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DUNWODY COMMENTARY

DIVERSITY IS A VALUE IN AMERICAN HIGHER EDUCATION, BUT IT IS NOT A LEGAL JUSTIFICATION FOR AFFIRMATIVE ACTION

E. John Gregory

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I. INTRODUCTION

Dean Kronman's lecture and subsequent essay, "Is Diversity a Value in American Higher Education?" was meant to set forth a "new" legal justification for affirmative action programs which take race into account in college admissions and personnel hiring.[1] Dean Kronman's essay provided a well-written and persuasive dissertation on the concept of liberal education and the role that diversity of values may play in achieving that liberal education. This Commentary generally assumes that Affirmative Action programs have an important role in our present society.[2] In this light, this Commentary explains how Dean Kronman's diversity argument, far from providing an alternative legal justification for affirmative action, merely reiterates in modified language arguments previously rejected by our nation's highest courts.

This Commentary will first briefly describe the background of the Affirmative Action debate in order to properly frame Dean Kronman's diversity argument. It will also explain the genesis of this argument and its increasing importance as a legal justification for affirmative action. In so doing, this analysis will set forth Dean Kronman's diversity argument as a logical syllogism.[3] Second, this Commentary will show how several

1. *See* Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861 (2000).

2. Affirmative Action is a subject which has the tendency to polarize its proponents and opponents at extremely opposite poles. The author of this Commentary personally feels that affirmative action programs, properly tailored and administered, play an important role in the social well-being of our current American society. For a good debate pointing out some of the principal arguments on both sides of the debate, *see* Dinesh D'Souza & Christopher Edley, *Debate: Affirmative Action Debate: Should Race-Based Affirmative Action Be Abandoned as a National Policy*, 60 ALB. L. REV. 425 (1996).

3. A syllogism "consists of three propositions (two premises and the conclusion), and these

United States Supreme Court decisions belie the contention that the diversity argument is a new, judicially-untested argument. Moreover, it will demonstrate that the United States Supreme Court has already essentially rejected the diversity argument. Finally, this Commentary will suggest that if courts were to accept the diversity argument as an alternative legal justification for affirmative action programs, our treasured individual liberty would be greatly imperiled.

II. THE VALUE-DIVERSITY RACE PROXY ARGUMENT

A. *Background to the Diversity Argument*

1. Affirmative Action and Strict Scrutiny

Affirmative Action programs, generally speaking, have the goal of increasing minority participation in various institutions, whether they be schools, government, or business.[4] In order to achieve this goal, these programs must make decisions based on a person's race and/or ethnicity. However, the Supreme Court, long ago, held that government decision-making based on race must be subjected to judicial strict scrutiny under the Equal Protection Clause of the U.S. Constitution.[5]

Up to the present time, the only affirmative action justification to pass the strict scrutiny standard has been the "remedial" justification.[6] Under the

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contain three terms, of which the two occurring in the conclusion are brought together in the premises by being referred to a common class." BLACK'S LAW DICTIONARY 1449 (6th ed. 1991).

4. *See* Kronman, *supra* note 1, at 863 ("The common aim of [affirmative action] programs [is] to increase the share of various social and economic goods—jobs, contracts, educational opportunities and the like—that disadvantaged minorities enjoy, and thereby change the background conditions that frustrate the achievement of racial justice.").

5. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."). Further, strict scrutiny applies to both "benign" and other racial classifications. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224-25 (1995).

6. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307-11 (1978) ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."). However, as this commentary will later discuss, in a concurring opinion in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 600 (1990), Justice Stevens stated: "Today the Court squarely rejects the proposition that a government decision that rests on a racial classification is never permissible except as a remedy for a past wrong." Although *Metro Broadcasting* certainly reads that way, it was a case involving the Court's temporary flirtation with "rational basis" review of "benign" racial classifications. *See id.* at 564. Even if *Metro Broadcasting* had not been soon overruled by the Court in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), the remedial justification is still the only justification that has ever

remedial justification, affirmative action is used within an institution to remedy past identified discrimination[7] within that particular institution.[8] The Supreme Court has specifically rejected the use of the remedial justification to uphold affirmative action programs that seek to rectify past discrimination in society generally or even within a certain profession.[9]

2. Distributive Justice as a Justification for Affirmative Action

Lacking the requisite finding of institutional discrimination required to use the remedial justification, affirmative action programs were justified as promoting "distributive justice."[10] The distributive justice argument essentially posits that members of certain minority groups have been disadvantaged by the majority, and therefore opportunities should be redistributed to the disfavored minorities at the expense of members of the majority.[11] But, as Dean Kronman explains, the distributive justice argument "required too many controversial assumptions, both factual and moral, to ever be fully convincing."[12]

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passed strict scrutiny.

