THE EFFICIENCY OF FAIRNESS: A LAW AND ECONOMICS ANALYSIS OF THE *BAKKE-GRUTTER* DIVERSITY RATIONALE

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I. INTRODUCTION

On one side of the post-affirmative action debate is the Center for Individual Rights (CIR), an organization that strives to end all forms of race-conscious remedies on the stock argument that such policies unfairly penalize whites for past acts of discrimination and encourages minorities to rely, not on merit or labor, but on a redistributive policy to gain an unearned advantage.[1] On the other side of the debate are proponents of affirmative action that defend race-conscious policies on grounds that race-neutral policies unfairly burden minorities.[2] Unfortunately for those in the latter camp, the former have gained an unrelenting advantage in framing affirmative action as being grounded in a zero-sum game.[3]

CIR's success in assailing race-conscious interventions is evidenced in states like California and Washington, where electorates enacted constitutional amendment proscriptions on the use

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1. *See* Kimberle Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. 123, 123-24 (2007) (discussing the two sides of the post-affirmative action debate surrounding the Michigan Civil Rights Initiative, a direct voter initiative that proscribed the use of race in admissions criteria at public universities).

2. *Id.*

3. *Id.* (considering CIR's success in eight states in its push to enact, via direct voter initiatives, bans on race-conscious remediations in public universities).

of race in public university admission policies. In convincing these electorates that affirmative action was impermissible and deleterious, CRI weaved a seductive storyline treading on hazy conceptions of agency, merit, and fair competition – a narrative legitimated by and rooted in the canonical U.S. Supreme Court case *Regents of University of California v. Bakke*.[4]

Bakke was the first case Supreme Court case, a plurality opinion with Justice Lewis Powell as its sole author, to decide the constitutionality of affirmative action plans at public universities. In that case, Justice Powell struck down the university's affirmative action program, but held that diversity was a compelling government interest.[5] Because the outcome hinged on Justice Powell's lonely vote, its precedential value was uncertain until the Court revisited the constitutionality of race-conscious admission policies in *Grutter v. Bollinger*, where the court reaffirmed his sole opinion.[6] The *Grutter* court also broadened diversity as a compelling government interest, the site of this Comment's analysis. In expanding diversity as a compelling government interest, Justice O'Connor predicated her reasoning on rivaling visions of justice: a liberating, color-conscious view embedded in *Brown v. Board of Education* versus a shackled view tethered to Justice Powell's plurality opinion in *Bakke* and the colorblind public and private distinctions found in *Plessy v. Ferguson*.[7]

These two decisions have attracted myriad commentaries from scholars across the political and ideological spectrum. Critical Race Theorists – scholars who consider race a product of law, and judicial conclusions to be the result of social phenomena – have advanced reformulations and retold Justice O'Connor's diversity rationale as one grounded in a credible vision of progress in hopes releasing the rationale from *Bakke*'s doctrinal grip.[8] Interestingly, Ayn Rand, an economics scholar widely embraced not by Critical Race Theorists, but by conservative pundits, articulates a narrative in "The Sign of the Dollar" undermining the very discursive practices Critical Race Theorists work mightily to dismantle.[9] In her work, Rand tells a story of strife and eco-

4. Regents of University of California v. Bakke, 438 U.S. 265 (1978).
5. *Id.* at 320.
6. Grutter v. Bollinger, 539 U.S. 306 (2003).
7. *See* Crenshaw, *supra* note 1, at 124.
8. *Id.*
9. AYN RAND, THE SIGN OF THE DOLLAR, *in* ATLAS SHRUGGED 610 (1957). In *The Sign of the Dollar*, Rand tells the story of the 20th Century Motor Company to demonstrate the effects of communism on human behavior. Need is determined by majority vote, and, because there is no independent objective measures of need, people feign subjective desire for need. To gratify need, each person resorts to begging to the group in hopes of invoking sympathy and convincing the majority to declare that individual's desire a worthy need. Under this system, income is detached from productive effort and work is assigned in accordance to ability. To

nomic bankruptcy under a communist regime. Although conservatives invoke Rand's formative writings to assert that race-conscious redistributive policies inspire strife and conflict, Rand's depiction of life under a communist regime sheds light onto the very conditions that affirmative action is designed to correct.

Motivating this Comment is a strategic effort to use law and economics as a framework to identify logical gaps in Justice Powell's plurality opinion and the moral hazards arising from his fallacies. Law and economics is especially useful because Justice Powell, by discussing affirmative action's attendant harms, implicitly invoked economic principles, such as the principles of efficiency and utility.[10] But, before embarking on a law and economics analysis, it is important to fully understand the scope of problems and conflicts that the Supreme Court was asked to decide. In this vein, Part II of this Comment provides a brief background of *Bakke*.

Part III uses law and economics to evaluate Justice Powell's rationale. By using law and economics to evaluate the wisdom and efficacy of his reasoning, this Comment will reveal that his analysis remains unfinished. Specifically, Justice Powell erred in that he considered the benefits of a merit-based policy against the costs of affirmative action on "innocent whites" without considering the costs of a race-blind policy on society as a whole. Simply put, the equation should have read the costs associated with the affirmative dismantling of *de facto* Jim Crow incentive systems on the one end versus the costs of inaction on the other. In evaluating costs and benefits, law and economics analysis assumes that parties to a transaction know with greater accuracy the costs and benefits underwriting a transaction.[11] Greater societal harms can potentially arise when a court, like the one in *Bakke*, substitutes its own assessment of valuation for that of the parties.'[12] In the case of *Bakke*, these harms included greater tertiary costs, instability in the law, moral hazards such as increased rent-seeking behavior, and entrenchment of existing racial disparities.[13] Of greatest concern is majoritarian rent-

avoid work, people hide their abilities and, as a result, productivity declines and the company goes bankrupt. Rand teaches a lesson: a system that inspires resentment and interferes with human development gives rise to meaningless strife and intellectual bankruptcy.

10. Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1792 (1992). Here, Stout demonstrates not the fairness grounds of the standards of scrutiny, but the efficiency and instrumental justifications for their usage.

11. *Id.*

12. *Id.*

13. Martin J. Katz similarly argues that affirmative action policies in employment practices can be understood as efficient. This Comment wishes to demonstrate the same principles in the context of university admissions. Martin J. Katz, *The*

seeking, which occurs when an individual or organization seeks income through manipulation or exploitation of the market rather than through transactions or production.[14]

Part IV unmasks the instrumental value of merit and discusses whether the merit-based rule in *Bakke* accomplishes what its colorblind premise purports to achieve. Because a desirable legal system fashions rules that incentivize individuals to engage in efficient conduct – ends inextricably dependent on rewards or punishment – merit-based systems having little instrumental value should be reformed or discarded.[15] Moreover, despite the fact that merit normatively encourages individuals to work for reward, merit can also give rise to moral hazards, as post-*Bakke* cases demonstrate.[16] This is especially true if the metrics by which merit is defined are subject to majoritarian discretion and prerogative.[17] Moreover, because traditional merit-based admission criteria impede minority access to institutions of higher education, colorblindness, as a touchstone of judicial reasoning, is ill-suited to undo existing color-conscious incentive systems that produce racially disparate outcomes and attend to the material realities that account for actual human behavior.[18] By narrowing the chasm between law and fact, a color-conscious approach can positively accomplish what colorblindness normatively aims to achieve.[19]

Part V examines *Grutter* in light of Justice Powell's plurality opinion, while Part VI provides a brief summary. Finally, Part VII considers ways in which the diversity rationale in *Grutter* can lead to efficient outcomes and Part VIII offers concluding remarks. In the last section, this Comment offers a compelling defense of affirmative action, or, to use Justice O'Connor's diversity rationale as a contemporary cite of analysis, highlights the myriad ways in which diversity can induce efficient outcomes and bring those living on the fringes of the pastoral commons into society's folds.

Economics of Discrimination: The Three Fallacies of Croson. 100 YALE L.J. 1033 (1991).

14. Stout, *supra* note 10, at 1787.

15. Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws,* 157 U. PA. L. REV. 1075 (2009) (contending that what is deemed objective or meritorious varies on the criteria necessary to meet certain ends – for the criteria to be of value it needs to be able to fairly predict a candidate's future success).

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

17. Devon W. Carbado and Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

18. Tamar Lewin, *Law School Admissions Lag Among Minorities*, N.Y. TIMES, Jan. 6, 2010, *available at* http://www.nytimes.com/2010/01/07/education/07law.html.

