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A General Theory of Cultural Diversity

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INTRODUCTION

Recent affirmative action litigation involving the University of Texas,[1] the University of Washington,[2] and the University of Michigan[3] has once again ushered the diversity rationale for affirmative action onto center stage. This Article focuses on a different aspect of diversity that entails culture-conscious decision-making that seeks to exploit meritorious cultural insights, experiences, and facilities offered by persons of traditionally-excluded backgrounds. It does not appear that this approach to

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1. Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1995) (holding that the University of Texas Law School, despite a notoriously racist history, may not consider race in its admissions process in order to attain a racially diverse student body). The Texas admissions program appears to have been custom made for a challenge on Equal Protection grounds since the plan segregated applications on the basis of race and subjected minority applicants to a separate admissions process. This hardly seems to be in accordance with the *Bakke* decision which simply held that race could be a "plus" factor that may be considered in a lawful admissions program. Univ. of Cal. Bd. of Regents v. Bakke, 438 U.S. 265, 316–17 (1978) (Powell, J., concurring). *See also* Johnson v. Board of Regents of the Univ. of Ga., 263 F.3d 1234, 1244 (11th Cir. 2001) (holding that pursuit of diversity must be narrowly tailored).

2. Smith v. Univ. of Wash. Law School, 233 F.3d 1188, 1197 (9th Cir. 2000) (finding that diversity rationale may support a properly designed affirmative action program entailing race conscious admissions).

3. Gratz v. Bollinger, 135 F. Supp. 2d 790 (E.D., Mich. 2001). The University of Michigan is embroiled in discrimination litigation regarding its race-based admissions process. Ironically, Michigan has established the importance of cultural diversity to its educational mission. However, it has thus far failed to show that its admission process merely entails discrimination based upon cultural facilities. The Michigan admissions litigation is the focus of a detailed University web page. UNIVERSITY OF MICHIGAN, Information on Admissions Lawsuits, *at* http://www.umich.edu/~urel/admissions (last modified Nov. 2, 2001). The University could certainly accomplish much of its diversity goal by imposing a regime of culture-conscious decision-making. Such a policy would probably have an only marginally different entering class than that yielded by race-based decision-making. *See infra* notes 177–83 and accompanying text.

cultural diversity has yet been fully understood by either institutional or legal authorities. Harvard and Justice Powell understand,[4] but few appreciate fully what they are saying.[5] If the goal of an institution is to achieve increased cultural diversity then the best way of doing so is through decision-making that values cultural diversity. Valuing cultural diversity is a facially neutral consideration that is best practiced and viewed not as race-conscious but instead as culture-conscious.[6] Race need not be a proxy for cultural diversity.[7] Race and culture are overlapping and divergent.[8] Culture crosses racial boundaries.[9] People of any "race" may become

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4. *Bakke*, 438 U.S. at 316–18 (Powell, J. concurring) (discussing Harvard's emphasis on cultural diversity in its admission process).

5. All prior legal scholarship addressing diversity generally focuses upon whether it is a justification for race-conscious measures, and not whether embracing diversity is a culture-conscious dimension of merit. This Article posits that culture-conscious initiatives can accomplish much that affirmative action (i.e., race-based initiatives) can achieve in terms of increasing opportunities for traditionally-excluded groups, without violating strictures against racial discrimination. Some argue that affirmative action differs from seeking diversity and that embracing diversity is, at least in the specific context of law school admissions, a facially neutral and merit driven practice. *See* Arnold H. Loewy, *Taking* Bakke *Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admissions Process*, 77 N.C. L. REV. 1479, 1480 (1999) (distinguishing diversity from affirmative action and stating that "[w]here diversity is desirable, it is because it makes the institution better"). However, even these scholars generally assume that valuing diversity is a race-conscious practice. *Id.* at 1501–02. *See also, e.g.*, Lino Graglia, *Professor Loewy's "Diversity" Defense of Racial Preferences: Defining Discrimination Away*, 77 N.C. L. REV. 1505, 1507 (1999) ("Possible arguments for advantaging some individuals on the basis of race—and therefore necessarily disadvantaging others—are few and unpromising . . . and diversity has become the new shibboloth."); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1187–90 (1999) (analyzing economics of diversity initiatives but failing to consider meritorious contributions of diverse individuals to enhancement of productivity); Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 828 (1998) (stating that diversity has thus far been ill-defined in the legal arena and that "if we would entertain any hope of defining diversity, we had better consult analogous areas of . . . non-legal knowledge."); Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1016–18 (1998) (discussing business community's lack of interest in abolishing affirmative action, but failing to comprehend the use of individual diversity contributions as a dimension of merit). Some scholars object to the use of diversity as a justification for racial justice on the ground that it furthers the exploitative needs of embedded White supremacy; here too, the assumption is that diversity entails race conscious measures. *E.g.*, Barbara Phillips Sullivan, *The Gift of* Hopwood*: Diversity and the Fife and Drum March Back to the Nineteenth Century*, 34 GA. L. REV. 291, 293 (1999) (criticizing "diversity for its service to [W]hite supremacy").

6. See *infra* Part II.

7. *See infra* notes 118–50 and accompanying text.

8. *See infra* notes 184–203 and accompanying text.

9. Culture is in fact defined in non-racial terms. *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 488 (2d ed. 1987) (defining culture, in relevant part, as "the behaviors and beliefs characteristic of a particular social, ethnic, or age group" and "the

acculturated to cultural traits of other groups.[10] Cultural diversity is achieved by looking at a host of factors (i.e., geography, socio-economic status, unique experiences) beyond race.[11] So, if cultural experiences and insights are a legitimate non-racial institutional value, and not just a proxy for race-based decisions, making classifications based upon the possession of cultural insights or experiences is not tantamount to making racial classifications, and therefore cannot run afoul of proscriptions on racial classifications.[12] Such an approach to embracing diversity is not about racial fairness or remedying the racial hangover permeating our society after centuries of race-based oppression.[13] Instead it is about the rationalization of our nation's increasing diversity and the recognition that cultural diversity is a strength, not a weakness.[14] A side benefit of embracing diversity is increased opportunities for traditionally-excluded groups, but this side effect is not due to a racial preference.[15] Ironically, this side effect is due to

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sum total of the ways of living built up by a group of human beings and transmitted from one generation to another."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 552 (1986) ("the total pattern of human behavior and its products embodied in thought, speech, action, and artifacts and dependent upon [humanity's] capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language, and systems of abstract thought" and "the body of customary beliefs, social forms, and material traits constituting a distinct complex of tradition of a racial, religious, or social group"). Any racial dimension of culture is almost besides the point. Valuing cultural diversity means valuing insights, understandings and experiences that flow from group affiliation or exposure, not from skin color or other morphological features.

10. Acculturation means the "process of intercultural borrowing marked by the continuous transmission of traits and elements between diverse peoples and resulting in new and blended patterns . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 552 (1986).

11. *Bakke*, 438 U.S. at 321–24 (appendix to the opinion of Powell, J.) (reprinting statement by Harvard describing its admissions program).

12. *E.g.*, Eric Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 847–48 (1997) ("Culture discrimination is not necessarily wrong and may even be rational; anti-discrimination law allows it.").

13. Despite its high ideals and its relatively multicultural history, America has yet to come to grips with its pervasively racist past. For example, American mythology still lionizes slave holders such as George Washington and Thomas Jefferson. Moreover, although most Americans have a passing familiarity with the outrages perpetrated against African Americans, few understand that until 1952 only "White persons" were eligible for naturalization, or that as recently as 1954 our government launched a program known as "Operation Wetback" that resulted in the deportation of over one million persons of Mexican descent, citizens included. IAN HANEY LOPEZ, WHITE BY LAW 38, 43 (1996).

14. *See* JOHN P. FERNANDEZ, THE DIVERSITY ADVANTAGE 14–15 (1993) (noting that America is uniquely positioned to exploit diversity to achieve greater international competitiveness).

15. This is a vital side benefit. The costs of American White male supremacy are enormous, albeit difficult to quantify. For example, respected commentators have raised the specter of a race war if racial tensions in our country do not ease. *E.g.*, RICHARD DELGADO, THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE 119–27 (1996) (theorizing race war ignited by right wing extrem-

our nation's racist past; traditionally-excluded groups benefit from an emphasis upon diversity because our nation needs a more culturally polylithic power structure than what is currently in place to maximize the opportunities implicit in an increasingly culturally polylithic environment.[16]

An example illustrates the point: a more diverse business environment is quickly taking hold in corporate America due to increasing economic globalization and powerful demographic forces that promise to leave America with a more diverse population than ever before.[17] This environment is causing business to embrace diversity and to find ways to rationally respond to its new, more diverse environment.[18] One way business is doing this is by rationally seeking employees with more cultural diversity so as to attain a diverse workforce that can better understand and communicate with more diverse consumers and other constituencies.[19] Along the way, business has discovered that a diverse workforce is more creative, innovative, and, ultimately, more productive than a culturally monolithic workforce.[20] Diverse employees offer employers a new dimension of individual merit: the contribution of more culturally diverse insights, experiences, and understanding.[21] Such individual contributions provide value to employers because, traditionally, corporate America has been dominated by a single cultural perspective: that of the upper middle-class White male.[22] This value is naturally increasing in tandem with the increasing diversity in the business environment.[23] Employers that seek cultural diversity seek insights, knowledge, and understanding, not skin

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ists); CARL T. ROWAN, THE COMING RACE WAR IN AMERICA 282 (1996) ("I must say honestly that I doubt there is any way to prevent bloody racial strife in America").

16. The extent to which minorities have been excluded from mainstream America and marginalized, even through the end of the 20th Century, is astounding. One commentator recently noted that "African Americans now comprise 50.8 percent of [the] prison population." ROWAN, *supra* note 15, at 193.

17. Steven A. Ramirez, *Diversity and the Boardroom*, 4 STAN. J.L. BUS. & FIN. 85, 109–23 (2000) (providing detailed overview of increasing diversity in American business environment).

18. *Id.* at 88–90 (detailing efforts of corporate America to embrace diversity to enhance competitiveness).

19. *Id.* at 101 (citing studies showing that diversity facilitates communication).

20. *Id.* at 96–100 (citing studies showing enhanced creativity).

21. *Id.* at 102–03 (citing studies showing competitive advantage for firms embracing diversity).

22. *Id.* at 90 n.13 (citing statistics showing the continued exclusion of minorities and women).

23. *Id.* at 106–07 (citing evidence of increased performance by companies embracing diversity).

color, and not ancestral characteristics.[24] Similarly, seeking a diverse workforce entails no racial preference; instead, all persons (regardless of race) offer some ability to provide cultural insights.[25] The question is what value to place upon these insights. The answer will depend on whether the employer already has sufficient access to such insights or has a deficit of such insights within its workforce.[26] Employers will rationally value those cultural backgrounds that they need the most in light of their need for a given cultural background and the cultural make-up of their preexisting workforce.[27] Certainly, this movement has pried open opportunities for women, minorities, and other traditionally-excluded groups, but only because of the largely segregated nature of corporate America, not because of any preferences.[28] These initiatives are facially neutral, merit-driven, and culture-conscious, not race-conscious.[29] Thus, they do not violate anti-discrimination law.[30]

This Article seeks to extend the analysis of these developments in the corporate world to anti-discrimination law under the Equal Protection Clause of the Fourteenth Amendment.[31] This Article will show that discrimination based upon cultural insights or experiences is distinct from race discrimination and will articulate a general theory of why and under what circumstances this holds true. The difference between culture-based discrimination and using culture as a proxy for race (Which would then be race discrimination) requires a careful and non-mythological understanding of what race is, and what race is not. Moreover, showing that culture discrimination is not prohibited by anti-discrimination law does not really resolve much, as cultural discrimination carries the risks of many of the evils our anti-discrimination laws are designed to address.[32]

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24. Thus, these initiatives do not violate Title VII, which does not prohibit discrimination based upon contribution of more valuable insights. Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE L. 127 (2000) (showing that merit-driven, facially-neutral and culture-conscious initiatives do not violate Title VII).

25. *Id.* at 128 n.3 (citing statements by diversity management experts that embracing diversity means valuing all employees).

26. *Id.* at 149 n.108 (citing statements by diversity experts that merit requires an analysis of institutional needs and institutional context).

27. *See id.* at 137 n.45 (citing study by economists showing that diversity is being driven by need to rationalize a more culturally dynamic environment).

28. *Id.* at 131 n.13 (citing statistics showing that corporations embracing diversity are hiring higher percentages of minorities).

29. *See id.*

30. *See id.*

31. U.S. CONST. amend. XIV, § 1 (no state "shall deny to any person . . . the equal protection of the laws").

32. The 20th Century has witnessed government sponsored and government coordinated hate campaigns and group oppression based upon socio-economic class, religious beliefs, race, political affiliation, ethnicity, and culture. Millions have died and millions more have been stripped of fundamental human dignity and human rights. All of the suffering has had the same root cause, manifested in particular circumstances against particular

Therefore, this Article concludes with proposals for regulating cultural discrimination so that fair discrimination based upon specific cultural facility, ranging from communication skills to cultural insights, is not accompanied by the potential for parasitic cultural discrimination.[33]

A foundational element to fully comprehending the nuances of culture is a full understanding of what race is. Part I of this Article reviews the putative definitions of race which form the foundation of racial discrimination prohibitions. There is no scientific basis to race. Indeed, recent genetic learning teaches that the morphological features that have traditionally defined racial categories are literally only skin deep. The concept of race is instead largely based on the pseudo-science of yesteryear. Thus, race is mythological; a function of legal and social construction. The key issue underlying whether valuing cultural diversity violates racial discrimination laws is the legal construction of race, particularly in the context of the law of racial discrimination. Courts that enforce laws against racial discrimination have essentially left "race" undefined and instead rely upon an *ad hoc* analysis. Such an approach is understandable given the lack of scientific basis to the term "race." But, in the end, this part will show that "race" has always been legally constructed to turn upon morphological features and heritable traits. Although it is conceivable, perhaps even foreseeable, that morphological features will be a more remote element of the legal construction of race, morphological links to the legal construction of race are too deeply imbedded in our culture to

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groups: the political expediency of indulging popular hatred, prejudice, and the need for scapegoating, eliminating enemies, and asserting dominance. American slavery posed an opportunity for our republic to come to grips with this phenomenon in the 19th Century before mechanized murder and oppression were feasible. The logical end of the Equal Protection Clause transcends slavery to prohibit all government sponsored and government coordinated hatred and oppression. Many of the Framers of the Equal Protection Clause seemed to recognize its transcendent purpose and the plain language of the Amendment does not limit its applicability to "suspect classifications" nor to race. "The 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular need and plight of the newly freed Negro slaves." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1976). *See also Bakke*, 438 U.S. at 293 (citing statements from the Framers of the Fourteenth Amendment to show that the Equal Protection Clause states a principle of "universal application"). This Article seeks, however, only to fit cultural diversity initiatives within existing Equal Protection doctrine, and not to fundamentally rework the basis for that doctrine.

