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ESSAY

The Benign-Invidious Asymmetry in Equal Protection Analysis

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Introduction

The Supreme Court has rejected the view that a policy challenged as racially discriminatory in violation of the equal protection clause is subject to less stringent scrutiny if it is benign rather than invidious. According to the Court's interpretation of the equal protection clause, the same level of heightened scrutiny applies to any racially discriminatory policy. As Justice O'Connor explained in *City of Richmond v. J.A. Croson Co.*,[1] "Absent searching judicial inquiry into the justification for [racially discriminatory] measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[2]

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1. 488 U.S. 469 (1989).

2. *Id.* at 493. Throughout this essay, I use the term racially discriminatory descriptively, to refer both to policies that are facially discriminatory in that they treat individuals differently on the basis of race and to policies that are formally race-neutral

In this essay, I draw upon the affirmative action controversy, including the recent decisions regarding the policies of the University of Michigan[3] and its law school,[4] in order to highlight the persistence of the benign-invidious asymmetry. Contrary to the pronouncements of the Court, characterization of a policy as benign or invidious often influences the level of scrutiny to which the policy will be subject.

To dramatize the continuing importance of the benign-invidious asymmetry I consider two race-based college admissions policies.[5] First, I discuss what have been described as race-neutral alternatives to affirmative action, admissions policies that take into account where applicants have lived or attended high school or their socioeconomic status. Second, I consider a historically black college's effort, hypothesized by Justice Thomas in *Grutter v. Bollinger*, to create racial homogeneity in its student body on the basis of empirical evidence documenting its educational benefits.[6]

Although in neither case would a court explicitly invoke the benign-invidious asymmetry, in both cases a court's normative assessment of the challenged policy as benign or invidious would influence the level of scrutiny applied. A formally race-neutral policy enacted in order to boost the enrollment of racial minority students would likely be exempt from strict scrutiny because it would be viewed as benign, even as a policy proven to have been enacted in order to increase the enrollment of white students would be subject to strict scrutiny.[7] Similarly, the Court would apply to a homogeneity policy a more stringent form of strict scrutiny than that applied to a diversity policy. Even a homogeneity policy whose empirical justification and operation mirrored that of the diversity policy upheld in *Grutter* would be struck down. The Court would view homogeneity as more invidious than diversity.

While judgment regarding whether a policy is benign or invidious is often reduced to which groups it burdens or benefits, that determination may also turn on assessment of the values that a particular policy seems to promote. While race-neutral policies would be viewed as benign because they benefit, rather than burden, members of disadvantaged racial groups, a

but that are animated by a racial purpose.

3. Gratz v. Bollinger, 539 U.S. 244 (2003).

4. Grutter v. Bollinger, 539 U.S. 306 (2003).

5. Although I focus in this brief essay on school admissions policies, the benign-invidious asymmetry whose influence I analyze influences equal protection doctrine with respect to race more generally.

6. 539 U.S. at 365-66 (Thomas, J., dissenting).

7. A court might also exempt a race-neutral policy from strict scrutiny by declining to conclude that the policy was, in fact, motivated by a racially discriminatory purpose.

homogeneity policy that also benefits racial minorities would be viewed as invidious because it seems to promote segregation, contrary to the integrationist thrust of equal protection jurisprudence.

The persistence of the benign-invidious asymmetry suggests that the moral intuitions it embodies are more widely shared than commonly supposed. Even seemingly stalwart defenders of a symmetrical nondiscrimination mandate may, in practice, support the very sort of asymmetry they purport to oppose. Such deeply ingrained endorsement of the asymmetry suggests both that it would be exceedingly difficult to eliminate and, more importantly, that we should not strive to do so.

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The discussion proceeds as follows: Part I briefly recounts the Court's formal rejection of the benign-invidious asymmetry beginning with Justice Powell's opinion in *Regents of the University of California v. Bakke*.[8] Part II considers race-neutral alternatives to affirmative action, and Part III discusses the racial homogeneity policy hypothesized by Justice Thomas in *Grutter*.