19. Carbado & Gulati, *supra* note 17, at 1259.

II. BACKGROUND OF *BAKKE*

In 1978, the Supreme Court considered whether schools of higher education could account for race in their admission policies in *Bakke*. More specifically, the Court considered whether UC Davis' medical school admission policy violated Allan Bakke's rights under the Equal Protection Clause of the Fourteenth Amendment.[20] In 1973, the medical school implemented an admissions program that set aside sixteen out of a hundred seats to entering black and Latino students, a program that operated separately from the general admissions process.[21] To avoid outcry for the increase in the number of black and Latino students, the school increased the size of its regular admission pool, which in turn increased the total number of white applicants.[22] Under this program, the school asked applicants whether they belonged to a minority group.[23] If an applicant indicated that he or she belonged to a minority group, a special admissions committee screened that applicant to determine whether he or she endured "economic or educational deprivation."[24] The school understood that race, coupled with poverty, served as a proxy for harms stemming from racial discrimination.[25] While the admissions policy was novel in the sense that the university had not previously considered the applicant's race and class in its admissions criteria, its method of identifying and correcting a societal harm caused partly by its past *de facto* exclusionary admissions policy was not revolutionary.

In 1973, Allan Bakke, a 37 year old white male, applied to the medical school, was rejected, reapplied in 1974, and was again rejected.[26] Bakke filed suit alleging that the special admissions program, according minority applicants' preference on the basis of race, cost him his acceptance into the medical school. He sought an injunction "directing defendants to admit plaintiff to said Medical School" as well as punitive relief.[27] It was undisputed that Bakke had an MCAT score and grade point average (GPA) higher than the average MCAT score and GPA of the applicants admitted under the special admissions program.[28] However, Bakke would not have been admitted into the medical school even in the absence of the special admissions program be-

20. *Bakke*, 438 U.S. at 265.
21. *Id.* at 273.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 326.
26. *Id.* at 267. Notably, Bakke's age was omitted from the record.
27. *Id.*
28. *Id.* at 273.

cause there were other white male applicants with higher GPAs and MCAT scores who were also rejected.[29] Despite assertions to the contrary, the special admissions process did not negatively impact the number of white students, but in fact, as stated earlier, helped increase the number of white students admitted.[30] Nonetheless, the trial court found the special admissions program unconstitutional, but did not direct the school to admit Bakke.[31]

The California Supreme Court concurred with the trial court in holding that the special admissions program was unconstitutional, and also held that the school had the burden of establishing that Bakke would have been rejected in the absence of the special admissions program.[32] For the school to carry its burden, it would have had to expose its admissions process to judicial and public scrutiny.[33] Not only was the admissions process analogous to a highly protected trade secret, but because the school also implemented the special admissions program in response to allegations of racial discrimination, it would have also ran the risk of disclosing facts probative of racial discrimination. Accordingly, in response to the California Supreme Court, the university stipulated that it would not have been able to meet its burden – that is, that it would be unable to disprove that Bakke had standing – and, as a result, the California Supreme Court awarded Bakke injunctive relief.[34] The university then appealed to the U.S. Supreme Court to determine the constitutionality of affirmative action programs.

At issue before the trial court was whether Bakke suffered a legally cognizable harm.[35] When the case reached the Supreme Court, however, the issue was reframed to whether the school could account for race in its admission policy.[36] This reformulation of the issue splintered the opinion over the proper standard of review and removed the question of whether Bakke had standing from judicial consideration.[37] In his plurality opinion,

29. Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admission*, 100 MICH. L. REV. 1045, 1056 (2001).

30. *Id.* at 1047.

31. *Id.*

32. Bakke v. Regents of Univ. of Cal., 533 P.2d 1152, 1172 (Cal. 1976).

33. Liu, *supra* note 29, at 1058.

34. *Bakke*, 533 P.2d at 1172.

35. *Id.*

36. Liu, *supra* note 29, at 1060.

37. In subjecting the admissions program to strict scrutiny, Justice Powell found that while diversity was a compelling government interest, the means were not narrowly tailored. While four other justices concurred in the result, those justices found that diversity was *not* a compelling government interest. Four other justices argued that diversity was a compelling government interest, that the program should be subjected to lesser scrutiny, and thus that the means met the ends so as to render the program's admission process constitutional.

Justice Powell held that because all racial classifications are "subject to stringent examination," and because the special admissions program was "undeniably a classification based on race and ethnic background," the policy was subject to strict scrutiny.[38] As a result, the medical school had the burden of establishing that the special admissions program was narrowly tailored to meet a compelling government interest.[39] While diversity qualified as a compelling state interest, Justice Powell did not believe diversity could be remedied under the Fourteenth Amendment; rather, for Justice Powell, diversity rested on the need for educational institutions to exercise academic freedom under the First Amendment.[40]

Because Justice O'Connor's opinion in *Grutter* is grounded on Justice Powell's rationale in *Bakke*, this Comment will primarily discuss Justice Powell's opinion. Also, because judges, like economists, rely on assumptions to address complex issues, a systematic law and economics analysis will identify and unpack the critical assumptions that Justice Powell and Justice O'Connor relied upon.[41] To that end, a law and economics analysis will prompt a critical reader to ask whether Justice Powell's rationale meets the fundamental principle of efficiency. This reader might ask: if access to education can be understood as competitive, when does competition devolve into conflict that creates more negative than positive externalities so that court intervention is necessary? If a court does intervene, what information will it need and which parties can best or more accurately provide that information? Also, in deciding who prevails, what rules or which incentives are desirable?

III. ACCESS TO HIGHER EDUCATION: WHERE DOES CONFLICT START?

At the threshold, one must ask whether there is a conflict amenable to law and economics analysis. Law and economics is concerned with resolving conflicts and allocating resources in ways that help society as a whole produce net benefits and reduce net costs.[42] In *The Tragedy of the Commons*, Garrett Hardin uses law and economics to illustrate the resultant harms that

38. *Bakke*, 438 U.S. at 289.
39. *Id.* at 320.
40. *Id.* at 311-12.
41. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 1 (2003).
42. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 3 (2003). According to Posner there is a difference between value, utility, and efficiency. Value generally refers to costs or benefits that an individual may derive from a resource; utility as generally defined by utilitarianism is happiness (which accounts for the costs and benefits multiplied by the probability that the transaction will materialize); effi-

occur in a dilemma where cattle herdsmen are equally entitled to use a common pasture.[43] Each herdsman, out of rational self-interest, places more cows onto the land so as to produce a net benefit enjoyed by each herder individually. As a result of this self-interest, overgrazing occurs and causes damage to the land – a cost that is shared by the group as a whole. Thus, if each herder acts in rational self-interest, the commons will be destroyed and all herders will suffer, creating a situation ripe for conflict and dilemma.[44]

The tragedy of the commons demonstrates the value of committing scarce resources to efficient use.[45] Commitment to efficiency, which compares the relationship between the aggregate benefits and costs of a situation, posits that individuals' interests and the value of resources are measurable along a common axis.[46] In a capitalist society that uses money as a proxy to measure the value people attach to resources, willingness to pay generally determines how a resource is allocated. When labor is exchanged for money, people will have an incentive to work and produce resources that go to their most valued use.[47] In a way, one's GPA or standardized exam score can be thought of as money: the higher the score or GPA, the greater the bargaining power. In theory, like manual labor, one earns a high GPA and exam score by putting in time and effort. Therefore, the notion that one should be awarded an acceptance letter in return for the effort and time one devoted into securing a competitive GPA and exam score is, in principle, especially attractive. Indeed, comparing GPA and exam scores to money is a useful illustration since it shows the extent to which education, as a resource, has been reduced to a propriety interest subject to contractual exchange.

Yet, even assuming that Justice Powell would have awarded an educational resource to a minority applicant on the basis that they would make better use of it, maximizing overall wealth through rules does not always quell conflict.[48] Indeed, in the

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ciency refers to the allocation of scarce resources in a way that will maximize overall happiness.

43. Garrett Hardin, *The Tragedy of The Commons,* 162 Science 1243, 1244-45 (Dec. 13, 1968).

44. *Id.*

45. DAVID W. BARNES & LYNN A. STOUT, CASE MATERIALS ON LAW AND ECONOMICS 4-5 (1992). Barnes and Stout presume that individuals are capable of making rational decisions and that the individual knows best which transaction will further his or her interest.

46. *Id.* at 6. One of the best ways to measure how an individual values a resource is to attach a price to that resource and have the individual's willingness to pay for that resource serve as a proxy for the value they attach to that good.

47. *Id.* at 19-20.

48. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 Harv. L. Rev. 1089, 1092-93 (1972).