33. The protection individuals enjoy with respect to fundamental rights acts to protect any group, culturally defined or otherwise, from extreme forms of oppression or discrimination. *See* CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 29.00 (2d ed. 1997). Of course, this has not prevented group based oppression that stripped citizens of basic rights. *See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding internment of American citizens of Japanese ancestry).

ever be eliminated from the legal construction of race. Consequently, discrimination based upon cultural facility is not race discrimination, because cultural skills do not require any particular morphological features. This part of the Article concludes that race is an archaic concept, and that any modern formulation of race would exclude discrimination based upon cultural skills from racial discrimination prohibitions.

Cultural insights, understandings, and experiences are, however, nonmythological and, in a given context, a legitimate source of value. Part II of this Article examines both why and when morphological attributes are relevant to the institutional value of cultural diversity. Cultural insights and differences can be an important means of furthering an institutional mission. It seems as though the more we study cultural diversity, the clearer the benefits of diversity become. The benefits of cultural diversity do not stem from morphology or genetic bonds to ancestry but from insights that inhere to a unique cultural experience. The value of cultural insights knows no racial boundaries. Institutions can be expected to rationalize their approach to these benefits by seeking individuals with cultural backgrounds that have the most value to the institution based upon a contextual analysis of need as well as a contextual analysis of an individual's cultural background and experience. This analysis will increasingly focus upon a nuanced inquiry and relegate race or morphology to a side issue. Cultural diversity is important to a given institution generally because its institutional reality is less polylithic than its institutional mission requires. Institutional missions generally require more diversity due to a more diverse institutional environment, both domestically and internationally. Institutional realities lack multicultural facility and communication skills because of an exclusionary tradition. This is the case for diversity; it is utterly independent of morphology. This means of valuing cultural diversity stands in stark contrast to America's tradition of White supremacy; nevertheless, embracing cultural diversity is the rationalization of both America's increasing diversity as well as recent genetic learning.

Part III of this Article provides a framework for integrating values of cultural diversity (and to some extent the new learning from the world of genetics) into the law of Equal Protection. This part of the Article will provide a means for Equal Protection analysis to distinguish the rational embracing of cultural diversity from invidious and pernicious discrimination. First, because cultural facility is real and not mythological this Article concludes that discrimination based upon cultural abilities must be regulated less strictly than discrimination based upon mere skin color. Second, this part of the Article concludes that the Court must update its use of language and express increased scrutiny of merit systems that transmit embedded White supremacy as a means of accounting for the "new genetics." Finally, the Article argues that, although not illegal, invidious discrimination on any grounds, including cultural attributes, can lead to

many of the evils we have witnessed again and again in this century and throughout human history. Therefore, even though the Court has not appeared anxious to protect individuals from discrimination based upon cultural elements, the Court should insist that any culture-based discrimination be carefully scrutinized to assure that it is not used invidiously to perpetuate discrimination, as the logic of race has been used in the past.

This Article concludes that it is not unconstitutional to truly value cultural diversity. The ultimate implication of this Article is that proscriptions against discrimination should be recast in a more rationalized and ultimately broader concept of Equal Protection. In the end, this Article suggests that the legal system begin coming to terms with the archaic nature of the term "race" and the reality of America's increasing diversity.

I. THE SCIENCE, PSEUDO-SCIENCE AND SOCIAL SCIENCE OF RACE

Race historically exists only as a tool of hierarchy based upon discredited psuedo-science, and dates to the beginning of the period of the western European conquest of most of the world.[34] This section will attempt to establish three points. First, modern science rejects the existence of race and traditional racial categories on a biological and genetic basis. Second, although there is no scientific basis to race, there is a historic conception of race that is based upon 18th and 19th Century psuedo-science, and which still holds sway today, much as it took almost four hundred years for full acceptance of Galileo's rejection of an earth-centric universe.[35] Third, unfortunately, despite its mythological nature, our legal system continues to adhere to a non-mythological, immutable conception of race, with the United States Supreme Court leading the way. This section of the Article concludes that, as presently conceived, the legal construction of "race" has inherent morphological and genetic dimen-

34. *See generally* Roger Sanjek, *The Enduring Inequalities of Race, in* RACE 2, 10 (Steven Gregory & Roger Sanjek eds., 1994) (stating that the "roots and growth" of an "international racial hierarchy" developed as a justification for "conquest, dispossession, enforced transportation, and economic exploitation of human beings" beginning in the 1400s; and "that is what race is and all that it is").

35. The Catholic Church recently rescinded its condemnation of Galileo. William D. Montalbano, *Earth Moves for Vatican in Galileo Case*, L.A. TIMES, Nov. 1, 1992, at A1 ("The Roman Catholic Church has admitted to erring these past 359 years in formally condemning Galileo Galilei . . . ."). Continuing to extend racial mythology despite its lack of foundation will expose "racists" to this same type of historical embarrassment. *See* Leonard Lieberman, Alice Littlefield & Larry T. Reynolds, *The Debate Over Race: Thirty Years and Two Centuries Later, in* RACE AND IQ EXPANDED EDITION 72 (Ashley Montagu ed., 1999) ("The word is out, the Earth is no longer the center of this Universe. The word is spreading, the human species is not divided into discrete races. A revolution is occurring in scientific thinking.").

sions. In the end, under the current conception of race, racial discrimination means discrimination based upon skin color, related morphological features, and other heritable traits.[36]

There is no scientific concept of race.[37] Instead of any racial "continental divide" to biological and genetic variation, such variation (involving both visible and invisible biological traits) is expressed "continuously across continents."[38] "Small local populations vary slightly from each other as one proceeds from east to west from East Asia to Western Europe, or north to south from Scandinavia to the Congo basin."[39] Facets traditionally associated with "racial appearance," including skin color, hair, and facial features, do not "abruptly and discretely stop and start."[40] Most importantly, "invisible biological and genetic features vary independently, and not in accordance with traditional visible racial markers such as skin color or hair form."[41] Literally, one cannot judge genetic contents through genetic packaging.[42] Moreover, genetic variability of individuals within putative racial groups exceeds genetic variability of individuals from different populations.[43] Thus, scholars have observed that instead of simplistic racial categories, human biological variability should be thought of as "marble cake, crazy quilt, and tutti-frutti."[44] Simply stated, skin color and other racial markers have about the same significance as shoe size.[45]

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36. Yamamoto, *supra* note 12, at 847. *See also* Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1, 32 (1991) (citing Justice Scalia's focus upon "blood" as indicative of a biologically based notion of race).

37. MAREK KOHN, THE RACE GALLERY 7 (1995) ("When Steve Jones, Professor of Genetics at the Galton Laboratory of University College London, remarked ... that race would not return to science, I objected that it was already thriving in psychology. Yes, he replied, but not in science."). *See also* Lieberman, Littlefield & Reynolds, *supra* note 35 (providing summary of surveys of anthropologists, content analysis of textbooks, monographs on human variation, research on human variation and media reports to document the demise of "race" in science).

38. Sanjek, *supra* note 34, at 7.

39. *Id.*

40. *Id.*

41. *Id. See also* Kelly Owens & Mary-Claire King, *Genomic Views of Human History*, 286 SCI. 451, 453 (1999) (stating that genetics shows that "stereotypic" racial features are "quite literally superficial, in that they affect exposed surfaces of the body" and "involv[e] limited numbers of genes with very specific physiological effects").

42. Sanjek, *supra* note 34, at 7 ("There is more 'contents' than 'package' in our biological makeup, and simplistic racial categories based merely upon a few 'package' traits hardly constitute a scientific approach to biovariability.").

43. Lieberman, Littlefield & Reynolds, *supra* note 35, at 84. At one point, this fact was noted by the Supreme Court. *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (and authorities cited therein).

44. Sanjek, *supra* note 34, at 7.

45. More scientifically stated:

> Recent analysis of the melanocortin-stimulating hormone receptor gene (MCIR) suggests that various alleles of this single locus may underlie

More recently, geneticists have studied human genetic content as part of the Human Genome Project, a monumental undertaking in which scientists from around world are mapping the human genetic code.[46] One extension of this endeavor is the Human Genome Diversity Project (HGDP), which is looking at the human genetic code to catalogue and define human biological variability.[47] Luigi Luca Cavalli-Sforza is the head of this effort, and has emphatically stated that traditional racial markers are literally skin deep.[48] Geneticists who have carefully studied non-visible

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> much of observed human variation in skin and hair color. This variation is largely due to varied amounts of eumelanin (brown and black melanins) and phaeomelanin (red and yellow melanins) produced by melanocytes. Eumelanin protects against ultraviolet (UV) radiation, whereas phaeomelanin may contribute to skin damage, including melanoma, induced by UV. The balance of melanins is regulated by melanocyte-stimulating hormone, which acts through its receptor. Amino acid sequence variants occur at multiple sites in the second transmembrane domain, the first extracellular domain, and the seventh transmembrane domain of the MCIR protein. Variation at these sites was found in more than 80% of individuals with red hair and fair skin that burns rather than tans, but in less than 4% of British or Irish individuals with skin that tans without burning, and in no African individuals. Among Asians, still other amino acid substitutions in MCIR are common. Nucleotide diversity at MCIR is several times higher than the average nucleotide diversity in human populations. High nucleotide diversity, coupled with common variation at nonsynonymous sites, suggest that MCIR variation is an adaptive response to selection for different alleles in different environments, possibly to differences in day length and hence available sunlight at different latitudes. If true, variation at this locus, which encodes evolutionarily important but superficial traits, has been the cause of enormous suffering. Variation in other traits popularly used to identify "races" is likely to be due to similarly straightforward mechanisms, involving limited numbers of genes with very specific physiological effects. Of course, prejudice does not require a rational basis, let alone an evolutionary one, but the myth of major genetic differences across "races" is nonetheless worth dismissing with genetic evidence.

Owens & King, *supra* note 41, at 453 (citations omitted).

46. *See Human Genomics: The Home Straight*, THE ECONOMIST, May 13, 2000 (providing overview of Human Genome Project).

47. *See* Elizabeth Pennisi, *NRC OKs Long-Delayed Survey of Human Genome Diversity*, 278 SCI. 568 (1997) (summarizing mission of HGDP).

48. Scott Winokur, *Maybe We're Better Off Back in the Family of Man*, S.F. EXAMINER, Apr. 25, 2000, at A19 (quoting Cavalli-Sforza: "It is because they are external that these racial differences strike us so forcibly ... and we automatically assume that differences of similar magnitude exist below the surface ... [t]his is simply not so."); Sharon Begley, *Three is not Enough: Surprising New Lessons From the Controversial Science of Race*, NEWSWEEK, Feb. 13, 1995, at 67 (reviewing findings of Human Genome Diversity Project and interviewing project Chair, Luca Cavalli-Sforza: "The more we learn about humankind's genetic differences ... the more we see that they have almost nothing to do with what we call race.").

human variation "have confirmed that homogenous races do not exist."[49] Morphological features that have traditionally served as racial markers are only superficial genetic differences that have evolved in response to differing climatic conditions; only a few genes of little significance are responsible for these features.[50] Indeed, not only does "race" not exist, but giving any content to the scientific meaning of the term would require either that the number of racial categories be sufficient to account for innumerable local genetic variations or that twenty generations of genetically engineered inbreeding be undertaken.[51] This is because genetic differences of populations represent less than 8% of human genetic variation and no major genetic discontinuities across populations have been observed.[52] Moreover, most human variation predates the migration of humans out of Africa.[53] Geneticists posit that the concept of relatively homogeneous groups with major biological differences is inconsistent with genetic evidence.[54] In sum, if race is defined as some arbitrary level of statistically significant genetic divergence between population groups, such variability is provided by insular local populations instead of visible morphological features.[55]

Some do still believe in race.[56] Fundamentally, however, those arguing in favor of some scientifically based concept of race must fail. First, there

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49. LUIGI LUCA CAVALLI-SFORZA, GENES, PEOPLES, AND LANGUAGES 13 (2000).

50. *Id.* at 9–13. Geneticists specifically reject any genetically based differences in intelligence. *See* MATT RIDLEY, GENOME: THE AUTOBIOGRAPHY OF A SPECIES IN 23 CHAPTERS 86 (1999) ("There are differences between average IQ scores of [B]lacks and [W]hites, but there is no evidence that these differences are themselves heritable. Indeed, the evidence from cross-racial adoption suggest that the average IQ of [B]lacks reared by and among [W]hites is no different from that of [W]hites.").

51. CAVALLI-SFORZA, *supra* note 49, at 13 (stating that pure races do not exist and would have to be artificially created through "inbreeding" for "at least" 20 generations); *Id.* at 25–27 (stating that population of Ithaca, New York is probably sufficiently genetically divergent from Albany, New York to be deemed separate races).

52. Lieberman, Littlefield & Reynolds, *supra* note 35, at 84 (summarizing the results of three genetic studies).

53. CAVALLI-SFORZA, *supra* note 49, at 27.

54. Owens & King, *supra* note 45, at 452–53.

55. CAVALLI-SFORZA, *supra* note 49 at 25–27.

56. *See* Begley, *supra* note 48, at 67 (stating that as recently as 1989, only 70 % of cultural anthropologists and 50% of physical anthropologists reject race as a biological category). Psychologists too are wedded to the three race model. It allows them a simple and easy means of organizing many of their test results and other findings. *Id.* at 67. One such spectacle arose in 1995, when two psychometricians attempted to convince the American public that there were racial differences in intelligence, and that therefore, affirmative action should be radically modified. RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE 340 (1994) (arguing that writers should "avoid flamboyant rhetoric about ethnic oppression" as an explanation for inequalities and accept that racial and ethnic differences in standards of living and other important areas stem from differences in "cognitive ability"). Their thesis has been subjected to powerful attack. *See* Ramirez, *supra* note 24, at 151–54 (summarizing evidence against racially based differences

is no better evidence regarding biological variation than the human genetic code. Consequently, the failure of geneticists to uncover any genetically defined racial boundaries undercuts any biological basis to putative racial differences. Second, even in the absence of definitive genetic evidence showing the existence of no tenable racial categories, it appears relatively clear that no system of racial classifications can account for vast human genetic diversity.[57] Third, those believing in race ignore the futile history of any attempts to place race upon a scientific foundation.[58]

Once upon a time, scientists tried to show that race existed as a physical reality turning upon skull measurements.[59] Samuel Morton meticulously studied cranium measurements of various groups, finding that Whites had the biggest heads, and inferentially the most brain power of all the races. It was not until almost 1977 that this pseudo-science was shown to be ill-founded and biased.[60] Anthropologists attempting to create pigeon holes within which to fit human diversity have at various times concocted anywhere from 3 to 100 racial groups.[61] Over time, no coherent means of any racial classification system has ever emerged, and some efforts are almost laughable but for the pervasive human suffering that has invariably accompanied racial demarcations.