I. The Embrace of Symmetry

The symmetrical approach was relied on by Justice Powell in *Bakke* and explicitly adopted by the Court in *Croson*[9] and *Adarand Constructors Inc. v. Pena*.[10]

In his lone opinion announcing the judgment of the Court in *Bakke*,[11] Powell rejected the view of four Justices that the affirmative action policy of the University of California, Davis medical school should have been subjected to only intermediate scrutiny because it benefited rather than burdened members of disadvantaged racial minority groups.[12] Powell

8. 438 U.S. 265 (1978).

9. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In *Croson*, the Supreme Court applied strict scrutiny to a contracting set aside provision enacted by the city council of Richmond, Virginia.

10. 515 U.S. 200 (1995). In *Adarand*, the Court held that strict scrutiny would apply to a race-based contracting provision enacted by Congress.

11. *Bakke* invalidated the affirmative action policy of the University of California, Davis medical school. 438 U.S. 265.

12. *Id.* at 359 (Brennan, White, Marshall, Blackmun, J.J., dissenting). Nor did Justice Powell share the view of the four Justices opposed to the University of California, Davis policy that the case could be decided on statutory grounds without reaching the constitutional issue. *Id.* at 408 (Stevens, Stewart, Rehnquist, J.J., and Burger, C.J., concurring in part and dissenting in part). These Justices would have found the Davis program in violation of Title VI.

forthrightly dismissed the contention that "discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.'"[13] Powell went on to state that it "is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others."[14] Powell reasoned that "[i]f it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently."[15]

In *Croson* and *Adarand* the Court incorporated into equal protection doctrine the symmetrical approach that Justice Powell advocated in *Bakke*. In *Croson*, Justice O'Connor concluded in her opinion for the majority that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."[16] The Court relied upon this same reasoning in *Adarand*[17] and described it as a principle of "consistency."[18]

In applying strict scrutiny to the affirmative action policies of the University of Michigan and its law school, the *Gratz/Grutter* Court formally adhered to the symmetrical approach adopted in *Croson* and *Adarand*. The Court reiterated its view, stated in *Adarand*, that "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[19]

II. Race-Neutral Alternatives

What have come to be known as race-neutral alternatives to affirmative action have been enacted by public universities in California,[20]

13. *Id.* at 295.

14. *Id.*

15. *Id.* at 299. Justice Powell further stated, in often quoted language: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.* at 289-90.

16. *Croson*, 488 U.S. at 494.

17. *Adarand*, 515 U.S. at 224 (quoting *Croson*, 488 U.S. at 494).

18. *Id.* at 224 (stating that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized."). Scholarly commentators have generally been critical of the *Adarand* decision. *See, e.g.*, Ian Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

19. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting *Adarand*, 515 U.S. at 229-30).

20. After Proposition 209 prohibited affirmative action programs in California

Texas,[21] and Florida.[22] While these new admissions schemes raise a number of interesting policy questions,[23] here I only consider whether they would be subject to strict scrutiny if their constitutionality were challenged.

To begin with, such policies differ from conventional affirmative action policies in that they do not employ a racially discriminatory means. Race-neutral policies are not subject to strict scrutiny on the ground that they treat individual applicants differently on the basis of race, as do conventional affirmative action policies. Distinguishing among applicants on the basis of socioeconomic background or where they live or attend high school does not, of course, warrant heightened scrutiny, as such considerations are not constitutionally suspect.

But race-neutral policies may warrant strict scrutiny if they are animated by a racially discriminatory purpose. A quarter century ago in *Washington v. Davis*,[24] the Court defined discriminatory purpose as the touchstone of an equal protection violation, a position it has never disavowed.[25] The Court's subsequent decisions in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[26] and *Personnel Administrator of Mass. v. Feeney*[27] reaffirmed, as the *Arlington Heights* Court stated, that "[p]roof of racially discriminatory intent or

university administrators implemented a plan to guarantee admission to the top students at each high school in the state, introduced more subjective admissions criteria, and experimented with class-based affirmative action. *See, e.g.*, Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J.LEG.EDUC. 472 (1997); Karen W. Arenson, *California Proposal Aims to Improve College Diversity*, N.Y. TIMES, Sept. 22, 2000, at A16.

