quality and educational outcomes is shared. If, in fact, these sorts of barriers systematically discourage certain groups from entering the pool, the use of an unweighted lottery will simply

102. *See* Duxbury, *supra* note 20, at 100-02.

103. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 701 (4th Cir. 1999).

104. For example, 43% of public school students county-wide did not speak English as a first language, but these students constituted only 11.9% of the applicant pool to ATS. *See id.* at 702 n.4. Similarly, low-income, Black and Hispanic students constituted 40%, 17% and 31% of the students county-wide, but only 13.5%, 8.6% and 10.8% of the applicant pool respectively. *See id.*

reproduce these biases in the ultimate admissions decisions. Thus, the fairness of a lottery depends not only on the chance that each applicant in the pool will be selected, but also the chance for all potential claimants to enter the pool in the first place.

A similar analysis can be applied to Grutter's situation. An admissions lottery is only appealing if one ignores the process by which the pool of qualified applicants is generated. Undoubtedly, Grutter's chance of admission would have improved if Michigan Law School had conducted a lottery offering equal chances of admission to all qualified applicants.[105] But it is equally certain that not all children have equal chances of acquiring the credentials necessary to be included in the qualified applicant pool. Consider that the black unemployment rate is more than double that of whites,[106] and that the median income for black households is 34% less than for white households.[107] Moreover, the poverty rate for black Americans is nearly two and a half times that for whites, with an alarming 32.7% of black children living below the poverty line.[108] Entrenched patterns of segregation mean that many African-American and Hispanic children lack access to quality schools, and are deprived of valuable social capital—the access to networks, information, and mentoring necessary to take advantage of educational and economic opportunities.

Given the stark differences in measures of economic well-being and access to social and educational resources, blacks and whites do not face anything close to equal odds of qualifying for admission to Michigan Law School, or any other highly competitive educational opportunity. As discussed above, the "equal footing" argument amounts to a claim that affirmative action harms whites by reducing their odds of success. However, if the concern is statistical fairness, then the odds of the racial lottery is arguably a greater public policy concern than a diversity policy that shifts whites' odds of success by a few percentage points.

Proponents of colorblindness will likely object that this line of argument fails to treat Barbara Grutter as an individual. *Some* white applicants, they argue, will have suffered greater deprivations and

105. It is impossible to calculate exactly how much Grutter's chance would improve without a clear definition of who is "qualified." However, using an admissions lottery would have the biggest impact on the very highest scoring applicants, whose chances would drop from a near certainty of admission to the same level as all the other applicants. Obviously, one must evaluate the fairness of any given admissions system based on its impact on all applicants, not merely one subset.

106. The unemployment rate among black Americans in 2000 was 7.6%, versus 3.5% for whites in the same year. Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States: 2001, at 368 tbl.569 (121st ed. 2001).

107. In 1999, the median income for white households was $42,504; median income for black households was $27,910. *Id.* at 433 tbl.662.

108. The percentage of persons below the poverty level was 23.6% for blacks and 9.8% for whites in 1999. *Id.* at 442 tbl.679. In that same year, 32.7% of black children and 12.9% of white children were living below the poverty level. *Id.* tbl.680.

overcome greater obstacles than *some* black applicants, and thus, preferences that rely on group-based generalizations are unfair.[109] However, the process of defining the pool of "qualified" applicants itself necessarily involves group-based judgments. Unless the lottery were open to all, some decision would have to be made about the threshold level of GPA and LSAT scores that would qualify applicants for inclusion in the lottery. Such a decision would itself rest on statistical generalizations about how a group of individuals—those with similar grades and LSAT scores—are likely to perform in the future. Because of the uncertainty inherent in test scores, *some* applicants with scores below the qualifying level would perform as well or better than *some* applicants with higher scores. Although group-based generalizations of this sort also ignore relevant individual differences, their use is widely accepted.

A more fundamental difficulty, however, besets claims based on statistical fairness. Justice does not require that the odds for success must always be equally distributed among all potential claimants. In fact, in most areas of social decision-making, imposing equal chances of selection would be considered not only unwise, but unfair. Imagine, for example, the reaction to a requirement that a university or corporation chose among all qualified candidates for President or CEO by lot. It is commonly expected, even demanded, that selection will occur through the application of some relevant criteria, even though the choice of particular criteria will increase some applicants' chances of success relative to others. Of course, profound disagreements often exist as to which criteria are relevant and what weight they should be given. Yet, the important point is that *any* policy decision, even purely procedural ones, may alter claimants' relative odds of success. The mere fact that a policy decision changes the odds—even if the prior distribution of odds was acceptable—does not in itself create unfairness.