For centuries, scientists have tried in vain to give the concept of race a scientific basis. In 1795, for example, one prominent system of racial classification provided for five curious divisions: Caucasian, Mongolian, Ethiopian, American, and Malayan.[62] The term Caucasian was selected by Johann Friedrich Blumenbach because of the geographic proximity of Mount Caucus to the homeland of what he felt to be the most beautiful

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in intelligence). *See also* Lieberman, Littlefield & Reynolds, *supra* note 35 at 84 ("While individuals vary in their inherited intelligence, the claim that large subdivisions of the human species also vary in that regard has been demonstrated by a century of debate over race and IQ to be no more than the product of pseudoscientific imagination.").

57. CAVALLI-SFORZA, *supra* note 49, at 30 (stating that there may be 1,000,000 genetically distinct social groups on Earth).

58. THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 69 (2d ed. 1997) ("The Nineteenth Century was a period of exhaustive and . . . futile search for criteria to define and describe racial differences.").

59. Sanjek, *supra* note 34, at 5.

60. *Id.* (citing STEPHEN JAY GOULD, THE MISMEASURE OF MAN 50–62 (1981)). The efforts to articulate some principled basis to categorize humanity into races, and the related quest of finding genetically based human intelligence is pocked by "scholarship" tainted by bias and even fraud. CAVALLI-SFORZA, *supra* note 49, at 188–89. *See also generally* Jeffrey Rosen & Charles Lane, *The Sources of the Bell Curve*, *in* THE BELL CURVE WARS 58–61 (1995) (reviewing discredited sources).

61. CAVALLI-SFORZA, *supra* note 49, at 27.

62. JOHN S. HALLER, JR., OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY 1859–1900 4–5 (2d ed. 1995) (reviewing 19th Century pseudo-science regarding race).

race of man—the Georgian.[63] Blumenbach based his racial classification system upon skin color, hair, and skull and facial characteristics.[64] Anthropologists built upon this foundation and busily set about to measure the differences in physiology that could be attributed to racial differences.[65] Indeed, this kind of anthropometry was the focal point of anthropology throughout the 20th Century.[66] Ultimately, this effort led to the idea of a "facial angle."[67] This angle was formed by two lines: one from the bottom of the nose to the forehead, and the second from the bottom of the nose to the orifice of the ear.[68] Supposedly, the greater the angle, the higher the indicated intelligence; once again, the Caucasian scientists assumed that Caucasians had the greatest facial angle of any racial group.[69]

Charles Darwin tried to base racial categories upon the attractiveness of an individual to different kinds of lice.[70] J. Philippe Rushton, a leading psychometrician, tried to build racial categories based upon the distance semen traveled when a male ejaculated.[71] While none of this is very flattering to those who have attempted to place race upon a scientific basis, it is ultimately upon this sordid foundation that the social and legal construction of race rests.

Race does function, despite its lack of scientific basis, in the social realm, where it acts to categorize individuals based upon perceived morphological features, ancestry, and individual volitional choices as to racial identity.[72] Complex social conventions attach to a given set of morphological features and are associated with a specific racial identity.[73] This process mirrors yesteryear's pseudo-science. As a result of this process,

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63. *Id.* at 5.

64. *Id.*

65. *Id.* at 7.

66. *Id.*

67. *Id.* at 9–14.

68. *Id.*

69. *Id.* at 11.

70. GOSSETT, *supra* note 58, at 81.

71. Henry A. Giroux & Susan Searles, *The Bell Curve Debate and the Crisis of Public Intellectuals*, *in* MEASURED LIES: THE BELL CURVE EXAMINED 80 (Joe L. Kincheloe, Shirley R. Steinberg & Aaron D. Greesson III eds., 1996). It would be somewhat redeeming to state that Rushton hails from the 1920s or even the 19th Century; but in fact Hernnstein & Murray relied upon Rushton's work in the *Bell Curve*, and specifically defend him against charges of being a crackpot. Rosen & Lane, *supra* note 60, at 60 (quoting Rushton as stating: "It's a trade-off: more brain or more penis.").

72. Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) ("I define race as a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry."). Professor Haney Lopez summarizes scientific evidence regarding racial categories and the sordid scientific history of race in great detail. *Id.* at 11–18 (equating belief in race to belief in the "Easter Bunny.").

73. *Id.* at 27–52.

individuals experience vastly different cultural realities.[74] This difference in cultural experience has a wide range of consequences that may be manifested in anything from scores on so-called intelligence tests to criminal incarceration rates.[75] These indicia of a fundamental divergence in social experience with no genetic explanation are emblematic of a society mired in racial oppression.[76] However, for purposes of this Article, the important consequence of "race" is that the unique cultural experiences associated with a racial identity provide a basis for institutions to achieve enhanced innovation, creativity, small group action, and broader institutional cultural facility.[77]

Where science has failed, society has succeeded. America has always been plagued by racial categories, and these categories benefit from both social and legal sponsorship.[78] Although science could only find nonsensical racial categories, it prostituted itself to society's need for a racial hierarchy. Nonetheless, social mores and law need not rest on a rational basis.[79] Indeed, racial fabrication and government sponsored categorization continues to exist through the beginning of the 21st Century.[80] Pseudo-science failed, but that same pseudo-science lives on today in the form of the social and legal construction of race, which essentially mirrors that psuedo-science.[81] Society was a jealous mistress to the effort of scien-

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74. *Id.* at 38–39 ("Race is revealed as historically contingent, socially mediated systems of meaning that attach to elements of an individual's morphology and ancestry.").

75. *See* Ramirez, *supra* note 24, at 150–52. Indeed, one could use such divergent indicia to construct an index of racial oppression that could be used to test various societies and their "success" in constructing categories that have social significance. Such an index would likely not cast American society in the most favorable light globally. *See* Craig Turner, *U.N. Study Assails U.S. Executions as Biased Justice*, L.A. TIMES, Apr. 4, 1998, at A1 (reporting United Nations finding that death penalty in the U.S. is tainted by racism).

76. Indeed, at least one commentator has explicitly posited that divergent standardized test scores are evidence of a social caste system. John U. Ogbu, *The Consequences of the American Caste System*, *in* THE SCHOOL ACHIEVEMENT OF MINORITY CHILDREN 19 (Ulric Neisser ed., 1986). *See also* Ramirez, *supra* note 24, at 151 ("Alleged IQ differentials stem from pervasive social oppression.").

77. See *infra* Part II.

78. HANEY LOPEZ, *supra* note 13, at xii.

79. Owens & King, *supra* note 41.

80. An example of the complex relationship between the social mores, psuedo-science and the law of race is the U. S. Census Form. *See* POPULATION CENSUS BUREAU, *Race and Ethnicity in the Census: 1860 to 2000,* at http://www.prb.org/AmeristatTemplate.cfm?Section=RaceandEthnicity&template=/ContentManagement/ContentDisplay.cfm&ContentID=3553 (last visited Nov. 13, 2001) (providing a chart summarizing the highly dynamic racial categories used on census forms from 1860–2000). In 1860, there were three races: White, African American and mulatto. In 2000, there are 21.

81. HANEY LOPEZ, *supra* note 13, at 13 (arguing that the history of science has long been the history of failed attempts to justify racial social beliefs).

tists.[82] In the end, science could only work to reflect the social mores of its cultural context.[83] Indeed, when science failed in the effort to construct race, it was rudely dismissed.[84] Thus, the pseudo-science of race is no more than reflective of cultural demands for a racial hierarchy. It is upon this same pseudo-scientific basis that our legal system has defined race. Law has played a central role in the social construction of race.[85] Racial fabrication has always involved an admixture of law, pseudo-science and social mores.[86]

The definition of race has been legally synthesized in a number of contexts, most notably in the naturalization and race discrimination contexts. In the naturalization context, the Court defined race in terms of whether a given individual was a "White person" for purposes of satisfying the prerequisites for naturalized citizenship.[87] In *Ozawa v. United States*[88] the Court was faced with a Japanese petitioner seeking citizenship.[89] The Court held that he was not a member of the race "popularly known as Caucasian" and rejected his bid for citizenship.[90] The Court specifically invoked "numerous scientific authorities" that held Japanese persons to be "clearly of a race which is not Caucasian."[91] It is noteworthy that in its exercise of racial fabrication, the *Ozawa* Court specifically relied upon both "popular" beliefs as well as "scientific." In *United States v. Thind*[92] the Court rejected an Asian Indian's bid for citizenship because "the understanding of the common man" did not put Asian Indians

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82. HALLER, *supra* note 62, at x ("What this study intends to show is the manner in which their science provided a vocabulary and a set of concepts which rationalized and helped to justify the value system upon which the idea of racial inferiority rested in American thought.").

83. United States v. Thind, 261 U.S. 204, 214 (1922) (holding that racial term "Caucasian" should be interpreted in accordance with "common speech" because "scientific manipulation" had extended White race too far).

84. *Id.*

85. HANEY LOPEZ, *supra* note 13, at 9 ("The prerequisite cases compellingly demonstrate that races are socially constructed. More importantly, they evidence the centrality of law in that construction.").

86. *See supra* notes 72–85 and accompanying text.

87. HANEY LOPEZ, *supra* note 13, at 5.

88. 260 U.S. 178, 189–90 (1922) (holding that a person who was a resident of the U.S. for 20 years, who was a graduate of an American high school, who studied at the University of California, could not become a naturalized citizen because he was "of the Japanese race.").

89. *Id.* at 189.

90. *Id.* at 197 (stating that the words of the statute import a "racial meaning" and that "individual" color is irrelevant because "even" Anglo-Saxons range from "fair" to "swarthy").

91. *Id.* at 198.

92. 261 U.S. 204, 210 (1922) (holding that an "Aryan" of "high caste Hindu stock" could not naturalize because the "Aryan theory" has been discredited by ethnology as a "racial basis.").

within the White race, even though "scientific manipulation" had so included Asian Indians.[93] It is interesting to note that the Court recognized in *Thind* that racial categories were untenable.[94] The Court noted the lack of scientific success in defining racial categories.[95] Still, the Court continued its exercise in racial fabrication in finding that "White" meant a "racial" group defined by the "common man" as a "Caucasian" that is of European descent.[96] Moreover, this newly fabricated race was focused upon "physical group characteristics" that could "merge into the mass of our population."[97] Thus spoke the Supreme Court in fabricating the "White" race.

In each of these cases, the Court synthesized race based upon the same popular thinking that led science to strain beyond all rationality to validate both "race" and a racial hierarchy.[98] When science fell out of step with "the understanding of the common man," it was no longer deemed valid science.[99] In sum, even if the Court did not completely defer to scientific categories of racial groups, these cases treated race as immutable and supported by pseudo-science with regard to the significance of morphological features and ancestry. Significantly, this means that the process

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93. *Id.* at 211 ("The word Caucasian is ... at best a conventional term ... which, under scientific manipulation, has come to include far more than the scientific mind suspects.").

94. *Id.* at 212 (stating that racial categories suffer from "irreconcilable disagreement" and that "the innumerable varieties of mankind run into one another by insensible degrees.").

95. *Id.* ("Blumenbach has five races; Keane following Linneaus four; Deniker, twenty-nine.").

96. *Id.* at 213–15.

97. The *Thind* court posited:

> It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as White. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

Id. at 215. Like *Ozawa*, the Court in *Thind* relied upon a blend of science and common understanding. *Id.* at 210 (excluding "Aryan Theory" because of "modern" technology).

98. *Supra* notes 78 to 86 and accompanying text.

99. *Thind*, 261 U.S. at 211 (rejecting "scientific manipulation" of who gets the privilege of being a Caucasian).

of racial fabrication was freed from any scientific mooring and anchored only by judicial divination of "popular" thought or "scientific" authority, as the Court saw fit. In other words, "race" is ultimately refined from the highest extent of judicial fiat and forged from popular social views.

Nor has the Court in more modern times come to grips with the lack of any scientifically based racial grouping. In 1987, the Court did note the futility of racial classifications, but then proceeded to treat race as an immutable element of individual genetic reality.[100] Most recently, in *Rice v. Cayatano*,[101] the Court seemed to assume that people are born into an immutable racial category of some sort that proceeds from some distinct physical characteristics.[102] The Court relied upon the use of lines of "ancestry" and "physical characteristics" to find a "racial classification."[103] The Court certainly did not reject "race" as a tenable basis for grouping individuals, nor did the Court take the opportunity to discredit or debunk racial mythology. Instead, the Court actually extended the construction of races by finding a whole new racial classification, essentially created by judicial fiat.[104] And, the Court even went further, seemingly laying down a formulation for the continued legal viability of the construction of race: the Court stated that racial discrimination is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics."[105] In no case has the Court bothered to justify its approval of a continued process of racial fabrication; thus, speculation is the only means to explain the Court's interest in continuing the law's leading role in the social construction of race.[106] It is not as if there is a dearth of accessible learning that the Court could draw upon in demolishing the facade of race.[107] After *Rice*, the Court is in uncharted territory in terms of

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100. *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987). Ultimately the Court held that a plaintiff must show discrimination for being "born" into an "identifiable" group with "genetically" transmitted "ethnic or ancestral characteristics." *Id.* at 613.

101. 528 U.S. 495, 513 (2000) (holding that classification benefiting those Hawaiians with ancestors dating before 1778 on Hawaiian islands was a racial classification because ancestry was used as a proxy for race).

102. *Id.* at 513–14 (stating that Hawaiians in 1778 "shared common physical characteristics," "had a common culture," and that therefore a classification based upon ancestral lines was racial discrimination).

103. *Id.* at 513–17.

104. *Id.* at 517. The Court recognized that both the burdened class and the benefited class were largely of the same "race"—that of "Polynesians." *Id.* at 543 (Stevens, Ginsburg, JJ., dissenting). *See also Id.* at 515 (stating that just because some members of the "Polynesian" race were excluded from the classification, did not preclude finding of racial discrimination). At no point did the Court state where it found a basis for a Polynesian race. It seems as though "race" remains within the sphere of judicial fiat.

105. *Id.* at 515 (citing Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987)).

106. If the Court were to review the history of race it would find that White supremacy is at the bottom of the construct. *See supra* note 34 and accompanying text.

107. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S 55 (2d ed. 1994) (emphasizing that the social nature

finding "races." Race still vexes the Court and the Court still brandishes it to get the results it seeks, just as it did in *Ozawa* and *Thind*.