21. In Texas, the Fifth Circuit invalidated the state's affirmative action program. Hopwood v. Texas, 78 F.3d 932 (1996). In its place, the state enacted the so-called "Ten Percent Plan" to guarantee university admission to the top 10% of each high school graduating class. *See* Peter Applebome, *Affirmative Action Ban Changes a Law School*, N.Y. TIMES, July 2, 1999, at A14.

22. In Florida, the state's voters simultaneously repealed affirmative action and implemented a policy that guaranteed admission to a state university to the top twenty percent of students in each high school in the state. *See* Reuters, *Florida Ends Use of Race in College Admissions*, N.Y. TIMES, Feb. 23, 2000, at A14.

23. I have considered some of these issues in R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029 (2001). (analyzing the various conceptions of merit that might animate college admissions practices).

24. 426 U.S. 229 (1976).

25. In *Washington v. Davis*, the Court reasoned that unconstitutional racial discrimination requires a finding of discriminatory intent and straightforwardly declared that "[a] purpose to discriminate must be present." *Id.* at 239 (quoting *Akins v. Texas*, 325 U.S. 398, 403-04 (1945)).

26. 429 U.S. 252 (1977).

27. 442 U.S. 256 (1979).

purpose is required to show a violation of the Equal Protection Clause."[28] Even prior to the adoption of the discriminatory purpose standard, the Court had invalidated formally race-neutral policies enacted in part to disadvantage racial minorities.[29]

Suppose that a university acknowledged using socioeconomic or geographic admissions criteria as a proxy for race, in order to increase the number of minority students at the university. Would such a formally race-neutral policy be subject to strict scrutiny? The Court's disavowal of the benign-invidious asymmetry suggests that strict scrutiny should apply to such policy every bit as much as to a formally race-neutral policy intended to increase the enrollment of white students.[30] There is ample reason to conclude, however, that the Court would not apply strict scrutiny to race-neutral policies intended to benefit disadvantaged racial minorities.

The Supreme Court has not unequivocally stated that race-neutral policies intended to benefit racial minorities are exempt from strict scrutiny. Writing for the majority in *Croson*, Justice O'Connor faulted the city of Richmond for having enacted a contracting set-aside for racial minority firms without having considered "the use of race-neutral means to increase minority business participation in city contracting."[31] In *Adarand*, the Court similarly looked to the defendant's consideration of the viability of formally race-neutral policies as an element of the narrow tailoring test.[32]

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28. 429 U.S. at 265. The *Feeney* Court similarly observed that racial discrimination in violation of the equal protection clause "must be traced to an intent to discriminate on the basis of race." 442 U.S. at 260 (citing *Davis*, 426 U.S. at 238-44). *Feeney* and *Arlington Heights* also created uncertainty as to the precise meaning of discriminatory intent. The *Feeney* Court, for example, seemed to equate discriminatory intent with malice. *See* 442 U.S. at 279.

29. For example, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Supreme Court invalidated a redrawing of the boundaries of the city of Tuskegee that disenfranchised all of the black residents. In *Guinn v. United States*, 238 U.S. 347 (1915), the Court overturned the enactment of grandfather clauses that conditioned the right to vote on one's grandfather having been eligible to vote at the time immediately preceding the passage of the 15th amendment. More recently, in the aftermath of *Brown v. Board of Education*, the Court invalidated race-neutral policies that were enacted in order to maintain racially segregated schools. *See, e.g.,* Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968) (invalidating a "freedom of choice" plan).

30. It is worth noting that the opinions in *Adarand* and *Croson* arguably signal the Court's unease with the implications of the coupling of the discriminatory purpose standard and the consistency principle. In *Adarand*, for example, the Court cryptically stated: "We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race-neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." *Adarand*, 515 U.S. at 213.

31. *Croson*, 488 U.S. at 507.