Tragedy of the Commons, if one of the herdsmen were to misappropriate the entire pie, the transaction would still be efficient because the aggregate wealth is maximized over the aggregate costs.[49] Still, this situation would only foster conflict.[50] Hence, efficiency is only an attractive goal if society's members are individually better off by rules that aim to distribute resources in ways that each person's utility will be maximized.[51] Try the standing doctrine, which allows parties significantly affected by the matter at hand to litigate the case. Such a requirement guarantees that courts will be provided the information needed to decide a case because parties who are significantly affected will tend to have access to all the material information, a result generally considered efficient.[52] Indeed, failure to inquire if a party is entitled to ask a court to decide the merits of a dispute, a requirement embedded in judicial rules, can lead to inefficiencies.[53] As the following section will demonstrate, Justice Powell eviscerated traditional standing requirements, an outcome that only incentivized inefficient behavior.

A. *Justice Powell's Self-Created Quandary*

If a court miscalculates the harm that a victim suffers or the benefit of the injurer's conduct, then it may produce incentives that lead to inefficient outcomes.[54] A court cannot assess liability or identify the best cost-avoider without hearing from those who suffered a direct harm or who directly engaged in the activity that caused injury. Thus, in assigning liability, a court must first identify the parties, their interests, and who can best provide information – steps that Justice Powell did not adequately contemplate.[55]

First, the Court's failure to address the question of standing invariably led to the assumption that conflicts and interests significantly affected by the matter were binary when, in actuality,

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If the herdsmen committed to a fixed number of cows, there would be optimal profitability; and if each herdsman received a share of the pie proportional to his contribution, then the situation would be efficient and promote general welfare. *See* BARNES & STOUT, *supra* note 45, at 11-12 (discussing Pareto efficiency).

49. If a herdsman were to take control of the entire land he would internalize the costs of overgrazing and thus have an incentive to only graze the optimal number of cows. In this situation, the herdsman's conduct leads to a net benefit.

50. *See* Stout, *supra* note 10, at 1791.

51. BARNES & STOUT, *supra* note 45, at 16-17.

52. Warth v. Seldin, 422 U.S. 490, 498 (1975).

53. Lui, *supra* note 29, at 1058.

54. *Id.*

55. *See* BARNES & STOUT, *supra* note 45, at 16-17 (discussing Pareto efficiency and the problem of interpersonal comparisons of utility).

they existed along a spectrum.[56] Here, the parties immediately affected by the matter included the university, Bakke, minority students, and white students.[57] Further, because the school previously denied admission to minority applicants on the basis of race, the school, not Bakke, could provide better information as to how its conduct injured racial minorities. Justice Powell's conclusion that the Court lacked the judicial competence to evaluate the harms that the special admissions program sought to remedy[58] also assumed that the school could speak to the harms minorities endured. Yet, the school conceded that it would be unable to meet the burden of disproving causation. In fact, the costs of having its admission program subject to judicial scrutiny outweighed the benefits of defending its policy.[59] Moreover, if the school's and minority applicants' litigation interests were one of the same, it is doubtful the school would have conceded on the question of causation and, by extension, standing. When individuals who are considerably impressed by the particular issues at hand fail or are not given the opportunity to litigate their interests zealously, common law will trend towards inefficiency.[60]

Failure to inquire about actual causation invited mistaken assumptions of what actually transpired. Indeed, Justice Powell stated, "the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like [Bakke], who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[61] This gave rise to the "mistaken notion that when white applicants like Allan Bakke fail to gain admission ahead of minority applicants with equal or lesser qualifications, the likely cause is affirmative action."[62] Critical Race Theorists have argued that white anxiety over race conscious admissions policies is a function of flawed reasoning traveling to and from legal and public discourse.[63] Suits following *Bakke* challenging affirmative action relied on this fallacy.[64]

56. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971). *See also* Stout, *supra* note 10, at 1787 (citing JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1965) (applying the public choice theory to general constitutional analysis)).

57. It is also important to note that because Bakke was in fact rejected because of his age, it is questionable whether he suitably represented white applicants as a class. Lui, *supra* note 29, at 1058.

58. *Bakke*, 438 U.S. at 359 n.35.

59. Liu, *supra* note 29, at 1046.

60. Stout, *supra* note 10, at 1787.

61. *Bakke*, 438 U.S. at 309.

62. *Id.*

63. *Id.*

64. Liu, *supra* note 29, at 1050.

Unsurprisingly, the terms by which *Bakke* was decided inescapably led anti-affirmative action groups to stage end-runs around Justice Powell's assertion that diversity is a compelling government interest.[65] Fueling these groups was the notion that white males are the victims of "reverse discrimination."[66] However, it is unclear whether affirmative action harms white applicants in the narrow sense, that is, whether the harm stems from the rejection letter, or whether the harm is broader – an effort to affirmatively disturb privileged expectations and undo preexisting incentive systems.

His reasoning also provided imprimatur to the mistaken notion that when schools set lower admissions standards for blacks than for whites, schools engage in "reverse discrimination."[67] This is somehow supposed to be fundamentally analogous to "old-fashion discrimination against blacks" because one racial group is awarded a competitive advantage while non-members suffer the opportunity costs.[68] Contrary to this assertion, affirmative action has benefited white women more than any other group.[69] The affirmative action at UC Davis also benefited white applicants. To neutralize harms on white applicants, the school increased the class size – effectively raising the total number of white admitted students.[70] Moreover, this questionable legal reasoning posits that an admissions policy designed by the majority results in "reverse discrimination." This fails to comport to the fundamental notion that the individual acts of self-interest. Dubbing affirmative action "reverse discrimination" speciously intonates that a minority can discriminate against a group that has control over the very institutions allegedly making "reverse discrimination" possible.[71] If a rational individual acts out of self-interest and if affirmative action policies operate to the detriment of whites, then to what extent is affirmative action a redistributive rule fashioned by racial minorities? If diversity is a compelling interest because of a significant absence of racial minorities

65. *Id.*
66. Posner, *supra* note 42, at 689.
67. *Id.*
68. *Id.*
69. *See* Crenshaw, *supra* note 1, at 123-24.
70. The school not only increased the number of minority enrollment in 1973 and 1974 from 8 to 16, but it also increased the overall class size also from 50 to 100 during that same period. Thus, the number of white applicants admitted increased as well. *Bakke*, 438 U.S. at 274.
71. Cheryl Harris, *Whiteness as Property*, CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED A MOVEMENT 287 (1997) (stating, "The relative economic, political, and social advantages dispensed to whites under systemic white supremacy in the United States were reinforced through patterns of oppression of blacks and Native Americans. Materially, these advantages became institutionalized privileges; ideologically, they became part of the settle expectations of whites – a product of unalterable original bargain.").

at UC Davis, does it not follow that "reverse discrimination" is a necessary evil?[72] The notion of "reverse discrimination," thus, does not survive the test of logic.

Today, membership to a putatively harmed group provides adequate standing. To elude substantive critique, Justice Powell attests, "it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background . . . rather than the individual only because of his membership in a particular group."[73] Although the question of standing was relegated to obscurity, what was certain was that after *Bakke*, in cases where white plaintiffs litigated the constitutionality of a race-conscious admissions policy, the standing threshold was lowered since such plaintiffs were not required to show causation.[74] This effectively gave white plaintiffs a litigation subsidy that, in turn, encouraged litigation and increased tertiary costs – costs borne by society as a whole that lead to the inefficient use of legal resources.[75] Evidently, when a court has imperfect information, it can actually aggravate rather than placate conflict.[76]

B. *Awarding Injunctive Relief with Imperfect Information on Hand*

Part of the imperfection is displayed in Justice Powell's view that GPA and standardized scores, like money, have common determinable value. One might ask whether education is in fact comparable across race and class lines. Certainly, when a group is historically denied a resource while another has unfettered access to that same resource, the former will value that resource more so than the latter.[77] The Marginal Benefit Analysis, which provides that individuals value a resource progressively less the more they consume it, makes this a lucid point.[78] A UC Davis medical applicant seeking to practice medicine in a community or market where MDs are abundant would put that degree to less use. Contrariwise, an applicant seeking to use that same degree in a community where there was greater need for medical services would put the degree to greater use. Even a cursory application of Marginal Benefit Analysis suggests that a budding minority applicant may in fact extract greater utility from a medical degree as compared to Bakke himself, whose ripe age also mitigates any utility reaped. The point is to illustrate the implica-

72. West-Faulcon, *supra* note 15, at 1092.
73. *Bakke*, 438 U.S. at 299.
74. Liu, *supra* note 29, at 1049-50.
75. *Id.*
76. *Id.*
77. *Id.*
78. *See* BARNES AND STOUT, *supra* note 45, at 343-51.

tions of Justice Powell's indefensible colorblind analysis premised on the idea that individuals extract a common value from a scarce resource.