Certainly, the Court is to be applauded for its sensitivity to laws that, without basis, treat distinct groups (defined genetically or ancestrally) with enhanced or diminished recognition or respect.[108] Still, given the heinous history of the concept of race and its utter lack of scientific viability, doing so under the auspices of race seems ill-advised at best.[109] Moreover, given the Court's central role in racial fabrication, it would seem appropriate to exit the business of race.[110] The core problem is that people really do not belong to any "race."[111] So, any statement of Equal Protection tied to that concept is doomed to suffer from logical infirmities. The Court has shown some inclination to move to ancestry as an exclusive basis of Equal Protection.[112] There is strong support for such a shift; still, if Governor Hatfield awards a state contract to some contractor other than a McCoy should this kind of "ancestral" discrimination really rise to Equal Protection magnitude?[113]

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of race, the absence of any essential racial characteristics, the historical flexibility of racial meanings and categories, and the irreducible political aspect of racial dynamics); Anothy Appiah, *The Uncompleted Argument: Dubois and the Illusion of Race, in* "RACE," WRITING, AND DIFFERENCE 22 (Henry L. Gates ed., 1985); Haney Lopez, *supra* note 72, at 6 ("overwhelming evidence proves that race is not biological"). Indeed, the Supreme Court has previously cited a plethora of scientific evidence debunking racial mythology. *Saint Francis Coll.*, 481 U.S. at 610 n.4.

108. *E.g.*, *Rice*, 528 U.S. at 515.

109. *See supra* notes 13, 34, 37–71 and accompanying text.

110. *See supra* notes 78–97 and accompanying text.

111. *See supra* note 37–56 and accompanying text.

112. *Rice*, 528 U.S. at 513 (flirting with equating any ancestral test with a race-based classification); *Saint Francis Coll.*, 481 U.S. at 613 (stating that "distinctive physiognomy" is not essential to show race discrimination and emphasizing "ancestry or ethnic characteristics"). In *Rice*, the Court was forced to find a "racial" classification because the case was decided under the Fifteenth Amendment, which expressly prohibits denying or abridging voting rights on "account of race." *Rice*, 528 U.S. at 514. Of course, "under prior cases, discrimination on the basis of ancestry ... violates the Equal Protection Clause." *Saint Francis Coll.*, 481 U.S. at 613 n.5.

113. Perhaps the problem is simply intractable. The Court could articulate a theory of Equal Protection that secured individuals from government sponsored hatred or oppression based upon any macro group affiliation. There is little logical significance to a genetic bond among such victims. Groups may be bound together culturally, geographically, socio-economically, politically or morphologically. Oppression is still oppression. *See supra* note 32. The Court has never endorsed such an expansive view of Equal Protection but if expanded protection against irrational group discrimination is the goal, it should do so directly, not by breathing new life into the already rotten carcass of race. The Court stands alone, isolated from both rational scientific thought and scholarly analysis, into manipulating group identity into a new racial regime. *See supra* notes 34–55 and accompanying text. The only role left for the concept of race in a rationalized regime is to prohibit strictly discrimination based upon the pseudo-scientific racial categories (i.e. categories based

In any event, *Rice* makes clear that the Supreme Court has not yet come to terms with the archaic nature of "race" and seems fundamentally unable to relegate race to the ash bin of history while still preserving the central purpose of the Equal Protection Clause in eliminating discrimination on the basis of pseudo-scientific race.[114] Moreover, *Rice* reaffirmed the importance of group "physical characteristics" in the process of racial fabrication and the creation of some kind of genetically immutable racial categorization.[115] Thus, in the Supreme Court's continuing efforts to legally construct some concept of race, physical characteristics and ancestry have played a pivotal role in the definition of race.[116] Culture, to the extent that it plays any role in the fabrication of races, is an afterthought at best.[117] In fact, the Court has refused to protect individuals from discrimination based upon cultural attributes, even when those attributes seem to be in pursuit of weak values and could easily be emblematic of invidious discrimination against sub-racial groups.[118]

So, to date, the Supreme Court has hardly progressed beyond the pseudo-science of yesteryear. The Court seems to insist there is some basis to categorizing people based upon morphological characteristics and ancestry.[119] As hard as it is to expound any logical basis to "race" based upon the Court's opinions to date, it always requires some genetic bond, some heritable trait, and some "identifiable" characteristic.[120] Culture, cultural experience, and cultural insights do not fit this "racial" bill. They are simply not heritable.

II. THE VALUE OF CULTURAL DIVERSITY

Culture is different from race, and although there is a unique cultural experience associated with race, there is no unique cultural perspective

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upon morphological features on a direct or ancestral basis) of yesteryear. *See supra* notes 56–77 and accompanying text. There is no need to extend "race" further.

114. Indeed, the Court constructed a new construct: "racial purpose." *Rice*, 528 U.S. at 513–14. "Whatever that might mean." *Id.* at 1071. (Stevens, J., dissenting).

115. *Id.* 513.

116. *See id.*

117. *See id.* (noting that before 1778, the inhabitants of Hawaii had a "common culture").

118. *See* Hernandez v. New York, 500 U.S. 352, 361–63 (1991) (upholding exclusion of Spanish speaking jurors, in trial of Latino, based upon finding that such jurors "might have difficulty" in accepting the translator's rendition of Spanish-language testimony).

119. Before *Rice*, there was broad agreement among scholars that the Court believed in race and that race essentially meant skin color or other morphological features. *See* Yamamoto, *supra* note 12, at 847 ("For a majority of the current Supreme Court race is skin color. Race is thus seen as an immutable, biologically determined trait."); Haney Lopez, *supra* note 72, at 17 (noting Supreme Court's understanding of race as biologically determined—a matter of "blood"); Gotanda, *supra* note 36, at 17 (same).

120. *See supra* notes 100–02, 112 and accompanying text.

that can be associated with race in a monolithic fashion.[121] The reality of race and culture is that members of the same race can have radically different cultural experiences and perspectives.[122] Individuals can become acculturated to certain elements of a racial identity while retaining their own racial identity.[123] Others may retain a racial identity that is largely divorced from the mainstream culture associated with that identity.[124] Thus, one cannot infer a given cultural experience with a certain "race."[125]

Each of these propositions flows from the legal construction of race articulated by the Supreme Court, which has always been dependent on some genetically transmitted morphological features.[126] It is axiomatic that culture is not genetically attached to those genes that influence the legal construction of racial morphological features.[127] In other words, our racialized society can influence, but not dictate, cultural experiences, identity, and knowledge.[128] The reality of a non-genetic and non-morphological culture-based value is also manifest in the empirical and theoretical case supporting the benefits of cultural diversity. This Article focuses upon the case in support of cultural diversity in two related con-

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121. *See generally* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1801 (1989) (urging caution regarding "ideas about the naturalness, essentiality, and inescapability of race" because such ideas "have for too long stunted American Culture").

122. *See* CORNEL WEST, RACE MATTERS 25–27 (1993) (stating that "[B]lack authenticity" is a construct and that "[B]lackness has no meaning outside of a system of race-conscious people and practices . . . being [B]lack means [only] being minimally subject to [W]hite supremacist abuse . . . .").

123. Thus, the term "acculturation." *See supra* note 10.

124. Because culture is defined as accumulated learning, including that handed down from generation to generation, cultural transmission is defined to reflect this. Thus, there are two primary modes of cultural transmission: vertical and horizontal. CAVALLI-SFORZA, *supra* note 49, at 179–83. Vertical transmission is from parent to child; horizontal transmission includes all other pathways. *Id.* at 180. Consequently, ancestry plays a role in cultural transmission, but acculturation also occurs independently of ancestry. *See also generally* Luigi Luca Cavalli-Sforza, M. Feldman, K. Chen & Dornbusch, *Theory and Observation in Cultural Transmission*, 218 SCI. 19–27 (1982).

125. Scholars generally speak of "race" as involving genetically transmitted traits and culture as involving learned traits. *See* CAVALLI-SFORZA, *supra* note 49, at 9 (stating that race involves characteristics determined by "genetic differences" while culture involves traits dictated by "education"). By definition, culture can vary separate and apart from genetic makeup. *Id.* at 175 ("Culture, or the ability to learn from the experience of others is a special phenomenon that relies on communication.").

126. *See supra* notes 87–120 and accompanying text.

127. Owens & King, *supra* note 41.

128. Certainly, race in our society is so powerful that some race-correlated cultural traits may be handed down vertically; still, the possibility of significant horizontal influence diminishes any element of "racial" determinism to culture. CAVALLI-SFORZA, *supra* note 49, at 176 (stating that "cultural mutations" occur randomly).

texts: corporate America and higher education admissions. These areas enjoy a well-developed body of research into the benefits of cultural diversity, as well as the nature of such benefits. As such, they demonstrate that the benefits of cultural diversity are fundamentally non-morphological and non-heritable. Instead, institutions that value cultural diversity seek specific mental capabilities, such as cultural perspectives, insights, and skills.

The thinking that is driving corporate America to hire more persons than ever before from traditionally-excluded backgrounds is not that skin color will enhance performance. The business world, as could be expected, has taken the lead in rationalizing its approach to America's diverse populations by managing diversity to increase profitability.[129] Specifically, the business world is showing how to manage diversity to provide more innovative thinking, to spark creativity, to provide superior marketing insights, and to better manage more diverse workforces.[130] On virtually all of these fronts, business is exploiting the fundamentally different cultural insights and experiences of traditionally-excluded groups.[131] In addition, corporate America is learning that diversity initiatives create a positive environment for all employees, and thereby give employers a competitive advantage in an increasingly tight job market.[132] In no case does the business approach

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129. *See generally* Ramirez, *supra* note 24, at 128–29 (citing detailed evidence showing that leading elements of corporate America are enthusiastically embracing diversity).

130. Poppy Lauretta McLeod, Sharon Alisa Lobel & Taylor H. Cox, Jr., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. 248, 252 (1996) (comparing quality and feasibility of the ideas of "Anglo" working groups and racially/ethnically diverse groups and concluding that culturally diverse workforces create competitive advantage through better decisions). This study is supported by numerous psychological authorities that demonstrate that diversity in a wide-range of contexts can lead to better decision-making. *E.g.*, IRVING L. JANIS, VICTIMS OF GROUPTHINK 192 (1972) (undertaking intensive case studies of "groupthink;" and finding: "Groups of individuals showing a preponderance of certain personality and social attributes may prove to be the ones that succumb most readily to groupthink."); IRVING L. JANIS, GROUPTHINK 250 (2d ed. 1982) (undertaking further intensive case studies and finding that group heterogeneity can stem "groupthink").

131. Certainly, it is not skin color or ancestry that leads to deeper thinking, but the ability to provide unique insights or unique perspectives. Morphological features and ancestry logically do not act to achieve these benefits. It is not as if having an African American sit in on meetings, like a potted plant, will spark greater innovation by sheer force of dark skin. Contrast these benefits to the usually illegal exploitation of morphological features, ancestry or "racial nepotism." *See* Ferrill v. Parker Group, Inc., 168 F.3d 468, 472 (11th Cir. 1999) (holding that employer may not hire and fire persons of a given race solely to engage in marketing effort targeting a specific racial group). The concept of "racial nepotism" has been developed by Derrick Bell. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 56 (1992) (stating that members of a racial group will tend to favor their own group).

132. Margaret L. Williams & Tayla N. Bayer, *The Effect of a Managing Diversity Policy on Organizational Attractiveness*, 19 GROUP ORG. MGMT. 295, 305–06 (1994) ("Firms that have adopted policies and procedures concerning managing diversity may be able to enhance" their recruiting efforts).

to cultural diversity depend upon exploiting an individual's morphological features.[133] Thus, the business case for embracing diversity depends not upon exploiting an element of race but a consequence of race—the unique cultural experience and insights that arise from complex social conventions.

The same is true with respect to the benefits of diversity in the context of education. Here, too, cultural diversity helps to facilitate the institutional mission of colleges and universities.[134] A diverse student body provides a learning environment where problems are attacked from more diverse view points.[135] Students consequently learn more and think in

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133. *See generally* Ramirez, *supra* note 24 at 145–48.

134. *See* Patricia Gurin, *Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363, 364 (1999) ("A racially and ethnically diverse university student body has far ranging and significant benefits for all students, non-minorities and minorities alike."). This expert report was submitted by the University of Michigan in the litigation challenging its admission policies. THE UNIVERSITY OF MICHIGAN, *supra* note 2. The use of expert reports submitted in litigation warrants caution. In this instance, the reports are seemingly more reliable, as the plaintiffs in the Michigan litigation have submitted no expert reports contesting the value of diversity in education. Instead, the plaintiffs have submitted an analysis of the statistical probability of admission members of specified ethnic backgrounds face in applying to the University. *See* Kinley Larntz, *Expert Report of Kinley Larntz, Ph.D.*, 5 MICH. J. RACE & L. 463, 472 (1999) (concluding that membership in certain ethnic groups is an "extremely strong factor" in achieving admittance to the University of Michigan law school). In fact, it appears that the plaintiffs do not contest that diversity is important to the University's educational mission. CENTER FOR INDIVIDUAL RIGHTS, *Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment*, *at* http://www.cir-usa.org/legal_docs/grutter_v_bollinger_summary.pdf (last visited Nov. 13, 2001) (Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment). In any event, because objectivity may possibly be questioned, I cite the expert reports only as useful summaries of otherwise standard scholarly sources, or when supported by such sources. A growing body of such scholarship clearly supports Professor Gurin's views. AMER. COUNCIL ON EDUC. & AMER. ASSOC. OF UNIV. PROFESSORS, DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 3 (2000), *available at* http://www.acenet.edu/programs/omhe/diversity.cfm ("The limited scholarship that does exist has consistently shown that racial and ethnic diversity has both direct and indirect positive effects on . . . educational outcomes.").

135. One scholar implemented a descriptive, multiple case study of three classrooms at the University of Maryland. Patricia Marin, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms*, *in* DOES DIVERSITY MAKE A DIFFERENCE? 61 (Amer. Council on Educ. ed., 2000). Dr. Marin found that broader student backgrounds provided a basis for realizing important educational goals such as challenging stereotypes and developing critical thinking skills. *Id.* at 70–71. *See also* Gurin, *supra* note 134, at 373 ("having multiple voices in the classroom–and the multicultural teaching strategy of presenting multiple perspectives . . . fosters fully reflexive thinking"). A new psychological study shows that cultural influences lead to different modes of thought. A true education must stress understanding different modes of thinking and exploiting different modes of thinking. *See* Richard E. Nisbett, Kaiping Peng, Incheol Choi, Ara Noronzayan, *Culture and Systems of Thought: Holistic v. Analytical Cognition*, (finding that East Asian and Western thought differs

deeper, more complex ways in a diverse educational environment.[136] Diversity also facilitates the ability of students to function in a pluralistic democracy.[137] Moreover, "students who are exposed to a multicultural education through course work increase their level of racial awareness and understanding of multiple cultures."[138] The results of recent surveys support all of the evidence regarding the educational value of diversity. Eighty percent of *White* graduates from elite universities favor retaining or increasing their school's emphasis on diversity.[139] Similarly, seventy percent of law students responding to a survey regarding the benefits of diversity in the law school context reported that diversity has positively impacted the quality of their education.[140] Remarkably similar numbers were obtained by a survey of college faculty.[141] It is fair to say that impressive

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substantially, East Asian being more holistic and Westerners being more analytic) (working paper, on file with the author). The authors posit that different modes of thought result from a host of different social and cultural factors. *Id.* at 1.