32. In *Adarand* the Court faulted the lower court for "not address[ing] the question of

Numerous lower federal courts have followed suit.[33] These cases leave open the question whether race-neutral alternatives are constitutional because they satisfy strict scrutiny *or* because they are exempt from strict scrutiny.

Yet lower federal courts have explicitly declined to apply strict scrutiny to formally race-neutral state action arguably intended to benefit members of disadvantaged racial minority groups. In *Byers v. City of Albuquerque*,[34] for example, the Tenth Circuit did not apply strict scrutiny to a police department's decision to lower the written test score required to advance in the promotion process, even as the court accepted, for the sake of argument, allegations that the cutoff score was lowered to increase the number of non-whites and women eligible for promotion.[35] Similarly, in *Hayden v. County of Nassau*,[36] the Second Circuit did not apply strict scrutiny to the decision to consider scores from some elements rather than others of a police entrance exam in order to improve the total scores of African-American candidates.[37] In *Raso v. Lago*,[38] the First Circuit declined to apply strict scrutiny to the decision to curtail a group of displaced residents' statutory preference for new housing. The statutory preference of the predominantly white displaced residents was curtailed in order to promote racially integrated housing by increasing the chance of nonwhites to gain access to the new housing.[39] Finally, in *Allen v. Alabama State Board. of Education*,[40] the Eleventh Circuit did not apply strict scrutiny to a

narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting." 515 U.S. at 237-38 (citing *Croson*, 488 U.S. at 507).

33. *See, e.g.*, Sherbrooke Turf, Inc. v. Minn. Dep't. of Transp., 345 F.3d 964 (2003); Walker v. City of Mesquite, 169 F.3d 973, 983 (5th Cir. 1999) (stating that "[a] 'race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives–particularly race-neutral ones–have been considered and tried," such as the use of Section 8 vouchers in public housing context) (quoting *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997)); Podbresky v. Kirwan, 38 F.3d 147, 161 (4th Cir. 1994) (noting that application of strict scrutiny to race-based programs entails consideration of "possible race-neutral alternatives"); Ensley Branch NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994); Peightal v. Metro. Dade County, 26 F.3d 1545 (11th Cir. 1994); Billish v. City of Chicago, 962 F.2d 1269 (7th Cir. 1992).

34. 150 F.3d 1271 (10th Cir.1998).

35. *Id.* at 1276.

36. 180 F.3d 42 (2d Cir. 1999).

37. *Id.* at 47.

38. 135 F.3d 11 (1st Cir. 1998).

39. Id. at 16-17. The curtailment of the preference was prompted in part by a consent decree previously entered into by HUD, which had helped to finance the project.

40. 164 F.3d 1347 (11th Cir. 1999).

consent decree that mandated that future teacher certification exams be formulated to minimize the disparate impact on minority teacher candidates.[41]

These cases suggest, but do not definitively establish, that a race-neutral effort to benefit disadvantaged racial minorities is exempt from strict scrutiny. In each of these cases, courts declined to apply strict scrutiny to state action that reallocated some opportunity among racial groups. Such an effort to reallocate opportunity may be viewed as a race-neutral form of affirmative action. On the other hand, it is far from clear that lowering a test score requirement, say, in order to increase the number of minorities who qualify should be viewed as racially discriminatory. Minimizing disparate impact may reallocate opportunity among groups not as an end in itself, but as a necessary means of realizing the ultimate purpose of avoiding legal liability or reducing the prospect of litigation. If disparate impact doctrine embodies a permissible conception of equality, then efforts to comply with its mandate should not be viewed as discriminatory.

In other cases, as well, a court may not find proof of a racially discriminatory purpose. A race-neutral admissions policy, for example, need not have been enacted in order to boost the enrollment of racial minorities. Such policies might simply reflect an institution's decision to pursue socioeconomic or geographic diversity rather than racial diversity. Moreover, even if a given policy was enacted primarily to increase the enrollment of racial minority students, proof of that fact might be elusive. The university would have obvious reasons to obscure its intent. Even when confronted with substantial evidence of discriminatory purpose, a court that wanted to uphold a challenged policy might be inclined to conclude simply that the proof requirement had not been met. Doing so would uphold the policy without seeming to contravene the symmetrical nondiscrimination mandate of equal protection doctrine.