According to Coase's Theorem, it may be necessary for a court to assign a property right to one party so as to provide a bargaining starting point.[79] However, when a court awards an injunction to a party that enjoys a sustained monopoly, the costs of bargaining are astronomical, effectively preventing the efficient reallocation of resources.[80] Law and economics theorists find that courts typically impede bargaining, and thus the efficient allocation of resources, when they misjudge the limits of their knowledge in under- or over-estimating the costs of awarding injunctive relief.[81]

Despite the lack of reliable information, Justice Powell awarded injunctive relief to a party that already possessed a sustained competitive advantage. Here, Justice Powell enjoined the university from carrying out its race-conscious admission policy, a reward tantamount to a property right to white males as a class.[82] An admissions policy that rewards a minority applicant admission on the basis of race and class constitutes trespass because it would infringe on that property right.[83] Justice Powell's opinion in *Bakke* provides that the trespassers, here the school by virtue of awarding a minority applicant admission on the basis of race and the minority applicant for failing to meet worthiness criteria, are strictly liable since harm or causation need not be shown.[84] By not asking Bakke to prove harm and causation or take judicial notice of the school's racial composition, Justice Powell ignored the actual harms in question and misbalanced the utility of striking down the university's admission policy. As a corollary, correcting past discrimination is not a compelling governmental objective if the purpose is to reward a white applicant the equivalent of property interest in education on the basis of

79. *Id.* at 54-56.

80. *Id.*

81. *Id.* at 68.

82. *Id.*

83. Harris, *supra* note 71, at 287.

84. Posner, *supra* note 42, at 684; *see also* Marcellus Andrews, *Liberty and Equality and Diversity? Thoughts on Liberalism and Racial Inequality after Capitalism's Latest Triumph*, in RACE, LIBERALISM, AND ECONOMICS 205, 210-11 (2007). Andrews states cogently, "[the] state limits the prospects of the poor by respecting the rights of the non-poor to go on strike whenever redistribution becomes too burdensome. By contrast, conservative regime simply respects the wishes of the non-poor. This arrangement gives the well-off a permanent, legitimate veto over the structure of economic and social policy on the basis of their own narrow self-interest."

race and to impede voluntary exchanges of resources between race groups.[85]

C. *Colorblind Framework Making Imperfect Facts Illegible*

A colorblind framework in this case rendered relevant information ineligible. Whether Justice Powell's conundrum was intentional or a function of inherent biases is a question that deserves interrogation. A researcher in the area of cognitive psychology illustrates empirically that white men as a group have an incentive to suppress information that would give rise to conflict.[86] This results from an astute desire to preserve incentive systems that disproportionately award their group disproportionate economic security, leisure time, status, and power.[87] If Jim Crow segregation, historical discrimination, and an unceasing competitive advantage can be understood as arrangements that maintain channels of wealth distribution and majoritarian rent-seeking, then affirmative action, which destabilizes this system, inspires dispute among those with a clearly vested interest in preserving it.

How does this explain his rationale? Justice Powell sought to quell conflict and achieve societal security by removing the harms that minorities endure from the frame altogether. Having made this choice, Justice Powell was likely to reject information highlighting the risks and costs associated with the absence of affirmative action and existing incentive structures.[88] He, like the rest us, demonstrates a tendency to avoid the cognitive dissonance associated with information that suggests that a decision is a mistake or involves continuing risk.[89] For Justice Powell to identify the harms germinating from existing unrelenting discriminatory processes, he would need to highlight the problems he would prefer to deny.

IV. How Should Merit-Based Policies be Regulated?

Theoretically, without an admissions process, applicants would savagely compete for admissions and resources would be allocated to the physically strong without regard to the applicant's intellectual ability to make the most use of the scarce resource. Yet, the application process, like capitalism, provides a means in which competition can flourish without the violent or

85. Harris, *supra* note 71, at 287.
86. *See, e.g.*, George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 Am. Econ. Rev. 307, 308-09 (1982).
87. *Id.*
88. *Id.*
89. *Id.*

destructive consequences of brute competition. Although Hardin's prediction of civil unrest in the *Tragedy of the Commons* is normative, as *Bakke* and its progeny illustrate, conflicts arising from race-blind remedies give Hardin's prediction force.[90]

Unquestionably, *Bakke* is a story about access to and distribution of scarce educational resources. Universities rely on standardized tests and GPAs as predictors of academic performance, presuming that higher than average test scores and GPAs are indicative of merit.[91] Normatively, in order to induce students to develop skills for academic success, rewards need to be allocated to those individuals that have accrued those talents through hard work.[92] From an applicant's perspective, the application process to medical school is inherently selfish. Each applicant must compete for a seat in the school by showing that he or she possesses the skills necessary to complete the medical program. An applicant is also required to provide grades and MCAT scores as proxies for suitability, and letters of admission are awarded to the applicants according to their demonstrated skill.[93] If an applicant worked hard to earn a competitive GPA and MCAT score, then we should reward that applicant because we wish to encourage wealth production and because they have already demonstrated academic success.

The principle issue throughout this Comment is whether rules coming out of *Bakke* encourage wealth production, a goal achievable by fashioning law in way that is responsive to the facts on the ground. Evidence shows that merit has instrumental value when there is unfettered competition and individuals have the freedom to assume risks of unintended consequences.[94] Perhaps UC Davis conceived of merit in similar terms by implementing a race- and class-conscious policy that would stir competition among communities of color. Certainly, meaningful competition can be a catalyst for ingenuity and progress.[95] However, limits on the use of race in admissions policies can also result in shared negative externalities.

For instance, while traditional merit-based policies disparately impact minority students, these policies also impact the

90. Liu, *supra* note 29, at 1050

91. West-Faulcon, *supra* note 15, at 1116.

92. Andrews, *supra* note 84, at 220.

93. *Bakke*, 438 U.S. at 273.

94. Yet, majority groups collectively exclude target groups from competition by shifting "the costs of discrimination to these groups, just as producers often conspire to form cartels to escape the discipline of price competition." *Id.* at 221. *See also* Drucilla Cornell & William Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism, Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 642 (1998).

95. McAdams, *supra* note 16, at 1084.

university ranking process in ways that negatively affect every applicant. Research shows an increased reliance on SAT and LSAT scores in admissions criteria as colleges and graduate schools compete to move up in rankings.[96] SAT and LSAT proponents, for instance, justify the use of such test scores on the basis that it is an inexpensive tool to predict an applicant's future academic success.[97] Data, however, has shown that these exams are unreliable predictors of success for black students.[98] While adding other standardized criteria such as GPA increases the predictive value of standardized tests, data shows that African American students with comparable SAT scores who attend more selective schools are more likely to graduate than those attending less selective schools.[99] What is even more troubling with use of standardized test scores is that, even when African Americans and Latinos improve their average GPA and standardized test scores, studies show that they are increasingly being shut out of places like law school.[100] Accordingly, universities rely on race-blind policies in ways that do not fulfill their intended purposes, such as increasing competition and awarding desired behavior. Instead, universities implement such practices out of self-interest or, perhaps, self-dealing.

Yet, externalities are, by their nature, shared and not always contained within one community or another. If this trend endures, the future corps of lawyers and judges will be composed of a white super majority that will decide questions of law and policy of appreciable interest to all of society. Moreover, since an applicant's career choices do not start or end with a letter of acceptance, judge-made rules limiting what universities can and cannot consider in their admissions process has material implications beyond what can be observed in the classroom or university corridors.

A. *The Limits of Merit*

When out-groups compete against in-groups who posses unilateral monopoly, and when the terms of competition are set to facilitate wealth distribution along a racial axis, a test-based admissions policy asking students to compete on "equal footing" sanctions unequal opportunities between members of different classes and races.[101] While a race-blind admissions policy may

96. West-Faulcon, *supra* note 15, at 1105.
97. *See* REBECCA ZWICK, FAIR GAME? THE USE OF STANDARDIZED ADMISSIONS TEST IN HIGHER EDUCATION (2002).
98. West-Faulcon, *supra* note 15, at 1108-09.
99. *Id.*
100. *See* Lewin, *supra* note 18.
101. *Id.*

not mean that white applicant will always be admitted, it at least means that they will not lose, "if losing is defined as being at the bottom of the social and economic hierarchy – the position to which blacks have been consigned."[102] Functionally, merit becomes a judgment of a person's worth, not the value of their work, and at the same time ensures stable group formation when measurements of worthiness trade along racial lines.[103] The proof is in the pudding.