136. In a detailed multi-disciplinary analysis of research literature on diversity in education, Professor Jeffrey F. Milem concluded that students who engaged in more interactions with diversity while in college show relative gains in critical thinking and active thinking. Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, *in* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION Chapter 5, 11 (Mitchell Chang et al. eds., 2000) (preliminary draft of American Educational Research Association) *available at* http://www.stanford.edu/~hakuta/racial_dynamics/book_download.htm). *See also* Gurin, *supra* note 134, at 370 ("Students learn to think in deeper, more complex ways in a diverse educational environment."). Professor Gurin's study was based on far ranging data involving students from across the nation and at the University of Michigan. *Id.* at 380. While it is true her analysis was conducted for litigation, it mirrors the finding of the effects of diversity in sparking creativity and innovation in the world of business. *See supra* note 130.

137. Milem, *supra* note 136, at Chapter 5, 11 ("Students who have been exposed to greater diversity are more likely to show increases in racial understanding, cultural awareness and appreciation, engagement with social and political issues, and openness to diversity and challenge."). *See also* Gurin, *supra* note 134, at 367 ("One goal embraced by most colleges and universities . . . is to prepare young people for active participation in our democratic society, which is an increasingly diverse society.").

138. Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 753 (1998) ("existing studies provide evidence that racial and ethnic diversity on college campuses promotes learning, increases understanding of racial groups and cultures, reduces racism and prejudice, and leads to cordial relationships between students of different racial and ethnic heritage.").

139. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 251 (1998). Even those graduates who did not gain admission to their first choice school favored an emphasis on diversity as strongly as students who got into their first choice school. *Id.*

140. GARY ORFIELD & DEAN WHITLA, DIVERSITY AND LEGAL EDUCATION: STUDENT EXPERIENCES AT LEADING LAW SCHOOLS (1999), *available at* http://www.law.harvard.edu/groups/civilrights/publications/lawsurvey.html.

141. Geoffrey Maruyama & Jose F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom*, in DOES DIVERSITY MAKE A DIFFERENCE? THREE STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 15 (2000) (finding that 69.8% and 70.7%

evidence supports the benefits of diversity in higher education in preparing students to excel in a multicultural world and a more diverse America.

Additionally, the educational mission of institutions of higher learning cannot be divorced from the needs of corporate America or American society generally. Many commentators have recognized that because corporate America needs a more diverse workforce, America's colleges should produce a more diverse group of graduates.[142] Indeed, this mandate permeates all levels of our educational system. We as a society need to address why it is that so many students from traditionally-excluded groups are inadequately educated and thereby excluded from the highest levels of our society.[143] It is also clear that much of the divergence in the "qualifications" of minority group members versus "Caucasians" is directly attributable to standardized tests.[144] As previously mentioned, these tests have been shown to reflect embedded societal racial bias.[145] In other words, the college admissions process is saddled by merit measurements that transmit racial oppression into education, where they function to shut doors to the very opportunities that can allow individuals to escape oppression.[146] Ultimately, American business will suffer from these policies of exclusion as tightening labor markets take a slow toll on growth.[147] All of this is in the name of standardized tests designed by psychometricians, when geneticists tell us that there are no race-based differences in ability.[148] This is a grim result for American business, American education,

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of college faculty surveyed found diversity important for teaching students to examine their perspectives and exposing students to new perspectives, respectively).

142. *E.g.*, Gurin, *supra* note 134, at 367 ("the business community is looking to colleges and universities to produce highly valued cognitive skills and social skills: ability to work effectively in groups with colleagues of diverse backgrounds, openness to new ideas and perspectives, and empathy with other workers' perspectives").

143. *See* Ramirez, *supra* note 17, at 112–14 (summarizing evidence of continuing and pervasive racism).

144. *See* Larntz, *supra* note 134, at 488–90.

145. *Supra* note 76 and accompanying text.

146. Ramirez, *supra* note 24, at 158.

147. Ramirez, *supra* note 17, at 91 n.14.

148. There is no magic to standardized test scores. In fact, questions are selected by one criteria: correlation to academic performance. Claude M. Steele, *Expert Opinion of Claude M. Steele*, 5 MICH. J. RACE & L. 439, 441 (1999). Thus, the only thing these tests measure are "aptitude" which is neither achievement (i.e., what a candidate has learned) nor innate ability. *Id.* at 441–42. Only the U.S. uses such a test, even though achievement tests are better predictors of academic success. *Id.* at 442. Professor Steele has previously published a landmark study on the pernicious effects of "stereotype threat" on the scores of minority students on standardized tests. *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. OF PERSONALITY & SOC. PSYCHO. 797 (1997). Essentially, stereotype threat occurs when one is subjected to a negative stereotype. This threat disrupts high stakes test performance. Steele, at 444. Thus, when African

American students, and American society.[149] A Rand Corporation study suggests that colleges are not meeting the needs of corporations because college graduates are lacking the cross-cultural competencies that are sorely needed for our nation to compete in a more globalized economy.[150]

At the dawn of the 21st Century, the unfortunate truth is that "all too many Americans today live in separate racially homogenous worlds."[151] Consequently, "the mists of racial misunderstanding becloud the shared visions and aspirations and the common struggles that have the potential to bring us together."[152] It is clear that if cultural diversity is not appropriately valued, this same pathological segregation will burden American higher education and relegate its students to an inferior educational result.[153] Valuing cultural diversity gives institutions the ability to turn a societal albatross into an institutional strength.[154] Since it is viewed as fundamentally merit-driven, valuing cultural diversity can be achieved

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Americans were told that they were taking an "ability" test, their performance suffered "dramatically;" when told it was a "problem-solving" test they scored as well as Whites. *Id.* at 445.

149. General Motors has in fact submitted an *Amicus* brief in the Michigan litigation stating that: "In General Motors' view, only a well-educated, highly-diverse workforce, comprised of people who have learned to work productively and creatively with individuals from a multitude of races and ethnic, religious, and cultural histories, can maintain America's global competitiveness in the increasingly diverse and interconnected world economy." GENERAL MOTORS, *News Release: GM Files Brief in Support of U of M in Affirmative Action Lawsuits*, July 17, 2000, *available at http://209.61.155.43/news/releases/g000717a.html.*

150. Tora K. Bikson & Sally Ann Law, Global Preparedness and Human Resources: College and Corporate Perspectives (1994) (unpublished manuscript, on file with the author).

151. Thomas J. Sugrue, *Expert Report of Thomas J. Sugrue*, 5 MICH. J. RACE & L. 261, 265 (1999).

152. *Id.* at 266. Those who doubt that race still matters in America should consider this sobering assessment from a recent federal investigation:

> Our nation still struggles with the impact of its past policies, practices, and attitudes based on racial differences. Race and ethnicity still have profound impacts on the extent to which a person is fully included in American society and provided the equal opportunity and equal protection promised to all Americans. All of these characteristics continue to affect an individual's opportunity to receive an education, acquire the skills necessary to maintain a good job, have access to adequate health care, and receive equal justice under the law.

PRESIDENT'S INITIATIVE ON RACE, ONE AMERICA IN THE 21ST CENTURY: FORGING A NEW FUTURE 2 (1998).

153. *See* Larntz, *supra* note 134, at 472 (stating that Michigan gave ethnicity "strong" weight in attempting to achieve diversity).

154. PRESIDENT'S INITIATIVE ON RACE, *supra* note 152, at 1 ("America's greatest promise in the 21st Century lies in our ability to harness the strength of our racial diversity.").

without creating additional tensions or generating racial resentment.[155] Institutions are therefore faced with a choice of allowing pervasive segregation and oppression to impede their ability to achieve their missions or embracing the potential benefits of cultural diversity as a means of rationally responding to a diverse environment.[156] Evidence showing the benefits that can be achieved from embracing cultural diversity explains why so many educational and business organizations are pursuing such an approach.[157]

Both the business context and the educational context illustrate the far-ranging potential benefits of diversity. Neither serves to define those benefits. In virtually any institutional context, there are likely to be benefits from embracing cultural diversity.[158] In law enforcement, in order to understand and facilitate interaction with "racial" communities, police departments would want to hire individuals with a cultural experience with such communities.[159] Although it is certainly true that race as legally and socially constructed has nothing to do with fire fighting ability,[160] specific cultural linguistic skills certainly could help firefighters learn critical information rapidly in ways that may save lives—either by locating a fire or people imperiled by fire, or for treatment of those victimized by fire.[161]

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155. Both the Bowen and Bok study, in the context of higher education, and the Williams and Bayer study, found that organizational attractiveness is enhanced when diversity is emphasized. *See supra* notes 132, 139. It also seems that emphasizing the cultural insights that diversity offers, in a merit-driven fashion, as opposed to simply emphasizing "race," amplifies organizational attractiveness. Williams & Bayer, *supra* note 132, at 305–06 (comparing "affirmative action" to cultural diversity).

156. *Supra* notes 129–50 and accompanying text.

157. *E.g.*, Ramirez, *supra* note 17, at 102–09; Hallinan, *supra* note 138, at 753–54.

158. *See supra* notes 129–50 and accompanying text. There are also benefits to morphological diversity (in the sense of features that constitute traditional racial identity) are important in a given context. Here, a "compelling interest" must be found to justify unlocking any putative racial diversity benefits. *See e.g.*, Baker v. City of St. Petersburg, 400 F.2d 294, 301 n.10 (5th Cir. 1968) (acknowledging that the purpose of infiltrating Black crime, or in a time of racial strife, assignment of police officers based on race may be compelling); Wittmer v. Peters, 87 F.3d 916, 917–18 (7th Cir. 1996) (upholding race-based hiring when faced with experts claiming that operation of juvenile boot camp for delinquents justified morphological and ancestral discrimination).

159. *See* Talbert v. City of Richmond, 648 F.2d 925, 928–29 (4th Cir. 1981) (upholding that interest in diversity justified race-based hiring). *See also* Deborah Ramirez & Jana Rumminger, *Race, Culture and the New Diversity in the New Millennium*, 31 CUMB. L. REV. 481, 501 (2001) ("diverse police forces strengthen police community relations").

160. McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998) (rejecting diversity rationale based upon lack of evidence that White firefighters could not discharge their duties as well as non-White firefighters, although the city's affirmative action policy was still upheld).

161. Judge Posner specifically allowed that a diverse fire fighting force may enjoy advantages over an all White force. The Court held, however, on this point, that the city had

Indeed, there is reason to believe that any institution that has a need to effectively communicate with the full breadth of American or world culture will benefit from cultural diversity.[162] Similarly, any institution that relies upon group decision-making can expect benefits from diversity.[163] Any institution that addresses problems can benefit from the deeper more multi-faceted thinking that is provided by culturally diverse groups.[164] In short, more work needs to be done to define the benefits of cultural diversity in a myriad of institutional contexts, but the general theory of cultural diversity predicts specific non-morphological, non-ancestral benefits arising from cultural insights and facility in a plethora of areas.

An important element of the value of cultural diversity is the growing empirical data validating the benefits of cultural diversity in a specific context. In the business arena there are studies showing that firms managing cultural diversity achieve greater innovation and creativity,[165] provide a more attractive workforce to potential workers,[166] and, ultimately, achieve enhanced market performance.[167] In the education context, empirical data supports the benefits of cultural diversity in terms of creating a more dynamic learning environment and graduates that are better prepared to deal with a more multicultural society.[168] All of this empirical data shows the value of cultural diversity and not specific morphological features.[169] Cultural facility is divorced from race, as no specific cultural insights or experiences are genetically transmitted.[170] Indeed, it is not just the addition of morphologically diverse individuals that triggers the institutional benefits that diversity practitioners seek.[171] Rather, institutions must manage diversity in a way that logically works to unleash the benefits of cultural diversity.[172] This illustrates the divergence of race from culture; genes do not dictate cultural facility and do not ensure the benefits of cultural diversity.[173] As a consequence, the empirical data supporting the case for diversity very often includes assumptions, implied or expressed,

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failed to submit evidence showing such benefits. *McNamara*, 138 F.3d at 1222. *See also* Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) (holding that racial classification was justified by evidence demonstrating law enforcement need for racial diversity).

162. *See supra* notes 132,137–38 and accompanying text.
163. *See supra* notes 132, 137–38 and accompanying text.
164. *See supra* note 135.
165. *See supra* note 130.
166. *See supra* note 132.
167. *See supra* note 23.
168. *See supra* notes 135–36 and accompanying text.
169. *See supra* note 133.
170. *See supra* note 124.
171. *See supra* notes 124–25 and accompanying text.
172. *See supra* notes 120–28 and accompanying text.
173. *Supra* notes 124–25 and accompanying text.

that diversity be properly managed.[174] Because morphological features alone do not logically support the benefits of cultural diversity, commentators recognize that institutions must strive to create environments that will unleash the valuable cultural facility and perspectives that institutions seek.[175] Obviously, valuing cultural diversity means looking for ways to make cultural diversity pay for an institution, as the benefits of cultural diversity do not accrue by dint of mere skin color.[176]

This does not diminish the power of valuing cultural diversity in terms of extending opportunities to traditionally-excluded groups. This power can be thought of in theoretical terms or from a very pragmatic perspective. Theoretically, diversity will pay dividends so long as an institution faces a deficit of valuable culturally-based insights, in light of its institutional needs and the extent of its monolithic cultural tradition.[177] The more exclusive the institutional tradition, the more opportunities for individuals that offer cultural diversity.[178] The more diverse the relevant institutional environment, the more cultural diversity is likely to prove valuable.[179] From a pragmatic view, the numbers of traditionally-excluded persons who stand to benefit from institutional adoption of cultural diversity initiatives seem to exceed those who benefit from "affirmative action."[180] For example, those corporations valuing cultural diversity hire from within traditionally-excluded groups at a disproportionate rate—sometimes exceeding over 50 percent of new hires.[181] Some such corporations have boards or a group of officers and managers that also reflect a

174. Ramirez, *supra* note 17, at 109–24 (extrapolating best diversity practices from empirical data).

175. Milem, *supra* note 136 at Chapter 5, 31 (stating that having a diverse campus will not in and of itself guarantee educational benefits, and that diversity must be properly managed).

176. Ramirez, *supra* note 24, at 147.

177. *See supra* notes 17–30 and accompanying text.

178. Ramirez, *supra* note 24, at 147.

179. For example, Proctor & Gamble markets its products to the full array of American diversity, peddling household names from Tide to Ivory to Crest. Proctor & Gamble is a leader in using diversity to enhance its marketing efforts. *Diversity*, ADVERTISING AGE, Feb. 16, 1998, at S1 ("When we started getting more diverse . . . we started getting richer [marketing] plans.") (alteration in original).