7. In other words, a proponent of an affirmative action program based on the remedial justification at a particular university, would have to prove that that particular university, as opposed to universities in general or society, had illegally discriminated. *See Bakke*, 438 U.S. at 307-08. In such a case, the remedial justification merely permits affirmative action to be used as a remedy for the specific wrong perpetrated by that particular university. *See id.* Where the benefits and burdens of such a program lie arguably blurs the line between this and distributive justice.

8. *See id.* at 307-11.

9. *See id.* at 307 (rejecting the use of the remedial justification to remedy societal discrimination). The *Bakke* dissent unsuccessfully argued that the remedial justification was a sufficient justification for affirmative action programs which sought to increase minority representation in the medical profession. *See id.* at 355-79 (Brennan, J., dissenting).

10. *See* Kronman, *supra* note 1, at 864. "Distributive justice concerns obligations of the community to the individual, and requires fair disbursement of common advantages and sharing of common burdens." BLACK'S LAW DICTIONARY 864 (6th ed. 1991). Dean Kronman explains the distributive justice argument as a justification for affirmative action as follows:

> Defenders of affirmative action replied that non-minority applicants are themselves beneficiaries of the background conditions that maintain the system of *de facto* segregation from which minority applicants suffer, and that their ancestors (or some of them at least) helped to create these conditions in the first place. This response was meant to make the conflict between minority and non-minority applicants look more like a contest of right against wrong, and less like one of right against right.

Kronman, *supra* note 1, at 864.

11. *See id.* at 863.

12. *Id.* at 864.

3. *Hopwood v. Texas*: A Rejection of Distributive Justice

When the distributive justice justification for affirmative action was finally tested in *Hopwood v. Texas*,[13] that justification was resoundingly rejected by the United States Court of Appeals for the Fifth Circuit.[14] In *Hopwood*, a "white" woman challenged the admissions policy of the University of Texas School of Law after having her application rejected.[15] She alleged that under the University's affirmative action program, the University had admitted several minority students[16] with both undergraduate GPA's and LSAT scores significantly lower than hers.[17] She alleged that such disparate treatment violated the Equal Protection Clause of the U.S. Constitution.[18]

The District Court recognized "the proper constitutional standard under which to evaluate the admissions program: strict scrutiny."[19] The District Court further explained that in order to pass strict scrutiny, a race-conscious program must "(1) serve a compelling government interest and (2) [be] narrowly tailored to the achievement of that goal."[20] While the District Court held that both the distributive justice and diversity justifications passed strict scrutiny, the Fifth Circuit reversed this holding.[21] Relying on U.S. Supreme Court precedent, the Circuit Court held that neither distributive justice nor value-diversity (the topic of this commentary) justifications could satisfy Equal Protection strict scrutiny.[22] The U.S. Supreme Court denied certiori.[23]

B. *The Value-Diversity Race Proxy: A "New" Justification for Affirmative Action*

Dean Kronman points out that as the distributive justice argument was rejected both in the courts and at the polls, a new legal justification was

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13. 78 F.3d 932 (5th Cir. 1996).

14. *See id.* at 962; *see also* Kronman, *supra* note 1, at 867.

15. *Hopwood*, 78 F.3d at 938.

16. *See id.* In this context, "minority" students refers to black students and American students of Mexican heritage. *Id.*

17. *See id.*

18. *See id.*

19. *Id.*

20. *Id.*

21. *See id.* at 934.

22. *See id.* at 962. "In summary, we hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school." *Id.*

23. *See* Texas v. Hopwood, 518 U.S. 1033 (1996) (denying certiori).

needed for affirmative action programs—the value-diversity race proxy justification.[24] Dean Kronman notes that this justification was first set forth by Justice Powell, speaking for himself,[25] in *Bakke v. California*.[26] Dean Kronman explains the diversity argument as follows: "The claim that racial and ethnic diversity is an educational good rests on two propositions: first, that diversity of experience and values is [a valuable characteristic in the school]; and second, that diversity of experience and values is *strongly linked* to diversity of race and ethnicity."[27] The argument concludes that an institution should be allowed to admit or hire applicants based on race to achieve the desired characteristic which race represents (e.g., value-diversity). This simple syllogism is laid out as such below.

The diversity argument is a "proxy" argument in that it would allow educational institutions, seeking certain characteristics (i.e., value diversity), to use race as a proxy for these characteristics because race is "strongly linked" to these characteristics.[28] Dean Kronman also refers to this argument as the "internal argument" because it seeks to further the internal mission of educating rather than address an external mission, such as implementing distributive justice.[29] This commentary refers to this argument as the "value-diversity race proxy" justification because it seeks to allow race to be used as a proxy to achieve value diversity.