Data analysis of SAT scores indicates large racial and gender disparities in differences in scores.[104] Educational psychologist Claude Steele empirically demonstrates that the racial performance gap is a function of the "stereotype threat" – "consciousness that the gender, racial, or other demographic group to which one belongs is expected (stereotyped) by society to perform poorly in a particular milieu."[105] Others have looked at the performance of minorities in highly selective institutions to argue that the use of standardized scores and GPA are *ex ante* measures of filtering out "mismatches."[106] Proponents of mismatch theory deflect bias by emphasizing pipeline problems and class inequality as culprits for performance gaps.[107]

The point is not to dismiss the practical value of GPA and standardized test scores entirely, but to illustrate the reifying effect of test-based admissions policies on stereotypes about minority groups. Focusing exclusively on why certain minorities perform poorly as compared to other groups ignores the fact that the metrics used in academic preparation serve to gratify whites' need for self-esteem. Stereotyping minority students as less worthy of developmental resources and life opportunities sabotages a marginalized group's social position and gives race ubiquitous and material significance in the formation of in- and out-groups.[108] Essentially, the use of standardized test scores and GPA as "objective" measures of merit, more than anything, serve purposes other than simply aiding schools in identifying and selecting applicants who would make the most use of educational resources.

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102. Harris, *supra* note 71, at 286.

103. Andrews, *supra* note 84, at 221.

104. West-Faulcon, *supra* note 15, at 1118.

105. *Id.*

106. Richard Sanders, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV 367, 377-79. (2004). The mismatch theory rests on the "presumption that African American and Latino applicants into top-ranked public universities are not qualified to attend such institutions."

107. *Id.* at 370-71.

108. McAdams, *supra* note 16, at 1031.

B. *Race-Blind Meritocracy as a Product of Rent-Seeking Behavior*

Law and economics theorists have long recognized that there are processes that fail to meet free market principles and may in fact encourage individuals to gain wealth by means other than labor.[109] Rules governing collective action in a democratic system, which can be costly, are one of those processes.[110] Groups can reduce collective action costs by policing free riders and encouraging stable coalitions.[111] While it can be expected that coalescing along endogenous racial traits can lead to unstable coalitions,[112] race is resilient not only because the wealth effects of racial discrimination are cumulatively transgenerational,[113] but also because race is a cost-effective means of allocating group status and esteem.[114]

In *Cooperation and Conflict*, Richard McAdams posits that "individuals make material sacrifices for group welfare" because individuals want to selfishly satisfy "the desire for esteem or status."[115] Group status and conflict precipitated by racial discrimination serve two purposes. First, racist discourse "helps establish a norm of white behavior . . . which will lower the in-group status of non-conforming whites."[116] Second, such discourse "appeals to the individual's identification with the group . . . and effectively describes the status reward by contrasting other members of the group . . . who will not share in it."[117] Although esteem itself is a non-tangible good, "by allocating esteem to induce members to make contributions to group welfare," the payoff that a person obtains by virtue of one's group membership outweighs his individual sacrifice.[118]

Esteem production thus helps reduce collective action costs through rewards and punishments.[119] Installing this ideology at the Supreme Court level, Justice Powell stereotyped white applicants as similarly situated with respect to the impact of racial preferences.[120] When an admissions program that accounts for diversity is misconstrued as a back door for minorities,[121] white

109. *See* BARNES & STOUT, *supra* note 45, at 394-95.
110. Stout, *supra* note 10, at 1793-95.
111. McAdams, *supra* note 16, at 1009-11.
112. Stout, *supra* note 10, at 1820-21.
113. Katz, *supra* note 13, at 1039.
114. McAdams, *supra* note 16, at 1008.
115. *Id.* at 1009.
116. *Id.* at 1007.
117. *Id.*
118. *Id.*
119. "If disapproval itself exerts a real force, then the gossip, scorn, and ostracism are themselves sufficient to enforce norms." *Id.* at 1028.
120. Liu, *supra* note at 29, at 1097.
121. Sanders, *supra* note 106, at 377.

admittees are also stereotyped as lacking the personal attributes relevant to educational diversity.[122] Incidentally, Justice Powell's rationale distributes white male self-esteem by attributing a white applicant's rejection to racial preferences and not personal failure.[123] If the diversity rationale is retold as a function of intra-group punishment, white admittees are discouraged from embodying attributes relevant to diversity because diverse attributes are thought of as having little predictive value of future success and academic performance. Thus, Justice Powell helps the white majority to overcome the free-riding problem by rewarding and penalizing esteem to facilitate intra-group loyalty and cohesion.[124] To reiterate, the law and economics analysis asks whether courts create legal rules that reduce transaction costs and induce wealth production, and the framing of merit in *Bakke* distorts what it in fact performs.

In zero-sum games, intra-group cooperation increases at the expense of inter-group cooperation. This explains why "people are more likely to protest when they feel that the group to which they belong is relatively deprived than when they simply feel they as individuals are relatively deprived."[125] This idea also explains white anxiety over race-conscious remedies. Of case in point, Professor Lynn Stout, an authority on law and economics, finds that "Justice Powell's opinion may have accurately recognized that, as America approaches the twenty-first century, the traditionally monolithic white majority may become an attractive target of wasteful rent-seeking by coalitions of other minorities."[126] The misconception that whites are on the verge of becoming insular and discrete minorities who need to be constitutionally rescued from riffraff minority coalitions is captured in Justice Powell's opinion.[127] In this sense, strict scrutiny is used in *Bakke* to safeguard resources and life opportunities misappropriated by whites.[128] Merit as framed by Justice Powell

122. Liu, *supra* note at 29, at 1098-1100. Because whites constitute a significantly large number of applicants to selective institutions, "the story of Allan Bakke . . . captures only the tiniest sliver of the real impact of racial preferences."

123. McAdams, *supra* note 16, at 1095, "the size of this group is a powerful testament to the sheer statistical realities of selective admissions: so steep are the odds that not only do the vast majority of unsuccessful white applicants have no plausible claim that they were displaced by minority admittees, but a substantial number (close to half) have no plausible claim that race had anything to do with their rejection."

124. *Id.* at 1046.

125. *Id.* at 1023.

126. Stout, *supra* note 10, at 1820.

127. Racial group formation also reduces the costs to an individual's self-esteem by spreading the costs among the individual's group members.

128. Andrews, *supra* note 84, at 218. "The racial 'cold peace' of classical liberalism conveniently ignores the hard realities of social class and the impact of racial conflict on the allocation of resources in a market society. The classical liberal solu-

augments this injustice: if resources go to those who can make better use of it then it would not matter whether whites continue to enjoy the fruits of misappropriated goods.[129] Certainly, by designating the application process, which includes the submission of GPA and standardized test scores, as the obvious and only point of competition, Justice Powell rendered irrelevant those factors that guarantee wealthy white applicants a competitive advantage.

V. WHAT DOES *BAKKE* DO FOR *GRUTTER*?

A. *Race-Blind Admission Policies as a Product of White Majoritarian Rent-Seeking*

The binary nature of the legislative process induces individuals to rely on alternative ways of enacting rules that satisfy their interests.[130] Because "majority rule invites welfare transferring, as well as welfare increasing, legislation,"[131] courts perform counter-redistributive functions. Stout contends that Justice Powell's application of strict scrutiny in *Bakke* is warranted because affirmative action is a product and furtherance of rent-seeking.[132] Rent-seeking is inefficient because it inspires group conflict and encourages individuals to extract unearned wealth from others without making a contribution to productivity.[133] Affirmative action, if characterized as a rent-seeking tool, leads to inter-group conflict because it would inspire "deep resentment by the individuals burdened,"[134] presumably since the individual would resent those whose fortune is unearned.

This characterization treats race as a biological concept that precipitates minority group coalitions, just as it ignores the possibility that preexisting wealth gaps and unequal opportunities to

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tion to reconciling liberty and diversity has a seductive charm because it suggests that effort and talent can protect despised people from the noxious views and actions of their bigoted countrymen and countrywomen."

129. *See* BARNES & STOUT, *supra* note 45, at 16-17 (discussing Coase's theorem and Kaldor-Hicks' position on compensation).

130. Stout, *supra* note 10, at 1794. For example, individuals try to vote by making campaign contributions or by electing legislators that represent their interests. In turn, legislators vote strategically to enact laws that incorporate their base's strong interests.

131. *Id.* at 1812.

132. *Id.* at 1820. In economics, rent-seeking occurs when an individual or organization seeks to earn income by capturing economic rent through manipulation or exploitation rather than through economic transactions and the production of wealth.

133. *Id.* at 1817. "Rent-seeking individuals hoping to extract wealth through a discriminatory classification might want to minimize not only the risk that they themselves might fall into exploited class, but also the risk that redistributive measures will harm family or close friends."