180. At those companies, for example, that have the strongest records for managing diversity, minorities are hired at rates far above their respective population rates. *See* Edward Robinson & Jonathan Hickman, *The Diversity Elite*, FORTUNE, July 19, 1999, at 62, 66 (stating that 56 percent of Union Bank's new hires are minorities). Nor, is Union Bank alone; virtually all of Fortune's "Diversity Elite" post impressive numbers. Thirty-one of the listed companies had minority new-hire rates above 35%. *See generally id.*

181. *Id.*

polylithic approach to assembling senior management teams.[182] Certainly, it is fair to say that these corporations mean business about cultural diversity.[183]

As America continues its great multicultural odyssey, "race" will likely continue to diverge from culture and the whole concept of racial identity will lose gravity and become more complex.[184] The descendants of Thomas Jefferson provide a high-profile, but likely common, example.[185] As is well known by now, Thomas Jefferson took his role as founding father quite seriously.[186] In addition to his White family, Jefferson fathered a number of African Americans, at least as conventionally defined.[187] The Jefferson-Hemings family illustrates the separateness of race and culture as well as the utter instability of race. One branch of the Jefferson-Hemings family tree rejects any African American link and has acculturated into the mainstream majority population—in other words, they have "passed" into White America.[188] The other branch of the Jefferson-Hemings family morphologically also appears what would conventionally be termed White, but rejects anything other than African

182. *Id.* at 62 (noting that 35.9% of Union Bank's officers are minorities, as are 7 of 17 directors).

183. *See generally* Ramirez, *supra* note 24, at 128 n.6, 131 n.13, 133 n.20.

184. *See, e.g.*, Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 211 (1996) ("The problem is that 'identity itself' has little substance."). Identity is contextual, any identity category is a continuum, all human beings have claims to multiple categories, and identity may be ascribed by the self or others. *Id.* at 210–11. In short, the very concept of racial identity is a mess.

185. Over the years the question of whether Thomas Jefferson fathered any children with his slave Sally Hemings has been a controversial question in the academic world. The dominate position of historians was essentially that it just could not be. JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 305 (1996) ("Within the scholarly world, especially within the community of Jefferson specialists, there seems to be a clear consensus that the story is almost certainly not true.").

186. Eric S. Lander & Joseph J. Ellis, *Founding Father*, 396 NATURE 1314 (1998) ("DNA analysis now confirms that Jefferson was indeed the father of at least one of Hemings' children."). The DNA analysis of the issue of Jefferson's paternity has been a powerful influence in resolving much of the debate surrounding this question. There is now a broad consensus that Jefferson fathered children with his slave Sally Hemings. Indeed, even the Thomas Jefferson Memorial Foundation, which had resisted claims of Jefferson's paternity, appointed a research committee to study the DNA evidence. They concluded that there is a high probability that Jefferson fathered Eston Hemings and probably all six of Sally Heming's children. THOMAS JEFFERSON FOUNDATION, REPORT OF THE RESEARCH COMMITTEE ON THOMAS JEFFERSON AND SALLY HEMINGS (2000), *available at* http://www.monticello.org/plantation/hemings_report.html.

187. *Frontline: Jefferson's Blood* (PBS television broadcast, May 2, 2000), transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/jefferson. In this Article, "conventionally defined" means in accordance with prevailing societal definitions in modern as well as 18th and 19th Century America.

188. *Id.* (statement of Shelby Steele) (noting that "vast majority of Hemingses" had passed into the "White world," but some parts of Madison Hemings' family clung to African American identity).

American identity and culture.[189] The two branches have the same essential DNA insofar as racial morphology and ancestry is concerned (hereinafter, for lack of any suitable term, "racial DNA") and so the "race" of each branch seems to turn upon cultural volition and identity volition.[190] Presumably, the "White branch" would have standing to sue if it suffered from a state-imposed racial classification that benefits African Americans; and the branch with the same "racial DNA," but a different racial identity, would have standing to sue if it suffered from a state-imposed racial classification benefiting Whites.[191] The law has not really faced up to this variable reality to racial identity; the Supreme Court has always assumed that one is "born" with a racial identity that is immutable and genetically defined.[192] Eventually, there will probably be some recognition that people are entitled to their own racio-ethnic identity, but there is reason to doubt that our world is presently equipped to deal with such a regime.[193]

Now, consider the Jefferson-Hemings family but shift the focus from "racial DNA" to culture. Because culture is real and not founded on mythology, each family has fundamentally different cultural experiences and perspectives, despite having nearly identical "racial DNA."[194] Where an

189. *Id.* (statement of Belinda Hilliard) ("If you ask me what color I am, I am going to tell you I am [B]lack. I am not going to tell you I'm mixed because I'm not mixed . . . a lot of people have a hard time understanding that it's not purely the color of your skin that makes you [B]lack.").

190. *Id.* (statement of Amalia Cooper) (noting that at a reunion of many Jefferson-Hemings descendants, including those maintaining White identity and those maintaining African American identity, "I was sort of nervous to go there. And all of a sudden I walked into this room of people that looked . . . like us.").

191. *E.g.*, Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 ("If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.").

192. *Id.*

193. For example, if the "White" Jeffersons applied to University of Virginia, could the state deny them the status of an African American applicant? Under current Supreme Court doctrine it would appear that they possess the "ancestry and ethnic characteristics" to pass as African Americans, even though they previously passed as White. Given the absurd nature of race as a scientific concept, can the state force a person to accept a racial category? Race is simply untenable. American society is on the verge of a massive racial identity crisis. Harris, *supra* note 184, at 210–11. After all, we all have ancestral lines to Africa; we are all African American. Law cannot deny this, for it would be the ultimate exercise in racial fabrication to create some arbitrary generational cut off to qualify for some identity. *See supra* notes 52–55 and accompanying text.

194. *Frontline*, *supra* note 187 (statement of Shelby Steele) ("If Jefferson's descendants are unconvincing as a family, they are nevertheless struggling with their relatedness to each other. But, their racial identities attach them to so much history, give them territories to defend, grudges to settle, quilts to redeem.").

institutional mission is furthered by including persons who understand the stresses accompanying racial passing, the "White branch" Jefferson-Hemings would have an advantage regardless of their "racial DNA."[195] Meanwhile, the African American Jeffersons can almost certainly offer some rather unique views on the reality of racism in America; indeed, it may well be that an African American with the appearance of a White person can see racism like neither an African American who looks African American, nor a White person.[196] In any event, both groups of Jeffersons offer unique cultural insights and experiences in very different ways, despite the fact of the high degree of similarity in terms of "racial DNA" and related morphological features.[197]

Establishing the overlapping and divergent nature of culture and race is just the beginning of the analysis. There must be more than "culture in the air"—there must be some basis for finding valuable cultural insights. The premise of cultural diversity is that all persons offer cultural insights and experiences.[198] Thus, returning to the Jefferson clan, it is true that, in our highly racialized society, both sets of Jefferson descendants offer a unique set of cultural attributes.[199] Still, selecting one over the other on the grounds of culture identification alone may be tantamount to racial discrimination. Only culture differs. And, if culture is deemed to differ in *every* instance that race differs, then culture truly is only a proxy for race.[200] Holding one set of cultural attributes to be superior to the other is presumptuous and indulgent of race-based stereotypes, and is thus contrary

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195. *Id.* (statement of Shelby Steele) ("To pass out of a race always requires one to pass out of a family.").

196. Rev. Thomas Woodson, an African American Jefferson, offered the following insights on being an African American with a White appearance:

> I lived in a [W]hite neighborhood. I played with [W]hite children. And if one of them got beat up by a [B]lack, then I had a whipping coming.
>
> But then, it was a two-fold thing. If I went into the [B]lack neighborhood to go to school, and one of them got beat up by a [W]hite, they would call me, you know, "Hey, you're one of them [W]hite niggers." So then there would be a fight. It was not that it would be my fault, it was just the fact that they had to have an outward release of anger. And I fit the bill.

Id.

197. *See supra* note 190.

198. Ramirez, *supra* note 24, at 129–30 ("These initiatives do not allow for any racial preference ... and draw any bias [in terms of actual employment decisions] not from the inherent values of diversity but from the largely segregated pre-existing corporate tradition .... In other words White males can be and are hired in the name of cultural diversity.") (citing reports of diversity trailblazers hiring White males in the name of cultural diversity).

199. *See supra* notes 189, 196 and accompanying text.

200. In *Rice*, the Supreme court made clear that race discrimination will not be tolerated under cover of some proxy. Rice v. Cayatano, 528 U.S. 495, 513 (2000) (striking down use of ancestry as a proxy for race).

to the general theory of cultural diversity.[201] It is simply too easy to say "no persons of African American culture need apply" instead of "no African Americans need apply." Valuing cultural diversity does not turn, however, upon general cultural preferences.[202] Central to valuing cultural diversity is a focused and targeted pursuit of *specific* cultural facility, not merely cultural identity.[203] Unfounded cultural preferences are anathema to embracing cultural diversity—the whole point is for the institution to allow individuals with all cultural backgrounds to flourish.[204] It is this fundamental embrace of *all* cultural backgrounds that renders cultural diversity a facially-neutral value. But, in order to be facially neutral mere cultural identity cannot support cultural diversity; instead the merit must be found in specific cultural facilities. "Merit" serves to separate specific valuable cultural attributes from those having no value, but only in context.

Merit is also a slippery concept. High SAT scores, for example, seem ill-suited for measuring most skills, and would be an irrational basis for measuring many skills, like musical aptitude.[205] But, there is a growing recognition that merit is best defined as those individual attributes that serve to most further the institutional mission of the entity at issue, with a specific focus on the need at hand.[206] If the institution is a consumer products

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201. *See supra* notes 25–28 and accompanying text.

202. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS 261 (1997) (diversity initiatives should include all employees, including White males, and should not result in unfairness), *available at* http://www.eeoc.gov/task/prac2.html.

203. *Supra* notes 129–50 and accompanying text. It would not be logical to conclude that mere cultural identification yields the benefits promised by diversity theory; instead it is unique perspectives that drive diversity.

204. "[Managing diversity] means enabling every member of your workforce to perform to his or her potential. It means getting from employees . . . everything they have to give." R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirming Diversity*, HARV. BUS. REV., Mar./Apr. 1990, at 107, 112.

205. *Id.*

206. A "report card" on diversity in business explains:

> To admit on the merits, then, is to follow complex rules derived from the institution's own mission and based on its own experiences of educating students with different talents and backgrounds. These rules should not be thought of as abstract propositions to be deduced through contemplation in a Platonic cave. Nor are they rigid formulas that can be applied mechanically. Rather, they should be rough guidelines that are established rarely through empirical examination of the actual results achieved over long experience. For a school, that means asking how many students with characteristic x have done well in college, contributed to the education of their fellow students, and gone on to make major contributions to society. The specifics of these rules will differ from one institution to another be-

conglomerate seeking to penetrate upper middle-class Virginians, then it would seem wiser to hire the White Jeffersons to assist with that task.[207] Therefore, the first element to establishing cultural diversity as a legitimate measure of merit is a showing of institutional need for some non-morphological, non-ancestral (i.e., non-racial) cultural insight, knowledge, or experience.

A second element of merit is that it must be individually based.[208] Again, if mere membership in a racial group is "meritorious," then there is little difference between culture based discrimination and racial discrimination.[209] Only under the most narrow circumstances is race a legitimate measure of merit—in the sense that morphological and ancestral features really can be a non-invidious part of an institutional mission.[210] Consequently, there must be some individualized assessment that a given

> cause no two schools are identical—some place more emphasis on research, for example, some have deeper pools of applicants, and so on. The criteria should also be expected to change as circumstances change and as institutions learn from their mistakes.
>
> As is the case with selective colleges and universities, top companies throughout the United States have more applicants than they can hire for professional jobs. Like the academic institutions, companies and other organizations need to decide whether it is in their interest to have a diverse workforce. Increasing diversity does not mean setting quotas or accepting unqualified applicants. But it probably requires being sensitive to race when setting recruiting policies, and it surely requires a greater degree of thoughtfulness about merit. The overriding lesson is that making progress on diversity requires a thoughtful articulation of the meaning of merit in the specific context of the organization.
>
> Above all, merit must be defined in light of what an institution is trying to accomplish.

William G. Bowen, Derek Bok & Glenda Burkhart, *A Report Card on Diversity*, HARV. BUS. REV., Jan./Feb. 1999, at 139, 144–45.

207. Indeed, there are instances where prominent diversity practitioners have hired White males in pursuit of cultural diversity. *See supra* note 198. *See also Frontline*, *supra* note 187 (statement of Diana Redman) ("I think about [relatives who have passed], and I think they have a very difficult row to hoe because their experience will be—continues to be the experience of people who were raised in the [W]hite world, raised [W]hite in that world.").

208. *E.g.*, Univ. of California Bd. of Regents v. Bakke, 438 U.S. 265, 299 (1978).

209. *See supra* note 200.

210. *E.g.*, Hunter v. Regents of the Univ. Of Calif., 190 F.3d 1061 (9th Cir. 1999) (upholding race based admissions into university's laboratory school which was conducting research into improving urban education); Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) (allowing race-based hiring because of evidence that juveniles would not respect authority at a boot camp run by only Whites); Patrolmen's Benevolent Ass'n of N.Y., Inc., v. City of New York, 74 F. Supp. 2d 321 (S.D. N.Y. 1999) (holding that "operational needs" may support transfer of minority police officers to precinct with minority population in order to quell riot).

candidate is likely to promote the institutional need for cultural diversity. This means that there must be some reason beyond race for supposing that a given individual has the cultural insights, knowledge, or experience needed to further the institutional mission. For a decision to be culture-conscious, the culture-based value, not race, must be decisive. Interviews, personal statements, and other more nuanced inquiries are indicative of a bona fide investigation for cultural facility than mere reliance upon racial categories. Only through such a process can an institution rationalize its approach to cultural diversity in terms of a dimension of merit.[211]

Finally, valuing cultural diversity is a facially neutral practice.[212] Valuing cultural diversity means a fundamental institutional appreciation for the potential value of all cultural perspectives.[213] There can be no cultural preference in such an environment.[214] If there is any bias resulting from cultural diversity, it arises from the shortage of perspectives from traditionally-excluded groups, because of a traditionally exclusive society.[215] The cultural insights of White males are valuable, too.[216]

It may well be true that unfair cultural discrimination is dangerous even when it is not being used as a cover for racial discrimination. Indeed, perhaps unfair cultural discrimination should even be strictly prohibited. Nevertheless, when properly deployed in accordance with empirical data showing how to reap the benefits of cultural diversity, discrimination

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211. *See* Ramirez, *supra* note 24, at 137 n.45 (stating that diversity initiatives reflect a rationalization, or in business parlance, the "invisible hand," of a more diverse environment, and that as diversity takes root institutions can be expected to find more sophisticated means of ferreting out valuable cultural backgrounds) (citing STACEY KOLE & GLENN MACDONALD, ECONOMICS, DEMOGRAPHY AND COMMUNICATION 3 (1999) (University of Rochester School of Business working paper, on file with the Michigan Journal of Race & Law)). Kole and MacDonald focused upon the ability of gender identification to act as a facilitator of efficient communication between customers and employees. Their study utilized employment data from 12 developed nations. This data evidenced sectoral employment patterns across the 12 economies consistent with this "communication-based theory of diversity." It appears that women are being drawn into product delivery positions (Where communication skills have great value) rather than product production positions.