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24. *See* Kronman, *supra* note 1, at 867.

25. "In short, there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for government race-based discrimination. Subsequent Supreme Court case law strongly suggests, in fact, that it is not." *Hopwood*, 78 F.3d at 945. At least one legal scholar has opined that Justice Powell's statements in *Bakke* regarding diversity are binding Supreme Court precedent. *See* Roscoe C. Howard, *Getting it Wrong: Hopwood v. Texas and its Implications for Racial Diversity in Legal Education and Practice*, 31 NEW ENG. L. REV. 831, 833-34 (1997). The *Hopwood* Court persuasively pointed out, however, that the word 'diversity' only appears in Justice Powell's concurring opinion. *See* Hopwood, 78 F.3d at 944 ("While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. In *Bakke*, the word 'diversity' is mentioned nowhere except in Justice Powell's single-justice opinion."). It is this author's current understanding that while five justices did agree that race may be considered in the admissions process, see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 272, only Justice Powell suggested the value-"diversity" justification.

26. 438 U.S. 265, 311-12 (1978) ("The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education.").

27. Kronman, *supra* note 1, at 868 (emphasis added).

28. Dean Kronman also refers to his argument as a proxy argument: "And so long as this remains true, the argument for treating racial and ethnic diversity as a means to or component of or *proxy* for diversity of values can be supported by two claims." *Id.* at 883 (emphasis added).

29. *Id.* at 865-66.

C. *The Value-Diversity Race Proxy Argument as a Syllogism*

Dean Kronman contemplated that the diversity argument might be carried beyond the realm of academia (the specific subject of his essay) and into such varied areas as police forces, fire fighting, etc.[30] Therefore, this commentary must lay out Dean Kronman's essential legal argument as a legal syllogism applicable not only to the educational institution, but to the wide range of institutions to which he referred. This syllogism takes the following form:

> *Major Premise*: Institutional experts know what personnel characteristics would best contribute to the performance of their institutional missions (e.g., universities have determined that the characteristic of value-diversity is necessary in order to accomplish their institutional mission of educating).
> *Minor Premise*: Sometimes, race and ethnicity are so "strongly linked" to these desired characteristics (e.g., value-diversity or savvy in dealing with ethnic populations) that race and ethnicity are good proxies for these desired characteristics.
> *Conclusion*: Therefore, the institutional experts are legally justified in considering race/ethnicity as a shortcut to achieve the necessary personnel characteristics.

D. *Institutional Determination of Important Characteristic*

As the *Major Premise* of the syllogism above makes clear, the proxy argument requires that institutional experts have made a decision that a particular characteristic is valuable. In the case of educational institutions,

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30. *See id.* at 866.

> The distinction between internal and external goals is not a perfect one, but it is crucial to understanding what is at stake in the diversity debate. Most, perhaps all, activities have distinctive internal goals of their own. These are the specific ends toward which the activities in question are directed. The activity of policing, for example, aims to provide physical security for those living in a certain community. The activity of firefighting is directed toward the prevention and control of fires. These are the internal goals of policing and firefighting, respectively. They are what the activities are designated for. If a police or fire department is required to set aside a certain number of positions for minority applicants, who before have been the victims of prejudice and discrimination in hiring, the resources of the department are being used not in pursuit of its internal goal, but to help achieve a fairer distribution of wealth and opportunities in society generally, a goal external to the work of the department.

Id. at 865-66.

Dean Kronman makes a compelling case that educational experts have determined that value-diversity is a valuable characteristic.[31]

There exists a significant problem with judicial acceptance of the institutional determination of the valued characteristic required under the *Major Premise*. This problem stems from the lack of any safeguard to preclude the race proxy from being used as a subterfuge for blatant racist discrimination. For example, what if an institution merely asserted that a particular characteristic is valuable, knowing that generally one race is more likely to have that characteristic than another? For now, this commentary accepts arguendo that institutions would simply not engage in such subterfuge.[32] Even assuming away racism and bad faith, just as educational experts have made the value-diversity determination, some other institutional experts could in good faith make the determination that similarity of values (or some other characteristic) is more conducive to their particular institutional mission.[33]

E. *Quantum of Evidence Required of Characteristic-Proxy Linkage*

The *Minor Premise* of the proxy syllogism requires that race/ethnicity be a good proxy for those characteristics that the institution desires of its personnel. This begs the question, how strong must the proxy be, or rather, to what degree does race/ethnicity have to correlate to the characteristic in order for an institution to look to the race proxy rather than look for the underlying characteristic itself?