The broader consequences of applying strict scrutiny to race-neutral policies intended to benefit racial minorities also suggest that courts will exempt such policies from strict scrutiny. A truly symmetrical application of strict scrutiny could imperil a multitude of policies intended, in part, to benefit racial minorities.[42] Would a state's race-neutral effort to increase

41. *Id.* at 1353.

42. *See* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039 (1998). As Professor Forde-Mazrui insightfully notes, "taken to its logical end, the [consistency principle of the] Equal Protection Clause presumptively forbids all governmental efforts to address the stark social and economic disparities that persist between racial groups." 88 GEO. L.J. at 2334.

voting participation among racial minorities, or to repeal its felon disenfranchisement law precisely because of its effect on black men, warrant strict scrutiny? What of an effort to decrease the incidence of HIV infection among black women in particular? How about a school district's effort to close the racial gap in academic achievement? The prospect of applying strict scrutiny to these sorts of measures would cut against the view, shared by many, that the government should be able to play *some* role in narrowing racial disparities in, for example, political participation, education, employment, and health.

III. Racial Homogeneity

Justice Thomas concluded in his *Grutter* dissent that "[c]ontained within today's majority opinion is the seed of a new constitutional justification for a concept I thought long and rightly rejected—racial segregation."[43] Justice Thomas posed the provocative hypothetical of a historically black college that seeks racial homogeneity in its student body. Justice Thomas worried that a historically black college's "rejection of white applicants in order to maintain racial homogeneity [would be] permissible . . . under the majority's view of the equal protection clause."[44] Although Justice Thomas' stated concern that *Grutter* will lead to judicial approval of racially segregated education is undoubtedly misplaced, analyzing the constitutionality of his hypothetical homogeneity policy is instructive.

A homogeneity policy might be premised on the same sort of justification as the diversity policy upheld by the Court in *Grutter*. Proponents of such a policy might pursue racial homogeneity not for its own sake but because it yields educational benefits.[45] More broadly, the policy might reflect the view that students who share a similar cultural orientation, for example, would be more likely to develop the type of trust and personal comfort that facilitates intellectual interaction and exchange. Just as the Michigan defendants offered social science evidence that

43. *Grutter*, 539 U.S. at 365 (Thomas, J., dissenting). Justice Thomas also stated that "[t]he Court's deference to the Law School's conclusion that its racial experimentation leads to educational benefits will, if adhered to, have serious collateral consequences." *Id.* at 364.

44. *Id.* at 365.

45. In fact, there is some reason to believe that in other contexts homogeneity may yield benefits. *See, e.g.*, Katherine Williams & Charles O'Reilly, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RESEARCH ORG. BEHAV. 77 (1998) (concluding that in many organizations diversity is more likely to have negative than positive effects on group performance).

diversity enriches the educational experience,[46] so too would the proponents of a homogeneity policy offer evidence that homogeneity promotes students' learning outcomes.[47] Such claims are not as outlandish as universities' stated commitment to diversity would make them seem.[48] For example, there is evidence that black students seem to perform better academically at historically black colleges than at majority white institutions.[49]

A homogeneity policy might operate similarly to the law school policy upheld in *Grutter*, and therefore would seem to satisfy the narrow tailoring test. In its pursuit of homogeneity, the historically black college would not categorically reject white applicants, place a ceiling on the number of white students, or mechanically award bonus points on the basis of race. Instead, consistent with the narrow tailoring test, admissions officers would use race "in a flexible, nonmechanical way,"[50] considering each applicant holistically and comparing each applicant to all other applicants. Admissions officers might, for example, evaluate each applicant's knowledge of, and experience with, black history, politics, and culture.

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46. The Court at the outset characterized the benefits of diversity as "substantial." *Grutter*, 539 U.S. at 324 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)). The Court then approvingly referenced the District Court's findings that:

> [T]he Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and enables students to better understand persons of different races. These benefits are important and laudable because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.