134. *Bakke*, 438 U.S. at 359 n.34.

wealth *vis-à-vis* racial group lines form the basis of stable coalitions.[135] Concededly, this argument also presupposes in- and out-group formations: the in-group members are those who putatively engage in profit-seeking behavior, while out-group members engage in detrimental rent-seeking. Justice Powell found that "those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups."[136] Yet, a discussion that treats the three-year-old affirmative action policy at UC Davis as inefficient rent-seeking needs to be weighed against other forms of majoritarian rent-seeking. To name a few: 200 years of enslavement of over 4 million people, 300 years of redistribution of Native American lands, 80 years of wealth misappropriation under Jim Crow segregation, and 50 years of land displacement of native populations in the islands of Puerto Rico, the Philippines, and Guam under the guise of Manifest Destiny.[137]

Moreover, Stout and Justice Powell's disregard that membership to a minority group was a necessary but insufficient admission criteria at UC Davis belies the assertion that affirmative action is a rent-seeking vehicle for minorities. Both disregard the incentives that wealth effects have for the majority group. If wealth is transferred from one generation to the next, what incentives do future generations have to produce wealth? To ask the question bluntly, when individuals seek access to higher education, how can rent-seeking be distinguished from beneficial profit-seeking when the latter produces racially disparate rewards and when the ability to produce wealth is prefigured by a history of white-majoritarian rent-seeking? For Stout and Justice Powell, the nebulousness of race is only an issue when there is a policy that facially benefits minorities.[138] Thus, it is not that rent-seeking is inherently undesirable, but rather, what is problematic is the fact that minorities rely on rent-seeking processes put in place by majoritarian rent-seekers.[139] Without a doubt, the fact that minorities can engage in rent-seeking in a post-civil rights

135. Katz, *supra* note 13, at 1039.

136. *Bakke*, 438 U.S. at 359 n.34.

137. *See* Harris, *supra* note 71, at 287-88 (arguing that, "although the existing state of inequitable distribution is a product of institutionalized white supremacy and economic exploitation, it is seen as a natural order of things, something that cannot legitimately be disturbed").

138. *Id.* at 287 (stating, "the law has recognized and codified racial group identity as an instrument of exclusion and exploitation; however, it has refused to recognize group identity when asserted by racially oppressed groups as a basis for affirming or claiming rights").

139. *Id.* (arguing, "[w]hiteness is an aspect of racial identity surely, but it is much more; it remains a concept based on relations of power, a social construct predicated on white dominance and black subordination").

era is premised on the notion that rent-seeking existed pre-civil rights.

B. *What did* Bakke *Incentivize?*

After *Bakke*, normalized admissions policies led to significantly lower rates of admission of particular racial groups.[140] In one instance in 1998, the UCLA School of Law implemented an admissions policy granting preferences to applicants on the basis of class.[141] The number of black, Latino, and Native American admittees dropped to record lows despite the fact that the number of white and Asian applicants who were similarly situated along class lines increased. This outcome would not have been possible but for Proposition 209, which eliminated the use of race in admission policies at public universities in California. Race-blind admissions policies for whites thus produced disparate rewards – a windfall and perpetuation of preferential treatment produced by a reliance on the legal system to carve out rules favoring the white majority.[142] While the benefit of the reward is insularly enjoyed, its costs are widely shared.

In *The Selection of Disputes for Litigation*, George Priest and Burton Klein hypothesize that the common law will not evolve efficiently when there are repeat players who can afford to settle cases that would result in unfavorable rules and litigate cases that would lead to favorable rules.[143] They posit that the common law will only evolve towards efficiency when other organized repeat players, who can afford to litigate cases and who suffer damages that exceed a settlement range, challenge each other.[144] *Bakke* and *Grutter* demonstrate the Priest-Klein hypothesis of the common law's tendency to devolve. Despite Justice Powell's concern that affirmative action would lead to group conflict, the result in *Bakke* created a litigation subsidy for white interests groups by reducing the costs of litigation for white plaintiffs.[145] This, in turn, led to an increase in the number of cases that white litigants brought against universities, and even-

140. West-Faulcon, *supra* note 15, at 1095.

141. David L. Chambers, Timothy T. Clydesdale, William C. Kidder & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1866-68 (2004).

142. The uncertainty of the *Bakke* decision and the question of whether Justice Powell's opinion constituted precedent provided fodder for rejected white applicants to challenge race conscious admission policies. RACHEL F. MORAN, THE STORY OF GRUTTER V. BOLLINGER, RACE LAW STORIES 457 (2008).

143. George Priest & Burton Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

144. *See also* George Priest, *Selective Characteristics of Litigation,* 9 J. LEGAL STUD. 399, 410 (1980).

145. Liu, *supra* note 29, at 1057-59.

tually prompted the Supreme Court to revisit Justice Powell's decision in the sister University of Michigan cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*.[146] Indeed, in *Bakke*, the plaintiff did not need to show that the school's special admissions in fact caused harm – a typical and necessary element of standing. Moreover, unlike minority applicants, Bakke, standing in for the majority class, was in a relatively well-financed position to litigate the issue until reaching a favorable judge-made rule. As cases subsequent to *Bakke* demonstrate, white applicants were more likely to litigate affirmative action cases because the damages they would suffer in a potential loss were offset by the possibility of winning. The vigor by which white plaintiffs litigated race-conscious admission policies was further fueled by the precedent of not having to show actual causation or substantive standing. It thus follows that greater reliance on the judiciary system to produce rules that favor white applicants led to greater costs – among them tertiary costs and increased conflict. *Grutter* convincingly exemplifies these issues in greater detail.

In *Grutter*, Barbara Grutter alleged that the special admissions policy of the University of Michigan Law School gave minority applicants preferential treatment, costing her a letter of admission as a result.[147] Yet, the story behind the Michigan cases starts not with the individual plaintiffs, but with the Center for Individual Rights (CIR).[148]

CIR, a conservative special interest group, was founded shortly after *Bakke* was decided. Its mission was to end all forms of race-conscious remediations.[149] Even after convincing the Fifth Circuit to declare that Justice Powell's decision was not binding precedent and that diversity was not a compelling governmental interest, CIR fought to have the Supreme Court overturn *Bakke* and solicited potential white plaintiffs to help in this regard.[150] CIR found Barbara Grutter, a white mother of two who operated her own business, graduated from Michigan State with a 3.8 GPA, and had an LSAT score that placed her in the 86th percentile.[151] In 1996, Grutter applied to the University of Michigan Law School, was initially placed on a wait list, but was later rejected. With the help of CIR and the Washington Legal Foundation, a conservative advocacy group, Grutter challenged the law school's admissions policy.

146. *Id.*
147. *Grutter*, 539 U.S. at 205.
148. MORAN, *supra* note 142, at 457-58.
149. *Id.*
150. *Id.* at 456.
151. *Id.*

In *Grutter*, the Court found that the law school program was narrowly tailored to meet a compelling governmental interest and that race was not a determinative factor, but a plus factor. Because all applicants had the opportunity to compete equally so that diversity meant something more than just race, the Court found that the harms were not unduly overbearing.[152]

Grutter also stands for the proposition that admissions policies must adhere to the color-blind principle, which provides that applicants must be evaluated entirely on individual merit, and that the use of race in admissions must terminate as soon as "practicable."[153] Justice O'Connor sought to create a rule that would maximize the benefits of a diverse student body and minimize the costs that it would impose on white applicants. However, her reliance on *Bakke* undermined that objective.[154] More precisely, the justices in *Grutter* moved through similar fault lines as Justice Powell did in *Bakke*: interests were treated as binary, disregard of the amicus filed by the student-intervenors made imperfect information even more defective, and an illusory harm was warranted judicial intervention. The arguments made in the amicus briefs and during oral arguments are notable examples.

C. *The Student-Intervenors and Amicus Briefs*

The amicus briefs filed and the arguments proffered during oral arguments demonstrate the intensity of interests beyond those interests represented by the parties to the litigation. Of significant interest was the amicus brief filed by a group of minority-student intervenors – law students who attended the University of California after Proposition 209 had passed – who commented on the harms attendant to a race-blind admissions policy.[155] In their amicus brief, the student-intervenors asked the court to recognize present day racial subordination and its attendant harms on minority students at public universities.[156] As the defendant, the University of Michigan, like the University of California Regents in *Bakke*, had a common objective with minority students in preserving affirmative action, but had a con-

152. *Id.*

153. *Id.* at 341.

154. *Grutter*, 539 U.S. at 340-41. The majority affirmed that diversity is a compelling state interest under the First Amendment, but also dismissed the view that remedying past discrimination is a compelling governmental interest out of concern that it imposes burdens on "innocent third parties."