Dean Kronman explains that race/ethnicity has to be "strongly linked" to the underlying characteristic.[34] He concludes that the value-diversity race proxy satisfies this "strongly linked" standard.[35] Therefore, to determine what kind of evidence should be required of characteristic/race proxy linkage, this commentary looks to the evidence Dean Kronman found sufficient. A cursory listing of the evidence reveals its anecdotal nature:

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31. Over 9 pages of Dean Kronman's 34 page essay are devoted to proving the proposition that diversity of values is a valuable and important characteristic in promoting a liberal education. *See id.* at 868-877.

32. *But see infra* note 144 and accompanying text.

33. In his essay, Dean Kronman makes the important point that higher academia used to consider similarity of values a great asset, indeed even a goal, of the educational process. Kronman, *supra* note 1, at 874. It seems plausible that an institution could determine that similarity of values is indeed an asset for its particular internal mission. *See* DINESH D'SOUZA, THE END OF RACISM 326-35 (The Free Press 1995). Judicial recognition of the value of diversity in the educational environment might also support recognizing the importance of similarity of values in other institutions.

34. Kronman, *supra* note 1, at 868.

35. *See id.*

1. Blacks and whites are segregated residentially.[36]
2. Blacks and whites reacted to the O.J. Simpson verdict differently.[37]
3. Black and white opinion was severely divided on the Amadou Diallou shooting.[38]
4. "It also appears that blacks and whites differ . . . in their assessment of the fairness with which capital punishment is administered in the United States."[39]

Dean Kronman goes on to explain that there exists "a wealth of anecdotal evidence [suggesting] that race has a large influence . . . on the judgments of whites and blacks . . . ."[40]

While these statements are persuasive and this commentary accepts arguendo that they are all true, from an evidentiary standpoint, they are arguably anecdotal.[41] Therefore, it appears that in Dean Kronman's view, to use race as a "proxy" for a certain characteristic, the proxy's proponent need only present anecdotal evidence of the characteristic-race proxy link.

III. UNITED STATES SUPREME COURT TREATMENT OF RACE PROXY ARGUMENTS

A. *Overview*

Through his value-diversity race proxy argument, Dean Kronman apparently hopes to satisfy strict scrutiny by positing that the discrimination is not based on race, but rather on some underlying characteristic for which race is a good proxy.[42] This is not a new argument.[43] In defending race-based discrimination in the past, government actors have often argued that they were only using race because of the underlying characteristic which it represented.[44] With the value-diversity

36. *See id.* at 879.
37. *See id.*
38. *See id.*
39. *Id.*
40. *Id.* 879-80.
41. An anecdote is a "short account of some interesting or humorous incident." THE AMERICAN HERITAGE DICTIONARY 108 (2d ed. Houghton Mifflin Co. 1985) (1982).
42. *See* Kronman, *supra* note 1, at 883.
43. Dean Kronman, however, asserts that this is a "new" justification. Kronman, *supra* note 1, at 864 ("At this point, a *new* argument in defense of affirmative action appeared that had the advantage of meeting both those objections at once." (emphasis added)).
44. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 265 (1978) (examining proxy argument).

race proxy argument, the only new aspect is the specific language of the proxy argument which has only recently come into popular usage.[45]

Many lower federal courts have recently addressed the value-diversity race proxy argument.[46] This part consists of U.S. Supreme Court cases which help to shed light on how that Court may decide the value-diversity race proxy question. In the following three decisions, the Court does not always refer to the word "proxy." Moreover, it is clear that with only one exception, the Court's analysis unfailingly rejects the race proxy syllogism. However, the Court does sometimes accept gender proxy,[47] age proxy, and

45. While the "proxy" language is relatively new, the Court has addressed "proxies" as such on several occasions. See *infra* notes 47-49, 69 and accompanying text.