Id. at 333 (quoting Brief for Respondent at 246a). The Court then goes on to note that "[i]n addition to the expert studies and reports entered into evidence at trial, numerous studies show that student diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society and better prepares them as professionals." *Grutter*, 539 U.S. at 330.

47. *See* Williams & O'Reilly, *supra* note 45.

48. Advocates for single sex schools have also made similar arguments. For a review of this debate, see Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004).

49. *See* Frank Adams Jr., *Why* Brown v. Board of Education *and Affirmative Action Can Save Historically Black Colleges and Universities*, 47 ALA. L. REV. 481, 496 (1996) (reviewing studies that black students perform better at all black universities than at predominantly white schools); *see also* FLEMING, BLACKS IN COLLEGE (1984); GURIN & EPPS, BLACK CONSCIOUSNESS, IDENTITY AND ACHIEVEMENT: A STUDY OF STUDENTS IN HISTORICALLY BLACK COLLEGES (1975); Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. ED. REV. 26, 29 (1992) (reporting studies that find "in absolute terms, Black student intellectual gains are higher on Black majority campuses than on White majority campuses. Research also reveals a poor match between Black students' academic needs and White campus academic expectations").

50. *Grutter*, 539 U.S. at 334.

Race would, of course, enter into admissions officers' assessments of applicants, but it would be no more than a plus factor, one characteristic among many. Some white applicants would be admitted. In sum, as in the Michigan cases, the school would pursue racial homogeneity neither exclusively nor for its own sake, but instead as one aspect of a broader commitment to a homogenous educational setting that yields educational benefits.

Even if it satisfied the narrow tailoring test, such a policy would no doubt be struck down. No matter its supposed educational benefits, a court would readily find that racial homogeneity is not a compelling governmental interest. That conclusion would be facilitated by, if not a direct consequence of, a decision *not* to defer to the university's judgment that racial homogeneity yields educational benefits. Because the decision whether to defer determines the level of skepticism with which the court evaluates the university's claims, that decision would heavily influence whether the compelling interest test is met.

Recall that in the Michigan cases, the Court's acceptance of diversity as a compelling interest turned partly on the Court's deference to the University's judgment that diversity enriches the educational process. As the Court stated in *Grutter*, "[t]he Law School's judgment that such diversity is essential to its educational mission is one to which we defer."[51] The Court noted that such "complex educational judgments [lie] primarily within the expertise of the university."[52]

Contrary to Justice Thomas' fear that a historically black college's "assessment that racial homogeneity will yield educational benefits would similarly be given deference,"[53] the Supreme Court undoubtedly would decline to defer to that view. The Court would not defer to that view, even if held in good faith and supported by empirical evidence. Consequently, the Court would decline to characterize racial homogeneity as a compelling state interest.

The decision whether to defer not only determines whether the compelling interest test will be met, it also reflects a normative evaluation of the challenged policy as benign or invidious. How else could one explain a decision to defer to university administrators' belief in the educational importance of diversity but not to a logically parallel judgment about the educational benefits of homogeneity?

The Court would be more inclined to defer to university support for diversity than for homogeneity because the former fits more comfortably

51. *Id.* at 328.

52. *Id.*

53. *Id.* at 365 (Thomas, J., dissenting).

with the integrationist and assimilationist thrust of equal protection doctrine. While a diversity policy does presuppose that race is a significant social identity, its goal is to break down racial stereotypes through interracial interaction. A diversity policy connotes the primacy of integration, whereas a homogeneity policy seems to confer value to segregation.[54] Indeed, a homogeneity policy appears to endorse the racial segregation against which the civil rights movement fought. The conclusion that diversity is compelling and homogeneity is not thus reveals the influence of the same benign-invidious asymmetry that the Court has formally disavowed.

Just as a decision not to apply strict scrutiny to a formally race-neutral policy enacted to benefit racial minorities entails a judgment that the policy is benign, so too does a decision to defer to the university reflect an implicit assessment of the diversity policy as benign. The decision to defer to the university's judgment that diversity yields educational benefits is no less an expression of the benign-invidious asymmetry than a decision not to apply strict scrutiny to a formally race-neutral policy animated by a racially discriminatory purpose.