Consider the admissions policy for ATS in *Tuttle*. Among the pool of applicants, ATS first offered admission to those with a sibling already attending ATS.[110] Then, it held a weighted lottery among the non-sibling applicants, giving preference to students with certain characteristics.[111] In striking down the ATS admissions policy, the Fourth Circuit limited its analysis to the race/ethnicity factor,[112] implicitly permitting the Arlington School Board to continue to alter the odds by weighting the economic and language factors. However, the biggest factor "skewing the odds" of admission—the sibling

109. As discussed above, however, this objection cannot explain why an admissions lottery would be morally preferable, as it too fails to treat applicants as unique individuals.

110. *See* Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 702 (4th Cir. 1999).

111. *Id.* at 701.

112. *Id.* at 705.

preference—was not even challenged by the *Tuttle* plaintiffs. Because they did not have a sibling already enrolled at ATS, their chances of admission dropped from 37.3% to 28.4%, a larger reduction than that caused by all three of the diversity factors combined.[113] The point here is not that the sibling preference was wrong or a bad policy, but simply that *any* policy choice will alter the odds of success. Even a decision to increase advertising and outreach efforts would impact Tuttle's odds of selection, simply by increasing the size of the applicant pool for a fixed number of slots. Thus, the mere fact that a policy alters the odds of selection is not a legitimate basis for objection.

Nor is a policy inherently unfair because it changes the odds along racial lines. To argue otherwise would be to claim that a broad swath of existing laws is unfair. Because blacks and whites differ on a wide range of economic measures, decisions regarding everything from fiscal policy to welfare reform are likely to impact different racial groups differently. Undoubtedly, recognition of this likelihood motivates the doctrine stating that disproportionately adverse effects on a racial minority are not sufficient to show an Equal Protection Clause violation.[114]

Even the race-blind alternatives to affirmative action put forward by its opponents typically alter the relative odds of success for blacks and whites. In *Tuttle*, for example, the Fourth Circuit pointed to several options still available to the Arlington School Board, such as including all entering kindergarteners county-wide in a random lottery for spots at ATS.[115] Although the court described this option as "race-neutral," it would in fact tend to shift the relative odds of admission for Black and Hispanic students, compared with white applicants. Because proportionally more whites would be in a pool formed by self-selection, the shift to a universal, county-wide lottery would lower the relative odds that a white student would be selected for admission. Similarly, in criticizing Michigan Law School's diversity policy as not narrowly tailored, Judge Friedman mentioned several "race-neutral alternatives," all of which would affect whites' relative odds of

113. Because ATS had 185 applicants for 69 available spots, *id.* at 701, each applicant would have had a 37.3% chance of admission if no preferences were applied. Once the 23 sibling-applicants were offered places, *id.* at 702, 162 applicants remained for 46 spots, with a 28.4% chance of admission each.

114. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

115. *See Tuttle*, 195 F.3d at 706 n.11. The other alternative policies identified by the court were to "[a]ssign a small geographic area to identified alternative schools as the home school for that area, and fill the remaining spaces in the entering class by means of an unweighted random lottery from a self-selected applicant pool," *id.*, and to "allot[] a certain number of slots at each alternative school" to each neighborhood school. *Id.* These two suggested alternatives are also unlikely to be "race-neutral" in their effects.

admission.[116] He pointed to policies, such as increasing recruiting efforts for minority students, or accepting an established percentage of top graduates from certain schools as "alternative means for increasing minority enrollment."[117] These policies are true alternatives to a race-conscious diversity policy precisely because they also tend to shift the odds of admission along racial lines.

Thus, many policies that shift claimants' odds for success, even along racial lines, are not objected to on that basis. What distinguishes the alternatives deemed acceptable to colorblindness proponents is not that they have no impact on outcomes, but that they do not explicitly mention race.

## V. COLORBLINDNESS

Examining the preference for chance over race reveals the inherent circularity of insisting on colorblindness for its own sake: race-conscious decision-making is objectionable because any consideration of race is wrong. The values that purportedly motivate colorblindness—concerns about merit, treating persons as individuals, and not disrupting settled entitlements—caution against some uses of race, but not all. In addition, the fact that race-conscious policies alter the odds of success along racial lines does not distinguish them from widely accepted forms of social policy decision-making. Only the explicit mention of race does. Yet, despite its circularity, colorblindness claims have attained a certain gravity in debates over the permissibility of race-conscious decision-making. Three rhetorical moves—each reinforced by the Supreme Court's equal protection jurisprudence—help mask this inherent circularity.