46. Many of these cases have come up in the context of elementary and high school education. Most of these cases involved white plaintiffs seeking preliminary injunctions to block a school's use of race-conscious admissions programs purportedly based on "diversity." One element of a preliminary injunction is that the "plaintiff has exhibited a likelihood of success on the merits." Comfort v. Lynn School Comm., 100 F. Supp. 2d 57, 60-61 (D. Mass. 2000). Therefore, these courts have often had to speculate as to whether diversity *may* pass strict scrutiny in order to determine if the plaintiffs would ultimately be successful. The *Comfort* Court, without deciding the issue of whether diversity could pass strict scrutiny, *see id.* at 67, reversed the lower court's granting of a preliminary injunction, *see id.* at 69. Another case, *Wessmann v. Gittens*, 160 F.3d 790, 800 (1st Cir. 1998), held that a diversity program which primarily focused on race and ethnicity failed to meet even the requirements laid out by Justice Powell in *Bakke*. In *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 749 (2d Cir. 2000), the court reversed the district court's granting of a preliminary injunction in part because the Second Circuit "has not previously taken the position that diversity, or other non-remedial state interests, can never be compelling in the educational setting." However, in *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 134 (4th Cir. 1999), the Fourth Circuit reversed the district court's denial of a preliminary injunction, yet refrained from addressing the merits of the diversity argument stating, "We have not decided that the term diversity, as the term is used here, either is or is not a compelling governmental interest." This was the same approach taken by the Fourth Circuit in *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1552 (2000). Not surprisingly considering *Hopwood*, the Fifth Circuit has recently reiterated that diversity is not a compelling state interest for the purpose of justifying the use of racial preferences in admissions at a public university. *See* Lesage v. Texas, 158 F.3d 213, 221 (5th Cir. 1998), *rev'd on other grounds by* Texas v. Lesage, 120 S. Ct. 467 (1999). *See also* Podberesky v. Kirwan, 956 F.2d 52, 56 (4th Cir. 1992) (finding that a university scholarship program allegedly based on diversity was not in fact based on diversity where the scholarship was only available for black students). *But see* Hunter v. Regents of the Univ. of Cal., 190 F.3d 1061, 1067 (1999) (holding that a laboratory school's use of racial classifications to achieve a diverse student body met strict scrutiny).

47. *See* Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073 (1983). In *Norris*, the Court held that an annuity plan which provided lower benefits to women than men solely on the basis of sex was a violation of Title VII. *See id.* at 1074. However, in a concurring / dissenting opinion, several justices joined to explain that sex could be used as one of many proxies to determine distribution of benefits. *See id.* at 1096-1108.

mental-state proxy[48] arguments, at the minimum analyzing these types of proxies under less than strict scrutiny.[49]

B. Korematsu v. United States:[50] *Sadly, the Race Proxy Won*

This commentary begins its look at Supreme Court precedent with the one case in which the U.S. Supreme Court clearly and regrettably found that a race proxy passed strict scrutiny.[51] In the war-torn year of 1942, Fred Korematsu, an American, was living with his family in California in the family home.[52] Due to fear of enemy attack, the portion of California where Korematsu lived was under the military command of General DeWitt.[53] General DeWitt, no doubt an institutional expert in the military, made a determination that all those persons likely to be involved in sabotage and espionage activities should be removed from the area and held in relocation camps.[54] Based on this decision, General DeWitt issued an order "which directed that . . . all persons of Japanese ancestry should be excluded from that area."[55] Mr. Korematsu refused to obey the order, remained at home, and was subsequently charged and convicted for violating the order.[56]

Although the word "proxy" is nowhere mentioned in the decision, the only civil conclusion is that General DeWitt believed that race (that is, Japanese ancestry) was strongly linked to a propensity to commit espionage and sabotage.[57] Mr. Korematsu alleged that the application of the order against "none but citizens of Japanese ancestry amounted to a

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48. *See generally* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). The dissent correctly characterized this as a proxy case: "Similarly, that some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant variations in capacity do exist." *Id.* at 468 (Marshall, J., dissenting in part). The Court's opinion only called for rational basis scrutiny of such proxies. *Id.* at 446. ("To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.").

49. For another interesting proxy argument, *see* Rice v. Cayetano, 120 S. Ct. 1044, 1055 (2000) (explaining that "ancestry can be a proxy for race").

50. 323 U.S. 214 (1944).

51. *See id.*

52. *See id.* at 215.

53. *See id.*

54. *See id.* at 217.

55. *Id.* at 215.

56. *See id.*

57. One can make the argument here that no proxy, but mere racism, was involved in this decision. In fact, the *Korematsu* dissent makes just this point: "Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." *Id.* at 233 (Murphy, J., dissenting). However, this merely goes to point out an incipient danger of proxies—a proxy can easily be turned into a subterfuge. *See infra* note 144 and accompanying text.

constitutionally prohibited discrimination solely on account of race."[58] The Supreme Court, in turn, addressed what this commentary has identified as the two premises of the race proxy syllogism. First, it addressed the *Major Premise* by deferring to the military in its judgment regarding the dangers of sabotage and espionage (that is, that persons with such characteristics should be removed from the area).[59] Second, it addressed the *Minor Premise* by considering the strength of the proxy: "Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan."[60] The dissent properly characterized this and other evidence[61] proffered by the United States as anecdotal and unsubstantiated.[62] Nonetheless, the Supreme Court found the military had proved its case. Having found that the two premises were satisfied, the Court concluded that race could be used as a proxy to remove persons who presented a danger of espionage/sabotage.