212. The test for whether a policy is race neutral is whether it applies to Whites in the same way as African Americans. *See* In'tl Union v. Johnson Controls, 499 U.S. 187 (1991).

213. For example, the EEOC has studied and endorsed the diversity initiatives taking hold in Corporate America, and has highlighted the inclusiveness of diversity initiatives as fundamental to "best practices" in embracing diversity. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 203 (diversity initiatives should include all employees, including White males, and should not cause or result in unfairness).

214. *Id.*

215. *See supra* note 198.

216. Jacqueline A. Gilbert, Berle Ann Stead & John M. Ivanrevich, *Diversity Management: A New Organizational Paradigm*, 21 J. BUS. ETHICS 61, 71 (1949). "Diversity management is a voluntary organizational program designed to create greater inclusion of all individuals." *Id.* at 62.

based upon specific cultural facility is no different from discrimination based upon any other measure of merit, which our society has long been so deeply wedded to on a theoretical level. Like any other measure of merit, it is individually based. Like any other measure of merit, it is dependent upon the needs of a given institution. Although it may be difficult to measure, it can be assessed similar to any other dimension of merit; every measure of merit entails assessment risks and predictive infirmities. In short, cultural diversity is a value that is best pursued in a race-neutral, merit-driven, culture-conscious manner.

III. EQUAL PROTECTION AND CULTURAL DIVERSITY

Cultural diversity can lead to important institutional benefits in a variety of institutional contexts.[217] These benefits result from non-morphological and non-heritable factors, and are, therefore, distinct from all conceptions of race.[218] Benefits arise from meritorious contributions that are offered by individuals in a race-neutral, culture-conscious manner.[219] The benefits are supported by powerful empirical evidence and arise from integrated efforts to unleash the insights that cultural diversity offers.[220] As such, valuing cultural diversity violates no theory of Equal Protection heretofore articulated.[221] Depriving our society of these multicultural benefits would serve no interest at all and could only be justified as a last gasp for White supremacy.[222]

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217. *See supra* notes 121–76 and accompanying text.

218. *See supra* notes 121–28 and accompanying text.

219. *See supra* notes 198–204 and accompanying text.

220. *See supra* note 12.

221. Indeed, it would be difficult to construct such a theory. When diversity has value, it is because of an individual's cultural experiences and insights. No principled basis exists to preclude an institution's ability to value such a meritorious contribution. As previously shown, valuing cultural diversity entails neither discrimination on the basis of race, nor simply generalized culture discrimination. *See supra* Part II.

222. Fifty years after the repeal of the "White" prerequisite, forty-five years after *Brown*, and thirty-five years after the Civil Rights Act of 1964, the legacy of White supremacy under the law festers, with little effort expended to eradicate its continuing oppressive effects. For example, corporate America has, in general, operated based upon an assumption that only White males were qualified for corporate positions in general, and particularly senior management positions. This fact of pervasive discrimination has left corporate American in dire need of diverse perspectives. As Secretary of Labor, Robert Reich stated in 1995, "the glass ceiling is a concept that betrays America's most cherished principles. It is the unseen, yet unbreachable barrier that keeps minorities and women from rising to the upper rungs of the corporate ladder, regardless of their qualifications or achievements." FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995) (finding that "glass ceiling" exists, operating to exclude women and minorities and that it is detrimental to business). Title II of the Civil Rights Act of 1991 created the 21-member, bipartisan Federal Glass Ceiling Commission. Pub. L. No. 102-166, § 202(b), 203(a), 105 Stat. 1071 (1991). The Commission

Although the pursuit of White supremacy is in accordance with American history,[223] it is not in accord with the best American ideals, nor with America's future.[224] Embracing cultural diversity is the only means available for maximizing our nation's performance.[225] The new genetic learning confirms that White supremacy is an irrational value, ignorant of the best scientific evidence, and is surely no basis for the foundation of a modern society.[226] As previously mentioned, empirical data also demonstrates that embracing cultural diversity does not generate racial tensions or resentment because it is merit-driven.[227] Thus, this part of the Article argues that there is no substantial policy basis upon which to object to embracing cultural diversity.[228] Policy weighs heavily in favor of facilitating cultural diversity.

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consisted of Senators, Representatives, business leaders and other political leaders, all appointed by President Bush. The Commission concluded: "The glass ceiling is a reality in corporate America." FEDERAL GLASS CEILING, *supra*. The Commission's mandate was to study the barriers to the advancement of minorities and women within corporate hierarchies, to issue a report on its findings and conclusions, and to make recommendations on ways to dismantle the glass ceiling. *See also* Ann M. Morrison, THE NEW LEADERS: GUIDELINES ON LEADERSHIP DIVERSITY IN AMERICA 34–39 (1992) (suggesting that prejudice is the primary barrier to corporate advancement, manifesting itself in a prejudgment that someone "different," such as a female, is less able to do the job).

223. *See supra* notes 13, 16, 152 and accompanying text. White supremacy is fading in America, but it has not been eradicated. Luigi Luca Cavalli-Sforza, the noted geneticist, highlighted the subtlety with which our society still harbors irrational racial ideas. He noted that *The Bell Curve* was far too warmly received in 1994, for anyone to assume that America is no longer infected with racist ideas of inferiority and supremacy. CAVALLI-SFORZA, *supra* note 49, at 189.

224. By the year 2025, demographic experts project that the additional 65 million members of the U.S. population will include 30 million Latinos, 12 million African Americans and 11 million Asian American. After year 2030, all population growth will occur in the non-White population. U.S. BUREAU OF THE CENSUS, PROJECTIONS OF THE RESIDENT POPULATION BY RACE, HISPANIC ORIGIN, AND NATIVITY: MIDDLE SERIES, 1999–2100 (2000), *available at* http://www.census.gov/population/www/projections/natsum-T5.html.

225. America will not be able to succeed if it fails to come to grips with the challenges of its increasing diversity. A society that fails to allow the full participation of a significant portion of its population is doomed. *See* WEST, *supra* note 122, at 8, 11 ("there is no escape from our racial interdependence, yet enforced racial hierarchy dooms us as a nation to collective paranoia and hysteria").

226. Luigi Luca Cavalli-Sforza has specifically noted that from a genetic point of view greater diversity within a population is likely to be a source of strength. CAVALLI-SFORZA, *supra* note 49, at 13 (stating that any effort at artificial racial purity would be "undesirable" and would have "very dangerous" biological consequences). From an economic point of view, commentators have recognized that America's diversity positions it to become an economic powerhouse. *See* FERNANDEZ, *supra* note 14, at 13–14.

227. *Supra* note 155.

228. The Supreme Court has previously recognized the importance of facilitating the success of the United States in forging a multicultural society. Edmonson v. Leesville Con-

In the past, the Court has recognized that a given institutional mission may render cultural familiarity or facility a meritorious contribution and specifically held that pursuit of such a value was not a "racial" preference.[229] Certainly it is the case that due to America's tradition of exclusion, minorities typically offer cultural skills that institutions may find in short supply relative to those of upper middle-class White males; still, the Court has never held that a legitimate measure of merit should be suspect merely because it has some level of correlation to racial groups.[230] Instead, the Court has recognized that a facially-neutral explanation "means an explanation based upon something other than ... race."[231] A factor will be deemed facially neutral even though it may "bear a close relation" to racial factors.[232] Finally, the Court has never stated that mere racial consciousness is constitutionally suspect; instead, the Court seems to be reaching a consensus that race must be a "predominant factor" in a given decision.[233] At the very least, the Court has recognized that when "race-consciousness" is inherent in a given context, it cannot be allowed to freeze government action.[234] At no time has the Court held that admissions decisions for higher education must not be race-conscious; to do so would be to abolish face to face interviews, require censorship of personal essays, and eliminate careful interviews with

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crete Co., 500 U.S. 614, 630–31 (1991) ("If our society is to continue to progress as a multi-racial democracy, it must recognize that ... invocation of race stereotypes retards that progress.").

229. Morton v. Mancari, 417 U.S. 535, 553 (1974) (holding that preference for Indians did not constitute "racial" discrimination because preference only applied to federally recognized tribes not those who are merely racially "Indian," and the preference was a rational employment criterion because the agency imposing the preference governed Indian tribes). Because *Morton* involved the Bureau of Indian Affairs, some scholars have questioned its applicability in other contexts. ANTIEAU & RICH, *supra* note 33, at § 27.30. However, the Court itself spoke in broad terms stating that the preference "reasonably and directly related to a legitimate non-racially based goal. This is the principal characteristic of discrimination." 417 U.S. at 554.

230. *See* Hunt v. Cromartie, 526 U.S. 541, 551–52 (1999) (holding that district may be drawn to obtain certain party preference without being deemed racially motivated even when the "evidence also shows a high correlation between race and party preference"); Hernandez v. New York, 500 U.S. 352, 375 (1991) (O'Connor, J. concurring) ("No matter how closely tied or significantly correlated to race an explanation for [an action] may be, the [action] does not implicate the Equal Protection Clause unless it is based on race.").

231. *Hernandez*, 500 U.S. at 360. *See also supra* note 212.

232. *Hernandez*, 500 U.S. at 360.

233. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995). *See also* Univ. and Cmty. Coll. Sys. of Nev. v. Farmer, 930 P.2d 730, 735 (Nev. 1997) (reviewing Supreme Court decisions regarding affirmative action and concluding that race-conscious decisions based upon multiple non-racial factors do not run afoul of constitutional proscriptions).

234. Shaw v. Reno, 509 U.S. 630, 646 (1993) ("redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines .... [T]hat sort of race consciousness does not inevitably lead to impermissible race discrimination").

references. In education, as in hiring, no monochromatic curtain can be erected to assure an absence of race-consciousness.[235]

All of this suggests strongly that the court would not reject true culture-conscious decisions, in accordance with the standards articulated in this Article for embracing cultural diversity. Race, properly defined is no more than an archaic pseudo-scientific concept, historically utilized as a means of asserting White supremacy and as a moralization for racial oppression.[236] But racial identification, as opposed to race, defined as a series of categories based upon yesteryear's pseudo-science, can lead to powerful cultural experiences and insights in our racialized society.[237] The use of an individual's racial identification to serve as a marker of potential cultural facility, is thus a rationalized use of an individual's own definition of their cultural experience.[238] An institution seeking specific cultural facility should be expected to look beyond a given racial identification; but given the value of cultural diversity, and the power of diverse racial experiences in our racialized society, prohibiting the use of race as a marker is destructive of the very cultural diversity that has been shown to be so valuable.[239] In short, the use of racial identification as a marker for culture-conscious decisions, if based upon bona fide institutional need for diversity, should not be constitutionally prohibited. In the activities discussed herein, hiring and college admissions, race-consciousness is unavoidable; moreover, culture and race are so intertwined that in order to unlock the full value of culture, race-consciousness is inherent to the exercise of valuing cultural diversity.[240]

On the other hand, this Article has gone to great lengths to establish that cultural diversity values the possession of insights and other mental capabilities and processes and not morphology or "racial DNA" or ancestry.[241] It would be irrational to make decisions on the basis of "race" instead of on the basis of the ability to contribute cultural diversity in an institutionally meaningful way.[242] Using "race" as a marker is rational in a

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235. Ramirez, *supra* note 24, at 176.

236. *See supra* note 34.

237. *See supra* note 72–77 and accompanying text.

238. Ramirez, *supra* note 24, at 171.

239. *See supra* Part II.

240. *See* Haney Lopez, *supra* note 72, at 38–39. To require "color blindness," institutions would be required to forgo interviews; forbid candidates from alluding to race or cultural background (which could give clues about race); refrain from inquiry regarding parental or familial background or alumni status (very often tantamount to race-consciousness) or speaking with references (who could identify racial characteristics). "Race" is too embedded, too patent and too manifest.

241. *See supra* Part II.

242. *See supra* notes 121–28 and accompanying text.

highly racialized society; using it as a sole factor is a race-based, not a culture-based decision.[243] Making race-based decisions under the cover of cultural diversity is still fundamentally using race as a proxy for culture. The Supreme Court will not allow such a practice, absent a compelling state interest.[244] Thus, valuing cultural diversity means looking past race to determine an individual's potential contribution to cultural diversity.[245] As previously highlighted, this means that some bona fide investigation beyond race must be conducted.[246]

So conceived, valuing cultural diversity also does not run afoul of the Supreme Court's emphasis on the personal and individual nature of Equal Protection rights.[247] As Justice Powell highlighted in *Bakke*, an individual's contribution to cultural diversity can be assessed just as any other measure of merit—on an individualized basis.[248] It may be that the value of a given individual's diversity contribution is variable based upon the needs of the institution and the supply of different kinds of diversity available to the institution, but this is the case with all measures of merit.[249] Similarly, there may be infirmities in the process of assessing the value of an individual's contribution to meritorious diversity; again, however, no measure of merit is free of predictive imperfections.[250] In short, cultural diversity is no different from any other meritorious value. Thus, valuing cultural diversity is merit-driven in that each individual's contribution is assessed independently of their "race."

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243. *See supra* Part II.

244. Rice v. Cayatano, 528 U.S. 495, 513 (2000) (rejecting ancestry as a proxy for race).

245. *See supra* note 211 (embracing cultural diversity has always been about rationalizing responses to increasingly diverse environments; economists have actually shown this process to be manifest in employment statistics.).

246. *See supra* note 23.

247. *E.g.*, Univ. of Cal. Bd. of Regents v. Bakke, 438 U.S. 265, 299 (1978) (stating that individuals are entitled to protection from racial classifications based upon race because such distinctions impinge upon personal rights, in favor of group rights).

248. *Bakke*, 438 U.S. at 317–18.

249. As Justice Powell stated:

> In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

Id.

250. For example, standardized tests only predict, by design, academic performance. They do not necessarily predict success in post-graduate activities. Alan Wolf, *Has There Been a Cognitive Revolution in America?*, *in* THE BELL CURVE WARS 117 (Steven Fraser ed., 1995) ("When all is said and done, IQ predicts neither later success in life nor job performance.").

The constitution does not prohibit discrimination based upon merit.[251] Indeed, the Supreme Court has never stricken down a measure of merit that acts to legitimately (i.e., in a non-racial fashion) further an institutional mission.[252] Rather, the Supreme Court has acted aggressively to preserve the semblance of a "meritocracy."[253] This emphasis on "individual merit" would be for naught if the Court would reject the value of cultural diversity, for it would then be clear that insights and experiences would be embraced and valued only in accordance with the color of the individual who possesses such insights and not in accordance with their institutional value.[254] Nor is the Court free to substitute its judgment of

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251. *E.g.*, Rice v. Cayatano, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."); Plyler v. Doe, 457 U.S. 202, 221–22 (1982) ("one of the goals of the Equal Protection Clause [is] the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit").

252. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (striking down racial classification that was non-merit driven); Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (same). Of course, indulging invidious racial discrimination could never be a meritorious value. Morton v. Mancari, 417 U.S. 535, 554 (1974) (stating that goals must be "legitimate non-racially based" goals). Also, any measure of merit adopted with the intent to discriminate is violative of the Equal Protection Clause. *See* United States v. Fordice, 505 U.S. 717, 737–38 (1992) (holding that ACT scores, originally adopted with discriminatory intent and having segregative effects, cannot be used as sole admission requirement to university.).

253. *E.g.*, United States v. Virginia, 518 U.S. 515, 517 (1996) (prohibiting state action categorically excluding women, in "disregard of their individual merit," from educational opportunity).

254. As Justices Scalia and Thomas have recognized:

> This interpretation comports with dictionary definitions of the term discrimination, which means to "distinguish," to "differentiate," or to make a "distinction in favor of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit." Random House Dictionary 564 (2nd ed. 1987); see also Webster's Third New International Dictionary 648 (1981) (defining "discrimination" as "the making or perceiving of a distinction or difference" or as "the act, practice, or an instance of discriminating categorically rather than individually").

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 616 (1999) (Scalia, Thomas, JJ., dissenting). Thus, at the very least, all indicia of merit should be treated the same. Valuing merit held by traditionally-excluded groups differently than that held by traditionally favored groups amounts to discrimination. Some commentators have already argued that the Supreme Court is naturally inclined to protecting White privilege. *See* Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in* Walker v. City of Mesquite, 85 CORNELL L. REV. 1309, 1341, 1352–56 (2000) ("[W]hites virtually never lose on the merits when challenging civil rights gains by minorities.").

the institutional value of cultural diversity; institutional values must be determined in the first instance by the institution.[255] Under this approach to valuing cultural diversity, and given the empirical case in favor of diversity, it is difficult to see how the Court could ever find valuing cultural diversity to be "motivated by race."[256]

Still, merely showing that cultural diversity can be valued in a way that is squarely within Equal Protection doctrine is a start rather than an end. Both valuing cultural diversity and the "new genetics" challenge Equal Protection doctrine. A "revolution" has occurred in scientific thought on race and diversity; law must keep pace.[257] As it stands today, Equal Protection treats race as "immutable" and something an individual is "born" with, as opposed to recognizing the inherent instability of race, and that there really is only one race.[258] Similarly, the courts have thus far failed to recognize that cultural diversity is a meritorious value that exploits a non-morphological, non-heritable, dimension of an individual's racial experience, and is a key element to fulfilling America's promise and multicultural destiny.[259] The primary barrier to exploiting our cultural diversity to the maximum benefit of our society is the hangover of White supremacy, as ensconced in law by, among others, the Supreme Court. The implications of these defects are important.

With respect to the first problem, the Supreme Court has stumbled upon the right approach through no fault of its own. "Racial" classifications are almost always irrational, as shown by the new genetic learning, and should rightly be subject to the strictest scrutiny.[260] An adjustment is needed, however, in the language deployed to reach this result. The Court should redefine "race" (which is a rather fundamental concept in the law

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255. Derek Bok, former Harvard President, elaborated:

> It is dangerous for judges or for voters to overrule considered educational policies, especially those agreed to by virtually every college and university that has the opportunity to pick and choose among its applicants. In the end, we will have better universities if we leave educational questions to educators.

Transcript of the Boston Bar Association Diversity Committee Conference: Recruiting, Hiring and Retaining Lawyers of Color, BOSTON BAR JOURNAL, May/June 2000, at 8, 19 (statement of former Harvard President Derek Bok). *See also* Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (because a free society depends upon free universities the "exclusion of the governmental intervention in the intellectual life of a university" must be secured).

256. Hunt v. Cromartie, 526 U.S. 541, 552 (1999).

257. *See supra* note 35.

258. *Supra* notes 87–113 and accompanying text.

259. No court has addressed, squarely, whether culture-conscious decision making can be undertaken without violating proscriptions against race discrimination. Indeed, no reported case even mentions the issue. Instead, all seem to deal only with race-based decision-making. This dynamic is also mirrored in legal scholarship. *See supra* note 4.

260. *See supra* note 45.

of Equal Protection) in a manner that reflects scientific teaching. Thus, race only has meaning as a historical relic turning upon traditional classifications of humanity based upon certain morphological features and other heritable traits.[261] The Court should frankly acknowledge the absurdity of thinking in racial terms and start an important process of national re-education by highlighting its own missteps in this area, which is vital to the well-being of our society.[262] Fundamentally, strict scrutiny should continue to apply to racial classifications, but the Court should clarify that this degree of scrutiny is reserved for classifications that turn upon the backwards thinking of the 19th and 20th Century pseudo-scientists regarding the significance and cataloging of racial groups based upon heritable morphological features.[263] In sum, the Court should refuse to participate in the further racialization of any group and strike down any laws targeting groups that have previously been racialized, at least as a general proposition.[264]

This approach does not preclude all racial classifications. Strict scrutiny has been a controversial concept, but the Court has never treated strict scrutiny as always fatal.[265] Examples abound in which it is entirely illogical to ignore race even though race itself is entirely illogical.[266] The common theme to these cases, in general, is that a race-based classification rationally furthers important state missions in a non-invidious manner.[267] This approach is also fundamentally agnostic regarding race-based affirmative action. Affirmative action would instead turn on whether judges view unwinding or dismantling White supremacy as a "compelling" state interest. Given the traditional ideals and rhetoric of our republic, and the heinous history of racism in America and under law, it is difficult to comprehend that such an interest is not

261. *See supra* note 34.

262. From the Supreme Court, on down, our society lives the myth of race, upon a shaky foundation of discredited pseudo-science. *See supra* notes 79–121 and accompanying text.

263. I recognize that "race" has always been a mess, and plugging strict scrutiny into the non-sensical racial categories of yesteryear may seem to be an impossible task. Over the years, however, the Court has actually delineated many of the racial categories in need of protection. Indeed, from *Ozawa* to *Rice* the Supreme Court from has been the leading player in racializing our society. *See supra* notes 88–121. The point is that the Court should refuse to participate further in racialization.

264. *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 546 (1999).

265. *See* Korematsu v. United States, 323 U.S. 214, 223 (1944) (upholding internment of citizens without evidence of disloyalty based upon Japanese ancestry during World War II). *See supra* note 210.

266. *See supra* note 210.

267. *See supra* note 211.

compelling.[268] The "new genetics" now means that any assumption of inferiority must be rejected, and all racial inequalities should be presumptively deemed to be caused by the vestiges of state sponsored White supremacy.[269] Three decades after the death throes of White supremacy *de jure*, "affirmative action" is needed.[270] Cultural diversity is our destiny, and without elimination of vestigial White supremacy, getting there will be more painful, more tortuous, and, possibly, more bloody.[271]

A further adjustment would entail increased scrutiny of supposed non-race-based classifications that have a patent and embedded racial bias.[272] Currently, the Court will apply strict scrutiny to state action undertaken with a racially discriminatory intent, meaning that it is unexplainable on grounds other than race.[273] This can be a very high standard.[274] Under this formula, for facially neutral acts, just about any explanation will do in terms of serving as a cover for racism.[275] If valuing cultural diversity means anything, it means tearing down artificial barriers to success.[276] If the "new genetics" teaches that specific morphological and heritable features have virtually no general genetic significance, then actors cannot justify utilizing measures of ability that have a wide disparity

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268. The battle lines on this issue are by now well-drawn within the legal academy. *See supra* note 5.

269. *See supra* note 45.

270. "Affirmative Action" is a term without clear meaning. Ramirez, *supra* note 24, at 142 n.72.

271. *See supra* note 15.

272. *See supra* note 76.

273. Hunt v. Cromartie, 526 U.S. 541, 546 (1999).

274. *See* Hernandez v. City of New York, 500 U.S. 352, 360 (1991) (stating that plaintiff must show decision was " 'because of' not merely 'in spite of' " race.).

275. *E.g.,* Vill. of Arlington Heights v. Metro. Dev. Housing Corp., 429 U.S. 252, 265 (1977) (proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause); Washington v. Davis, 426 U.S. 229 (1976) (finding rational basis for standardized verbal test used to screen for police officer jobs in the District of Columbia). It appears that at the very least the officials involved in *Washington* would have faced a heavier burden in order to justify the use of the test under a recklessness standard. *See also* McClesky v. Kemp, 481 U.S. 279, 298 (1987) (stating that defendant challenging a state's death penalty would have to show that it was enacted "because of an anticipated racially discriminatory effect").

276. In *Washington* the Supreme Court evinced serious discomfort with any rule that a 14th Amendment violation could be found based upon disparate impact alone:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average [B]lack than to the more affluent [White].

Washington, 426 U.S. at 248.

between traditionally-defined racial groups. So far, the courts seem to indulge measures of merit that have embedded racial bias, while not allowing institutions to compensate for embedded racism.[277] One glaring example involves the University of Texas Law School.[278] Despite a tradition seething with overt racism, the Fifth Circuit explicitly approved legacy status as a basis for preference, while prohibiting any use of race.[279] Thus, relatives of alumni from times when only Whites could attend enjoy a preference over equally-qualified African Americans. Such a ruling can only be emblematic of judicial comfort with reinforcing embedded White supremacy. Another example is continued use of standardized tests, like the SAT and LSAT and other psychometrician efforts to rank human talent.[280] We know that these tests have an embedded racial bias in that they transmit racial oppression, yet they are warmly received by schools.[281] To address instances such as these, the Court should now condemn reckless racial discrimination, at the very least.[282] Under such a formulation, it would be tantamount to intentional discrimination to knowingly use measures of merit with unjustified racial biases. If we are to unleash the

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277. "Current doctrine benefits the government decision maker who remains—either through ignorance or design—ostensibly indifferent to decisions that have a disparate racial impact. It straight jackets those who value diversity and consciously seek to overcome the effects of past discrimination." ANTIEAU & RICH, *supra* note 33, at § 27.01. This Article seeks to reverse this paradigm: the court should straightjacket those indifferent to decisions that have a disparate impact, and benefit those who value cultural diversity.

278. Hopwood v. Texas, 78 F.3d 932, 946 (5th Cir. 1995).

279. *Id.*

280. Even today, it is arguable that the unbridled use of these tests and legacy status perpetuate embedded racism, and their continued use amounts to knowing discrimination, if "intent" were defined broadly to encompass recklessness. In other Fourteenth Amendment contexts, the courts have held that deliberate or callous indifference evidenced by an actual intent to violate a plaintiff's rights or "reckless disregard" of rights is actionable under the Fourteenth Amendment. *E.g.*, Wilson v. Williams, 83 F.3d 870, 875–76 (7th Cir. 1996) (addressing constitutional tort claim). Recklessness in this context would mean "proceeding with knowledge that the harm is substantially certain to occur." W. PAGE KEETON, PROSSER & KEETON ON TORTS § 34 (5th ed. 1984). Thus, an actor proceeding in a course of conduct with knowledge of an unjustified disparate impact would violate the Equal Protection Clause.

281. *See supra* notes 76, 148.

282. In practice, this approach would not condemn all conduct found illegal under the disparate impact analysis of discriminatory conduct under Title VII of the Civil Rights Act of 1964. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). Liability will not be imposed under *Griggs* if a defendant demonstrates that challenged practice is "job related" and "consistent with business necessity". 42 U.S.C. § 2000e-2(K)(1)(A) (1994). Under a recklessness approach, the plaintiff would have the burden of showing that the defendant had no reasonable basis for the practice, standard, or rule that had a racially disparate impact, and, for example, proceeded upon such a course with knowledge of the unjustified disparate impact.

full benefits of our cultural diversity, such discrimination must be stemmed.

Finally, the Court needs to revisit cultural discrimination. In *Rice*, the Court came close to recognizing that discrimination against cultural groups is prohibited but, instead, invoked the time-worn process of racial fabrication.[283] But if the "new genetics" teaches that there are no genetically significant group distinctions, then there is no basis for requiring any such heritable bond for protection. Group oppression is the gist of Equal Protection, with or without a putative genetic bond.[284] The obsession with heritable traits is emblematic of fundamentally racist thinking.[285] When cultural groups are faced with discrimination based solely on attributes of cultural group membership, as opposed to the possession of valuable cultural insights or facility, the Court should extend the highest degree of Equal Protection. This will preclude discrimination based upon cultural elements or attributes (like language) without impairing our nation's ability to harness cultural skills. If we are to truly facilitate exploitation of our multicultural strengths, then cultural oppression and discrimination must be eliminated.[286]

CONCLUSION:
A MODEL OF CULTURAL DISCRIMINATION

This Article has attempted to resolve the challenges posed to Equal Protection doctrine by the "new cultural diversity," including the "new genetics." Each of these developments requires that the Supreme Court revise its fundamental approach to race. The "new genetics" teaches that since there are no genetically-defined racial groups, there is no immutable racial identity. The "new cultural diversity" shows that non-morphological and non-ancestral benefits, in the form of cultural understanding and insights, can be achieved by embracing cultural diversity, and that these benefits can be achieved in a facially-neutral, merit-driven, and culture-conscious manner. These benefits do not arise from ancestry, genetics, or the morphological features that are traditionally associated with race. They

283. *See supra* notes 102–21 and accompanying text.

284. *See supra* note 32.

285. *See supra* notes 59–71 and accompanying text.

286. It is unclear if *Hernandez* would survive this standard. Hernandez v. New York, 500 U.S. 352, 360 (1991) (finding that exclusion of Spanish speaking jurors in criminal case against Latino was "race neutral"). The prosecutor in *Hernandez* claimed to be motivated by fear that Spanish-speaking jurors would adhere to official translation. *Id.* at 361. If discrimination based upon cultural attributes is more strictly scrutinized, then it would seem that the dissent's suggestion that more narrowly-tailored means were available to stem any risk that the Spanish-speaking jurors may not defer entirely to the official translation. *Id.* at 375–79 (Stevens, J., dissenting).

arise from a kind of learned knowledge that should be treated as any other measure of merit.

The Article has attempted to articulate a model of cultural diversity that reconciles Equal Protection doctrine with the "new cultural diversity" and the "new genetics." Essentially, this Article advocates a conservative retooling of Equal Protection so that discrimination based upon cultural facility or specific cultural expertise is widely permitted while generalized cultural discrimination is treated as tantamount to racial discrimination. Moreover, this Article advocates that the Supreme Court explicitly recognize the archaic nature of race and reject its own approach which is based upon the idea of racial immutability. The upshot of this approach is to maximize protection against irrational racial discrimination while permitting full exploitation of America's multicultural assets and ideals. At the same time, this Article urges that the Court begin to move beyond race and address the vestiges of state-sponsored racial oppression in a more aggressive fashion that reflects both the recognition that our society must embrace cultural diversity and that there is no genetic basis to the rampant inequalities within our society.