First, as I suggested at the outset, the Court's three-tiered approach to equal protection doctrine makes race appear uniquely problematic. By singling out race-conscious decision-making for the highest level of scrutiny, equal protection doctrine suggests that race is exceptional in its arbitrariness. As the comparison with a lottery reveals, however, the arbitrariness of race is not distinctive. In fact, much arbitrariness and even outright unfairness not only exists, but is legally tolerated in our system for distributing opportunities and benefits. For example, Title VII case law makes it clear that employers are free to make all sorts of arbitrary, irrational, and unfair personnel decisions, free from judicial scrutiny.[118] What makes race distinctive is that it has historically been used to subordinate *certain* racial groups, not merely

116. Grutter v. Bollinger, 137 F. Supp. 2d 821, 853 (E.D. Mich. 2001).

117. *See id.* at 852-53.

118. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 514-15 (1993); *see also* Fisher v. Vassar Coll., 114 F.3d 1332 (2d Cir. 1997); Foster v. Dalton, 71 F.3d 52 (1st Cir. 1995) (holding that an employer's failure to promote a black woman, motivated by cronyism rather than discrimination, did not violate Title VII).

that it is capable of being used in arbitrary ways.[119] The equal protection doctrine, by reserving strict scrutiny for racial classifications, implicitly suggests that something inherent in race, rather than the ways in which it has been used, constitutes the unfairness.[120]

The second rhetorical move involves narrowing the frame of reference to exclude relevant arguments from consideration. A lottery appears fair if attention is focused solely on the equal probability of selecting any participant in the pool. However, its fairness also depends upon how eligible claimants are identified. Narrowing the frame allows one to ignore the fairness of the process that determines who is eligible to participate. Similarly, in claiming that race-conscious policies unfairly burden whites, colorblindness proponents focus only on the discrete decision at issue—who gets hired or promoted or admitted to law school. This limited perspective excludes from view the social conditions that result in minority underrepresentation in the applicant pool. Once again, the Supreme Court's jurisprudence implicitly endorses this rhetorical move, by holding that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[121]

Third, colorblindness attempts to equate all contemporary forms of race-conscious decision-making—regardless of their purpose, intent, or effects—with the historical oppression of people of color solely on the basis of their race. This move is encouraged by the Court's notion of "consistency,"[122] under which all forms of race-conscious decision-making, regardless of who is benefited and who is burdened, are subject to the same exacting standard of review. Although Justice O'Connor, writing for the majority in *Grutter*, notes that strict scrutiny requires consideration of "relevant differences," and that "[n]ot every

119. As Justice Ginsburg writes, "Our jurisprudence ranks race a 'suspect' category, 'not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.'" Gratz v. Bollinger, 123 S. Ct. 2411, 2444 (2003) (Ginsburg, J., dissenting) (alteration in original) (quoting Norwalk Core v. Norwalk Redev. Agency, 395 F.2d 920, 931-32 (2d Cir. 1968)).

120. As Jed Rubenfeld points out, the Supreme Court's equal protection jurisprudence has undergone a subtle, but significant, shift. What began as a concern with protecting "suspect classes"—those subject to a history of purposeful discrimination—has transmogrified into a fixation with "suspect classifications;" that is, ending any conscious acknowledgment of racial differences in policy making. Classifications have become talismanic, while the original purpose of strict scrutiny—to smoke-out racially invidious purposes against vulnerable social groups—has been lost to a formalistic insistence on consistency. *See* Rubenfeld, *supra* note 49, at 427-72.

121. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

122. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 230 (1995) ("[C]onsistency . . . recognize[s] that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.").

decision influenced by race is equally objectionable,"[123] she does not repudiate her earlier insistence on "consistency." Writing for the majority in *Gratz*, Chief Justice Rehnquist reiterates that the standard of review "'is not dependent on the race of those burdened or benefited by a particular classification.'"[124] This adherence to the language of "consistency" encourages the efforts of colorblindness proponents to equate the evils of slavery and segregation with efforts at racial remediation.

The consistency argument overlooks the differing role that race plays in different types of policies. When race is used to oppress, little else matters. Freedom from slavery,[125] the right to testify in court,[126] the right to attend certain schools,[127] or to sit in certain places,[128] all turned on the issue of how a person was racially classified. By contrast, the kinds of race-conscious decisions challenged today rarely entail making judgments *solely* on the basis of race. Barbara Grutter, for example, might complain that in the absence of Michigan Law School's diversity policy, her chance of admission would have risen from 19.3% to 21.5%, but had she scored just a few points higher on the LSAT, her chance would have risen even more, to 50.4%, even under the existing diversity policy.[129] Thus, far from being the sole basis for decision, race matters relatively little for white outcomes in decisions such as law school admissions that involve multiple criteria.[130]

Moreover, an even more critical difference separates historical examples of race-based oppression and contemporary race-conscious policies, rendering the consistency argument problematic. As Justice Ginsburg writes, "Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated."[131] The evil contained in Jim Crow laws lay not in the mere fact of racial classification, but the motivation behind that classification.[132] Laws mandating separation of the races were not

123. Grutter v. Bollinger, 123 S. Ct. 2325, 2338 (2003) (quoting *Adarand*, 515 U.S. at 228).

124. Gratz v. Bollinger, 123 S. Ct. 2411, 2427 (2003) (citations omitted).

125. *See, e.g.*, Hudgins v. Wrights, 11 Va. 134 (Hen. & M. 1806); Gobu v. Gobu, 1 N.C. 188 (1802).