The Court found that the military judgment regarding the link between the sought-after characteristics (that is, propensity to commit espionage or sabotage) and the race proxy were sufficient and therefore validated the military's use of a race proxy.[63] The searching question though is why the military could not mount an extensive inquiry and interview each individual to determine if that individual possessed the sought-after sabotage/espionage characteristics. The majority briefly brushed over this point in deferring to the military's judgment of the existence of an exigency.[64] The dissent asked this question in more forceful terms.[65]

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58. *Korematsu*, 323 U.S. at 217.

59. *See id.* at 218.This is logically the same as an institution of higher learning determining that persons with the value diversity characteristic should be admitted. It merely entails an institutional decision regarding what characteristics are sought after or desirable.

60. *Id.* at 219.

61. *See id.* at 237-38 (Murphy, J., dissenting) "Individuals of Japanese ancestry are condemned because they are said to be a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.... Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with facts as to certain persons being educated and residing at length in Japan." *Id.*

62. *See id.* at 236-37.

63. *See id.* at 223-24.

64. *See id.* at 218-19 ("It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group.").

65. *See id.* at 241-42 (Murphy, J., dissenting). Justice Murphy stated:

> No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land.... It seems incredible that under these circumstances it would have been

Importantly, Dean Kronman does not address the issue as to why use the proxy at all. Why not just look for the desired characteristic?

Later courts would characterize the *Korematsu* race proxy decision as follows: "Justices of that Court and legal scholars have commented that the decision is an anachronism in upholding overt racial discrimination as 'compellingly justified.'"[66] It seems odd that in light of such characterizations, the race proxy argument would again take on new life as a justification for affirmative action.

C. United States v. Virginia:[67] *Supreme Court Rejects a Gender Proxy*

In recent years, the Supreme Court has had several opportunities to review gender proxies.[68] Almost without fail, the Supreme Court has rejected these gender proxies, even in cases where it appeared that the gender proxy was "strongly linked" to the particular characteristic.[69] The recent Supreme Court decision striking down the male-only policy of the Virginia Military Institute (VMI) is one such case.[70]

VMI is an old and venerable military college with a proud lineage of successful graduates, both as servants of the nation and as leaders in business and industry.[71] The VMI training program involves the use of an "adversarial method," lack of privacy, and a harsh and very physically demanding lifestyle.[72] Until recently, VMI was also the sole male-only state-supported college in Virginia.[73]

> impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women.

Id. (Murphy, J., dissenting).

66. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

67. 518 U.S. 515 (1996).

68. *See, e.g.*, UAW v. Johnson Controls, 499 U.S. 187, 202 (1991) (rejecting sex as a proxy for strength even if it is generally a good proxy); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Orr v. Orr, 440 U.S. 268, 281 (1979) (rejecting sex as a proxy for need for child support even if there exists a statistically significant link); Craig v. Boren, 429 U.S. 190 (1976).

69. *See, e.g., UAW*, 499 U.S. at 202 ("We also required in *Dothard* a high correlation between sex and ability to perform job functions and refused to allow employers to *use sex as a proxy for strength although it might be a fairly accurate one.*" (emphasis added)); *Craig*, 429 U.S. at 204 ("Suffice to say that the showing offered by the appellees does not satisfy us that *sex represents a legitimate, accurate proxy* for the regulation of drinking and driving." (emphasis added)); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (holding that a proxy of family member dependency on the male, but not on the female was invalid in the armed forces).

70. *See Virginia*, 518 U.S. at 515.

71. *See id.* at 521-22.

72. *Id.* at 522.

73. *See id.* at 520.

During recent litigation challenging its male-only policy, VMI argued and proferred expert-created reports to "prove" that generally speaking, the VMI system was more appropriate for the training of men than women.[74] Further, VMI presented "proof" that men were better able to endure the physical challenges of VMI life than women.[75] Although the word "proxy" does not appear in the decision, this is nothing more than a proxy argument. The argument contains all the syllogistic essentials: the expert-determined institutionally valuable characteristic (*Major Premise*),[76] the "strong link" between gender (the proxy) and the desired characteristics (*Minor Premise*),[77] and the use of the gender-proxy to achieve the desired characteristics (*Conclusion*).[78]

Justice Ginsburg's response to the proxy presented in the *VMI* case provides a very succinct answer to the value-diversity race proxy syllogism:

> The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in *Reed v. Reed*. . ., we have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court . . . . State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." . . . [*S*]*ee J.E.B.* (equal protection principles, as applied to gender

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74. *See id.* at 523.

75. Justice Ginsburg explained:

> In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made "findings" on "gender-based developmental differences." . . . These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." . . . For example, "males tend to need an atmosphere of adversativeness," while "females tend to thrive in a cooperative atmosphere." "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do"; but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception."

Id. (citations omitted).