To be sure, the benign-invidious asymmetry is expressed differently in the two settings – race-neutral policies on the one hand, and diversity or homogeneity policies on the other. A race-neutral affirmative action policy is exempt from strict scrutiny because its purpose is benign and it does not rely on a racially discriminatory means. In other words, the policy is formally neutral rather than facially racial. The homogeneity and diversity policies, in contrast, are each subject to strict scrutiny because they rely on a racially discriminatory means. Pursuant to each policy, individual applicants would be evaluated in part on the basis of race. Such policies are facially racial rather than formally neutral. The judgment of a homogeneity policy as invidious and of a diversity policy as benign determines not whether strict scrutiny applies, so much as the strictness of the strict scrutiny that is applied. The diversity policy in *Grutter* was subject to an especially relaxed form of strict scrutiny.

54. The homogeneity policy might also seem more invidious than a diversity policy because its benefits are enjoyed by a racially homogenous group, rather than the integrated group that a diversity policy would produce. While the diversity policy would burden white applicants, it would benefit white students. The homogeneity policy, in contrast, might seem to benefit only black applicants and students. It is worth noting, as well, that societal attitudes about homogeneity and diversity are quite conflicted. While the pursuit of a racially homogenous student body may seem invidious, a racially homogenous college dorm or student group may seem benign or even a positive good.

Conclusion

Courts' implicit reliance on the benign-invidious asymmetry may be at odds with the formal dictates of equal protection doctrine, but it is certainly consistent with widely shared, and sensible, moral intuitions about racial discrimination. As a society, we are not as skeptical of discrimination intended to benefit disadvantaged racial minorities as discrimination intended to burden them. Nor do most people view discrimination that promotes racial integration as morally equivalent to discrimination that reinforces racial segregation.

Whatever the potential benefits of a symmetrical nondiscrimination principle,[55] it is so at odds with prevailing intuitions about racial discrimination that it would be difficult, if not impossible, to actually enact such an approach. The benign-invidious asymmetry seeps, almost imperceptibly, into the views of even some of the most adamant proponents of the symmetrical approach. Justice Thomas' concurring opinion in *United States v. Fordice*,[56] for example, relied on the very sort of asymmetrical nondiscrimination principle that he explicitly and forcefully disavowed in the Michigan cases.[57] In *Fordice*, Justice Thomas enthusiastically endorsed the "maintaining of historically black colleges, *as such*."[58] Of course, a government decision to aid colleges *because* they are predominantly and historically black would, under a genuinely symmetrical standard, be subject to strict scrutiny just as certainly as a decision to support certain colleges because they are predominantly white. Not only is his *Fordice* concurrence an ironic counterpoint to Justice Thomas' use of the homogeneity policy to criticize the reasoning of the Grutter majority, it dramatizes the extent to which the benign-invidious asymmetry is

55. A symmetrical prohibition of discrimination does seem to reflect the moral primacy of nondiscrimination and to free the Court from the need to make contestable value judgments. Moreover, some commentators believe that a symmetrical nondiscrimination rule is easier for courts to implement and accords more with widespread intuitions about the role and competence of the judiciary. As Justice Powell reasoned in *Bakke*, "the difficulties entailed in varying the level of judicial review according to the perceived 'preferred' status of a particular racial or ethnic minority are intractable." *Bakke*, 438 U.S. at 295.

56. 505 U.S. 717 (1992).

57. In *Grutter*, Justice Thomas equated compelling state interest with pressing public necessity and "conclude[d] that only those measures a State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity.'" 539 U.S. at 353 (Thomas, J., concurring in part, dissenting in part). In *Gratz*, Justice Thomas stated that "a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause." *Gratz*, 539 U.S. at 281 (Thomas, J., concurring).

58. 505 U.S. at 748 (emphasis in original).

embraced even by those who most vehemently oppose it.

Widespread, if sometimes unacknowledged, support for the benign-invidious asymmetry suggests that we neither should, nor could, completely banish it from the actual operation of equal protection doctrine.