155. Defendant-Intervenors' Brief in Support of Defendant's Motion for Summary Judgment at 1, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928).

156. *See* MORAN, *supra* note 142, at 484.

flicting interest in the deployment of litigation strategies.[157] For instance, while the legal team representing the university participated during oral arguments, the students-intervenors, who represented a critically invested class in the litigation, were not allowed to participate.[158] Yet, despite the students' efforts to have the Court account for the costs that race-blind admissions policies impose on minority groups, their interests were accounted for only to the extent they were incidental or ancillary to those societal interests Justice O'Connor found important.[159] These interests included the need for a diverse competitive America, cohesion and solidarity in the military, democratic legitimacy, and the Court's need for institutional integrity.[160]

To reiterate, the minority students were integral to the analysis because their testimony was critical to the accuracy of information needed to assess the costs of validating or proscribing the admissions policy. By disregarding the amicus brief filed by the student-intervenors, the Court not only failed to take judicial notice of the ample evidence available that substantiates the disparate harms that stem from race-blind admissions policies, but also risked failure to engage a very large body of citizens who might endorse Justice O'Connor's reaffirmation of diversity as a compelling governmental interest. While Justice O'Connor's effort to highlight society's shared interest in diversity is a vital objective, an analysis that relegates the interests of student-intervenors to the margins leaves the diversity rationale vulnerable to majoritarian prerogative. Evidently, equal access to education does not equate to equal participation in crafting the very legal rules that make equal access to education possible.

D. *The Significance of the Oral Arguments*

The oral arguments demonstrate the resilience of Justice Powell's holding in *Bakke,* its flawed presuppositions, and its inability to attend to the very conflicts that its rationale precipitated. Grutter's attorney, Kirk Kolbo, proffered arguments that instantiate the causation fallacy: "By discriminating on the basis of race at a point of competition, innocent individuals are being injured in their constitutional rights."[161] Mr. Kolbo maintained that because race, and not merit, was the controlling factor in who was admitted into the law school, race must have also been the controlling factor in why Grutter was rejected. This dialectic

157. Response of Defendants Regents of the University of Michigan et al. at 1, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928).
158. *See* MORAN, *supra* note 142, at 482.
159. *Id.* at 483.
160. *Grutter*, 539 U.S. at 331.
161. Trial Transcript, Grutter v. Bollinger, 2003 WL 1728613 at *3.

places merit and whiteness on one end and non-whiteness and theft on the other. Mr. Kolbo stressed that the race-conscious admissions policy created "perverse incentives" because applicants relied on race and not on merit to gain admission.

In representing the government, Solicitor General Olson emphasized that the law school admissions policy hurt minority applicants because "it overly employs stigmatizing and divisive racial stereotypes."[162] This stigmatization idea resounds the notion that normative concepts of merit allocate esteem by ascribing shame to a minority's marginalized status. In contending that an unhampered market can meet the need for a racially diverse student body, Olson suggested that the market operates efficiently and independently of the law, fictitiously associating incentive structures that regulate academic institutions with ordinary profit-seeking.[163]

Maureen Mahoney argued, on behalf of the university, that the use of race in its admissions policy did not discriminate, but instead produced racially-neutral benefits.[164] The Court, however, wished to determine the precise point where race produces optimal results and where it produces suboptimal results.[165] Ms. Mahoney emphasized that "the law school has attempted to take race into account in a very mode-defendant-limited fashion, no more than necessary to achieve the goal of trying to have sufficient numbers of minorities that there can be an excellent educational experience for everyone."[166] Speaking for the Court, Justice Scalia pressed, "when you say sufficient numbers . . . there is some minimum."[167] This tension between competing claims rests on the assumption that a gain for a minority represents a loss to society at large. Critical Race Theorists may reasonably find this characterization of the issue unattractive because its analysis invites a view of race-conscious remedies as grounded in zero-sum gaming. However, the point is not to demonstrate the inherent limits of a law and economics analysis. Rather, the purpose of the law and economics exercise is to identify the assumptions that exist at the meta-level that renders a framing of an issue unassailable to critique. A fair and genuine law and economics analysis helps cast doubt on the claim that race-neutral equals efficient, and undermines the notion that a race-conscious remedy invariably leads to inefficient and perverse outcomes.

162. Trial Transcript, Grutter v. Bollinger, 2003 WL 1728613 at *10.
163. A point reiterated by Becker and Posner.
164. Trial Transcript, Grutter v. Bollinger, 2003 WL 1728613 at *13-14.
165. *Id.*
166. *Id.* at *17.
167. *Id.*

VI. IN SUM: HOW DOES LAW AND ECONOMICS RETELL *BAKKE* AND *GRUTTER*?

The tragedy of the commons shows that when groups compete over a common resource, unregulated competition incentivizes individuals to claim private ownership over and to exploit that resource, thus creating harms shared by the entire group. Awarding white applicants a property right in unregulated competition decreases their transaction costs just as it increases an impoverished minority's bargaining power. Additionally, a debate about what constitutes merit is analogous to the Court's debate as to what the relevant transactions and market entry points are. Designating the standardized exam scores and GPAs as the predominant factors in competition further removes relevant information from the analysis.

The parity of GPA and standardized test scores along race and class lines suggests that there might be a problem with minorities' effective participation in determining the rules and standards dictating educational access. When a majority group has unilateral monopoly over access to a resource, the majority sets worthiness criteria that create in- and out-group members, allocates status, and reduces costs of collective action for the majority. Thus, despite Stout's assertion that affirmative action represents minority rent-seeking, merit-based policies represent majoritarian rent-seeking because it preserves a disproportionate economic power previously obtained through state-sanctioned discrimination.

Compounding these issues is the standing requirement, which as treated in *Bakke*, reduced white plaintiffs' litigation costs by not requiring these plaintiffs to show causation. Because the Court presumed that Bakke's individual interest was consistent with that of all whites and that the school's interest was aligned with that of minority students, the Court supposed that interests were comparable and existed on polar ends rather than along a spectrum. This had the effect of further making information unreliable, making the Court's cost-benefit analysis deeply flawed by obscuring *de facto* rules and conserving incentive structures traceable to *de jure* segregation. Accounting for past and present discrimination may cure this because courts would have to make individualized assessments of how groups value education.[168]

168. As Harris states, "affirmative action is required . . . to dismantle the actual and expected privilege that has attended 'white' skin since the founding of this country." Harris, *supra* note 71, at 288.

Furthermore, the Court provided Bakke a property right in education by awarding him an injunctive remedy.[169] Such a remedy both under- and over-includes the interests of minority applicants. In one sense, minorities are third parties to the litigation in that they are not fairly represented. In another sense, they are forced to stand in the defendant's shoes. Failure to account for the interest of minorities effectively precludes them from litigating an issue that substantially infringes on their interests.

Lastly, *Bakke's* juridical effects can also be understood as products of and vehicles for majoritarian rent-seeking because *Bakke* eliminates a white applicant's need to establish causation, a critical element of the standing requirement. This affects not only minorities and institutions that seek to remedy discrimination to majoritarian rent-seeking, but also subjects the courts to very similar pressures and risks. *Bakke's* holding increased tertiary costs and the number of rent-seeking groups because the case encouraged more white applicants to perceive themselves as victims of race-conscious admissions policies and to view higher education as white entitlement.

VII. THE DIVERSITY RATIONALE REFRAMED

Rescuing race-conscious admissions policies from perpetual demise requires an unmooring of the *Bakke* rationale from *Grutter* and a reframing of the policy on grounds that it serves numerous important societal interests. The prior section's law and economics analysis of *Bakke* demonstrates compelling reasons to divorce Justice O'Connor's rationale from Justice Powell's sole plurality opinion. Undoubtedly, the loss of a race-conscious rationale means that the interests of subordinated constituencies, which are traditionally underrepresented in any event, are much more likely to be overridden by powerful market forces. Notwithstanding the constitutional countenance of Justice Powell's opinion, the diversity rationale articulated in *Grutter* can be framed on its own terms in such a way that serves wealth-maximizing functions and principles of fairness. Ultimately, whether a race-conscious admissions policy proves to be efficient is largely contingent on how education as an entitlement is conceptualized.