76. *See id.*

77. *See id.*

78. *See id.*

> classifications, mean state actors may not rely on "overbroad" generalizations . . .).[79]

It is indeed telling that the United States did not even feel it necessary to challenge Virginia's proof of the "proxy" link (i.e., the "estimation on average capacities or preferences" of men and women).[80] It was not necessary for the United States to challenge the strength of the proxy itself because, as Justice Ginsburg pointed out, the accuracy of the proxy does not matter: even if the character-proxy link is generally accepted and most women would not do well in the VMI environment, there exist women who could meet the physical requirements.[81] In other words, so long as there exist people who fall outside of the proxy, the gender proxy cannot be used in making admissions decisions. The race proxy argument, while internally coherent and persuasive, cannot be used because its cost on the individual and society is too great. So held Justice Ginsburg despite the undisputed fact that VMI admissions personnel were the experts in the field, and the characteristic/gender proxy link was not even challenged.

The issue before the *VMI* Court was a gender-based proxy. Indeed, the constitutional standard for gender-based discrimination is only that the state have an "exceedingly persuasive" justification.[82] Even though the proxy was not challenged, the Court did not allow the proxy to substitute for an actual inquiry into whether or not a particular woman would succeed

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79. *Id.* at 541-42.

80. *Id.* at 540-41.

81. Justice Ginsburg explained:

> The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect "at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach." . . . And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. . . . It is also undisputed, however, that "the VMI methodology could be used to educate women." . . . The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. "Some women, at least, would want to attend [VMI] if they had the opportunity," the District Court recognized, . . . and "some women," the expert testimony established, "are capable of all of the individual activities required of VMI cadets" . . . . The parties, furthermore, agree that "some women can meet the physical standards [VMI] now impose[s] on men." . . . In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's raison d'etre, "nor VMI's implementing methodology is inherently unsuitable to women."
> . . . .

Id. (citations omitted).

82. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

at VMI.[83] The detailed reports provided by the experts in the VMI case failed to satisfy even this less stringent standard. In the case of government discrimination based on race, the U.S. Supreme Court has continually applied strict scrutiny, not this lesser intermediate scrutiny ("exceedingly persuasive") standard. In light of this decision, it is difficult to see how any race proxy could pass muster.

VMI, whose admissions system arguably represented an extreme use of a proxy,[84] argued that it was not "stereotyping" women.[85] Indeed, a "stereotype" is merely a synonym for a weak characteristic / proxy link. In this sense, whenever an assumption about a group is called a "stereotype," a conclusory judgment is being drawn as to the strength of the proxy.[86] In fact, viewed this way, the proxy argument is not new at all. The *VMI* case also shows that the proxy argument has already been rejected by this nation's highest court, having failed to satisfy a standard even lower than the strict scrutiny it would face as a race proxy.

D. Batson v. Kentucky:[87] *Supreme Court Rejects a Race Proxy*

Batson involved a criminal trial in a Kentucky state court of a black man.[88] The prosecutor used his peremptory challenges to strike all four black persons from the jury, and an all white jury was selected.[89] Here, the prosecutor used race as a proxy for perceived biases and beliefs of the black prospective jurors.[90] Defense counsel alleged that the prosecutor's

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83. *See Virginia*, 518 U.S. at 550.

84. The VMI case was "extreme" because the proxy argument completely precluded women from attending the college. *See id.* at 520.

85. *Id.* at 549. A "stereotype" is a "conventional, formulaic, and usually oversimplified conception, opinion, or belief." THE AMERICAN HERITAGE DICTIONARY 1195 (2d ed. Houghton Mifflin Co. 1985). By the terms of the race proxy syllogism, a "proxy" based on race/ethnicity is merely the contention that a race is so "strongly linked" to a particular characteristic that race can be used as a stand in for that characteristic. In this sense, use of a race proxy can be viewed as a form of super-stereotyping. "Virginia maintain[ed] that these methodological differences are 'justified pedagogically,' based on 'important differences between men and women in learning and developmental needs,' 'psychological and sociological differences' Virginia describes as 'real' and 'not stereotypes.'" *Virginia*, 518 U.S. at 548 (quoting Respondent's Brief at 28). The above quotation makes it fairly clear that in denying that it was merely "stereotyping" women, VMI was arguing that it had a strong characteristic-gender proxy link.

86. *See supra* note 85 and accompanying text.

87. 476 U.S. 79 (1986).

88. *See id.* at 82.

89. *See id.* at 83.

90. *See id.* at 138 (Rehnquist, J., dissenting).