126. *See, e.g.*, People v. Hall, 4 Cal. 399 (1854).

127. *See, e.g.*, Gong Lum v. Rice, 275 U.S. 78 (1927).

128. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).

129. Similarly, although Cheryl Hopwood argues that Texas Law School would have put her in the "presumptive admit" category had she been a member of a preferred minority, it is also true that she would have been a "presumptive admit" had her application not been downgraded because her undergraduate institution was insufficiently rigorous. *See* Hopwood v. Texas, 78 F.3d 932, 938 (5th Cir. 1996).

130. *See* Liu, *supra* note 76, at 1074.

131. Gratz v. Bollinger, 123 S. Ct. 2411, 2444 (2003) (Ginsburg, J., dissenting).

132. As many others have pointed out, a condemnation of caste legislation, not a

objectionable merely because they utilized a racial classification. Rather, it was the *meaning* of those classifications—the driving sentiment behind laws mandating segregation that "put[] the brand of servitude and degradation"[133] on black citizens, that rendered them immoral. No such motivation, neither explicit nor hidden, underlies policies that seek to enhance diversity by taking account of race. Their purpose is not to isolate or subordinate anyone, nor do they impose any kind of stigma on whites. Even under the challenged diversity policy, Michigan Law School's student body remained predominately white. Where the supposedly disfavored race continues to constitute a large majority of matriculating students, it is illogical to equate the consciousness of race with the evils of segregation.

## CONCLUSION

As the comparison with utilizing a lottery exposes, arguments against race-consciousness do not apply universally. Rather, their force depends heavily on the context of the decision and the way in which race is taken into account. Comparing race and chance also helps conceptualize the burden imposed by race-conscious policies. Far from what the rhetoric suggests, race-conscious policies do not necessarily deprive whites of fixed entitlements. Instead, their impact is to alter the odds of success between racial groups. Moreover, in situations such as higher education admissions, in which white claimants far outnumber racial minorities, the impact on white applicants is often quite minimal.

Formal colorblindness ignores these nuances, disregarding the importance of context and details when judging the fairness of a particular policy. Instead, colorblindness proponents insist upon prohibiting race-consciousness in any form, in every situation, regardless of the role that race plays in the decision-making process. In doing so, they emphasize the alleged unfairness of altering white odds of success through race-conscious policies, while ignoring the ways in which race stacks the odds for each individual from birth. Although the Supreme Court has stepped back from this extreme colorblind vision of the Constitution, the doctrinal framework it has built implicitly privileges claims of colorblindness, by treating race as uniquely problematic, narrowing the doctrinal focus to block out

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formalistic notion of colorblindness, underlies our historical objection to racial discrimination. *See, e.g.*, Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution (1989); Laurence H. Tribe, American Constitutional Law §§ 16-13 to 16-16 (2d ed. 1988); Balkin, *supra* note 49, at 2313; Fiss, supra note 49, at 107-77; Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparison*, 97 Mich. L. Rev. 1311 (1999).

133. *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

relevant background inequalities, and imposing a uniform standard of scrutiny regardless of differing purposes, motives, and effects.

Exploiting the rhetoric of colorblindness, advocates are now attempting to push their battle against affirmative action one step further. A new ballot initiative in California seeks to prohibit state agencies from collecting any information about the race of state residents in the course of conducting its ordinary operations of hiring, contracting, licensing, and so on.[134] The desire to deprive government agencies of the information necessary to engage in affirmative action obviously drives this latest initiative. However, the policy implications of such a proposal extend far beyond affirmative action. If the government were banned from collecting information about race, policy makers and researchers would lack information critical for understanding and addressing racial disparities in school performance, housing, employment and economic opportunities and health outcomes. Perhaps the proposal truly is the logical extension of formal colorblindness, for it represents the vain hope that by blinding ourselves to the reality of persistent racial inequality, the problem will simply disappear.

134. *See* Darryl Fears, *California Activist Seeks End to Identification by Race*, Wash. Post, July 5, 2003, at A1; Robert Tomsho, *Some Seek Ban on Collection of Ethnic Data*, Wall St. J., June 30, 2003, at B1.