A. *The Instrumental Value of Diversity*

Although Stout's conclusion on *Bakke* rests on arguable presumptions, her thoughtful proposal on how courts can respond to

169. Awarding a property entitlement while disregarding coercive wealth transfers operates like the law of adverse possession because ownership interest is conferred to a group that possesses a resource adversely to the interest of its true owner.

rent-seeking initiatives infringing on the interests of society's subgroups is instructive: "One way to reduce the danger that an independent judiciary will systemically favor a subgroup of society is to appoint judges from a variety of ethnic, racial, and class backgrounds."[170] Because legal rules are made upon judicial review, judges can only enact rules with the support of other judges.[171] "A diverse judiciary also may be less prone to judicial failure due to honest mistake because diverse appellate panels have access to a broader range of experiences in estimating the likely welfare effects of a statute."[172] Judges, like legislators, negotiate by trading votes or by writing decisions in a way that speaks to as many interests as possible. In this sense, diversity and the color-blind principle work hand-in-hand because a diverse judiciary and strategic voting would encourage judges to account for society's welfare as a whole.

However, Stout's call for a diverse judiciary is undermined by her arguments' rhetorical flourishes – namely, the labeling of affirmative action as a minority rent-seeking tool. A more robust economic analysis would ask how educational policies and institutions create wealth effects and burden marginalized groups' ability to transact and negotiate. This requires an analytical framework attuned not only to the prevailing paradigms of law and economics, but also to the multiple market vulnerabilities and complex realities of subordinated groups.

One analysis undertaken by Martin Katz in the *Economics of Discrimination: Three Fallacies of Croson* uses a competitive equilibrium model to show that past discrimination contributes to racial disparities that presently depress black's productivity.[173] Even in a market that is free of discrimination, "as long as [b]lacks['] productivity is lower than that of whites, employers will prefer whites."[174] This is because "financial disadvantage . . . is transferable across generations."[175] If blacks lack the skills necessary to obtain higher wages for their labor, either "blacks must be less rational than whites . . . or their incentives must differ from those of whites."[176]

Katz's analysis of discrimination in employment practices illustrates similar quandaries that poor minority applicants endure. A race-blind admissions policy assumes that those seeking to

170. Stout, *supra* note 10, at 1829.
171. *Id.*
172. *Id.*
173. Katz, *supra* note 13, at 1039. "Any act of discrimination continues to affect (or "sic") its victim's productivity beyond the time when the act has ceased."
174. *Id.*
175. *Id.* at 1043.
176. *Id.* at 1044.

enter universities are all equally situated.[177] If competition exists because of the potential for reward, and if rewards are allocated along group lines, then we can expect little incentive for those excluded to develop the skills needed to compete. Justice O'Connor's conceptualization of a diversity-seeking admissions policy as one that gives a minority applicant a small boost, when viewed through Katz's analysis of market discrimination, recasts affirmative action as a necessary step in remedying not the applicant, but the conditions that impede fair competition. The top applicants of a specific target group "will receive a competitive 'leg up' on unaided members of the aspirant pool, as well as on marginal entrants in the market."[178] By increasing the number of participants, those competing to gain admission into a university will have to work harder. As the number of talented applicants in the pool increases, schools may have to improve education to attract and retain talent.

B. *Education as a Public Entitlement*

Recognizing and correcting problems of access to higher education requires analytical tools and a reorganization of priorities. If done correctly this may destabilize contemporary and normative conventions that set private property and interest as the primary means and ends of exercising individual agency. To put it differently, the contemporary framing of higher education views intellect only in possessive or privatized forms. Thus, while institutional efforts to promote access to higher education produces collective costs, a good portion of the benefits accrued, sadly, are not shared collectively. By bringing minority groups into society's folds and rethinking education as an intellectual commons where knowledge is collectively gathered and used for the benefit of all, society can begin to move towards practices that produce greater wealth and ingenuity.[179] Today's economic crisis may propel the currents necessary for a sea-sized change.

More than ever, groups need to stand shoulder to shoulder to more effectively face global economic and geopolitical challenges. Today the U.S. is in an historic recession partly precipitated by a shift from a production to a service-based economy – a change that has created a demand for employees with skills that can only be developed at the university level.[180] In facing these challenges, it is necessary to understand that the imperatives that

177. *Id.* at 1045.
178. *Id.* at 1047.
179. Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369, 371-72 (2002).
180. *Grutter*, 539 U.S. at 340-41.

Justice O'Connor identified as compelling end not with the application process, but continue beyond graduation. In *Coase's Penguin, or, Linux and the Nature of the Firm*, Yochai Benkler argues that an intellectual commons trends towards greater productivity, unlike a property based commons that relies on organized markets and managerial hierarchies to induce productivity.[181] Benkler analyzes software programmers who had not relied on managerial hierarchies or a market to successfully develop software programs to demonstrate an alternative "nonproprietary production strategy" that identifies and efficiently allocates human creativity.[182] He argues that reducing human creativity to proprietary interests and relying on the market to assign developmental resources to any given individual produces inefficient outcomes.[183] This happens because firms are limited in how they can harness human intellect. He notes that, "given the high variability among individuals . . . human creativity is especially difficult to specify for efficient contracting or management."[184] Indeed, despite this historic recession we have seen a boom in software programs developed for phone and computer applications, a result largely facilitated by corporations, such as Apple, that have reduced the costs of accessing information and technology for all individuals regardless of race, gender, or class affiliations.

In this sense, the diversity rationale, if understood as providing universities the tools needed to reduce the costs of accessing education and increasing the composition of its student body, can lead to greater intellectual output and productivity.[185] Certainly, the briefs that Justice O'Connor referenced in her majority opinion evidence a concern that a race-blind admissions policy would produce a scarcity of human creativity. Although a test-based admissions policy has some advantages, a diversity model better identifies the best applicants because human intellect is variable and is inherently difficult to standardize.[186]

Benkler's analysis helps ground the diversity rationale in economic analysis. Firstly, admitting applicants solely on basis of standardized test scores and GPA would be equivalent to imposing a property rights regime on education. Test scores and GPA are forms of currency that operate like money: the higher they are, the better an applicant can negotiate. As such, merit as normatively understood in *Bakke*, and the diversity rationale as de-

181. Benkler, *supra* note 179, at 375.
182. *Id.*
183. *Id.*
184. *Id.* at 376.
185. *Id.* at 330.
186. *Id.* at 414.

fined in *Grutter* cannot coexist. Yet, imposing a non-proprietary norm – the equivalent to an admissions policy that vigorously accounts for diversity – is useful when individuals do not expect to exclude from its product anyone who does not pay for it. Because the opportunity costs of participating in academic research, rather than applying themselves to commercial enterprise, carries a high economic price tag, managerial hierarchies, premised on proprietary norms, are ill suited in optimally encouraging human creativity.[187] The solution thus calls for a public- or a commons-based intervention, a remedy premised on a view of education as a collective good. The fact that individualized assessments are made of white applicants with lower than average criteria suggests a collective view of higher education is implicit or already in the works.[188] This idea is further supported by the fact that public universities receive government grants and are largely supported by taxpayers – facts that compel a rethinking of education as more of a common rather than private resource. The difference, however, turns on whether a dominant conception of a societal commons includes those who have been historically relegated to the pastoral fringes. Herein lays the utility of the diversity rationale, since it re-imagines societal groups not as isolated discrete groups onto themselves, but as integral parts of a dynamic whole.

VIII. CONCLUSION

A conventional and narrowing reading of the rationale in *Bakke* is tragic because, as history demonstrates, it fueled conflict and encouraged waste of human creativity. The standing question in *Bakke* presumes that white males have a property interest in education, making the tragedy of the commons even more unfortunate because battle lines are drawn across prefigured race lines. In labeling affirmative action minority rent-seeking and discounting the structural dimensions of our lives, courts endorse racially disparate rules and mask norms in the guise of neutrality and equality. But, like ubiquitous smog, these triangulations have shared costs. When human creativity is bountiful, race-blind admissions policies severely restrict society's wealth. A court that aims to quell conflict and enact rules that aid universities to tap into raw and undeveloped talent is thus antithetical to a court that effectively perpetuates and insulates an economic, legal, and political system rooted in disparate punishment and reward.

187. *Id.* at 381.
188. *Grutter*, 539 U.S. at 340.

The solution, however, calls not for a fairness argument in defense of race conscious policies. Instead, proponents of affirmative action should seek to bridge the chasm between a Critical Race Theory framework with a law and economics analysis that focuses on the collective benefit of minorities' fair share of the pie. For this to occur, Critical Race Theorists must start from the presupposition that incentive structures affect and implicate all of us, including this Comment's author. Of critical import to this project is an acknowledgment that an exercise in agency is lavishly attractive. Certainly, cabining affirmative action justifications in opaque fairness terms concedes the question of efficiency and agency. This concession only adds value to a conservative narrative pretending to promote effective self-help antidotes and characterizing affirmative action as a handout. Thus, a credible rebuttal reframes a demand for institutional change as an exertion of self-help and an incredible demand that the norms of society live up to its practices.