> The use of group affiliations, such as age, race, or occupation, as a "proxy" for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long

actions violated petitioner's rights under the Sixth and Fourteenth Amendments.[91]

The Supreme Court noted that "competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence as presented at trial."[92] Further, the Court conceded that "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried."[93] Although the Court recognized that the prosecutor is entitled "for any reason at all" to exclude jurors, the Court specifically stated: "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[94]

One element of Dean Kronman's anecdotal proof that race is a good proxy for value diversity is that blacks and whites reacted to the O.J. Simpson verdict differently.[95] He also posited that "blacks and whites differ, to a statistically impressive degree, in their assessment of the fairness with which capital punishment is administered in the United States."[96] In light of this assertion, consider that during voir-dire, a prosecutor can freely question a prospective juror. After the voir-dire, the prosecutor can certainly determine that a particular juror held the foregoing views which Dean Kronman alleges are "strongly linked" to race.[97] Clearly, the prosecutor could rightfully strike this particular juror from the panel as biased. *A fortiori*, if one accepts the value-diversity proxy syllogism with the "strong link" between viewpoint and race, why should a prosecutor be precluded from using race as a proxy for the same views?

> been accepted as a legitimate basis for the State's exercise of peremptory challenges.

Id. at 138 (Rehnquist, J. dissenting).

91. *See id.* at 83.

92. *Id.* at 87.

93. *Id.* at 89 (quoting United States v. Robinson, 421 F. Supp. 467, 473 (Conn. 1976)).

94. *Id.*

95. *See* Kronman, *supra* note 1, at 879.

96. *Id.*

97. For instance, if after questioning the jurors in a death penalty, the prosecutor felt that certain prospective jurors held the view that the death penalty was inherently unfair, he could strike those people from the jury. The same is true if the prosecutor believed those individuals thought the criminal justice system was unfair. Dean Kronman asserts that these group views and values are so "strongly linked" that admissions personnel should look merely to race. *Id.* at 879. *A fortiori*, the state's interest in a fair trial would seem to compel the same conclusion in the prosecutor's selection of an unbiased jury. Such a use might also be considered "benign." *See infra* note 129 and accompanying text.

The *Batson* Court clearly held that a prosecutor cannot use race as the proxy.[98] The *Batson* case makes it clear that a prosecutor during jury selection could never take notice of Dean Kronman's assertion that:

> [T]he correlation between being white, on the one hand, and black or Hispanic on the other, and holding a certain set of beliefs about issues of moral and political importance—about the honesty of the police, the fairness of the courts, the openness of the world of work to all with energy and talent—is bound to be a strong one.[99]

It is true that the use of race proxies may increase efficiency because they allow the proxy proponent to eliminate large groups of people without having to make individualized reviews. In fact, proponents of race proxies would find a compelling argument in Justice Rehnquist's dissent in *Batson:* "Indeed, given the need for reasonable limitations on the time devoted to voir dire, the use of such [race] 'proxies' by both the State and the defendant may be extremely useful in eliminating from the jury persons who might be biased in one way or another."[100]

E. *Conclusion for Supreme Court Treatment of Proxies*

This section has showed that the Supreme Court has generally treated proxies negatively, even at standards lower than strict scrutiny. Therefore, proponents of race proxy arguments, such as the value-diversity argument, are left in the awkward position of having to argue the persuasive value of *Korematsu* and Justice Rehnquist's *Batson* dissent. This is not an enviable position. As one Federal district court recently explained, "[T]oday, the decision in Korematsu lies overruled in the court of history."[101]

IV. THE DANGEROUS RACE PROXY SYLLOGISM: A HYPOTHETICAL

Dean Kronman highlights in his essay that while race is a good proxy for diversity of values, it is only a "contingent" one at best.[102] Based solely

98. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986).
99. Kronman, *supra* note 1, at 880.
100. *Batson,* 476 U.S. at 138-39 (Rehnquist, J., dissenting).
101. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).
102. *See* Kronman, *supra* note 1, at 885. Dean Kronman explains:

> Diversity of values *is* permanently tied to the ends of liberal learning. Diversity of race and ethnicity is strongly but only contingently tied to these same ends, and

on this proxy, the value-diversity race proxy argument would justify an institution's choice between two candidates based on the candidate's race (serving as a proxy) without any inquiry as to whether the candidate does indeed possess the desired characteristics. The race proxy argument works best, and is least abhorrent in the contemporary environment of higher education, where experts have determined that diversity of values is an asset.[103] But, the race proxy argument could find application elsewhere.

Putting aside the distinction between government and private discrimination, consider a hypothetical conservative Atlanta law firm whose clients are 99% "white" businessmen. No doubt the senior partners of this law firm would be those best qualified to determine the proper mix of associates in their firm. Suppose that these institutional experts determined that they needed individuals with similar values in their law firm, values they perceived to be shared with their clients.[104] Indeed, studies of large Japanese firms have shown that similarity of values might even be a greater asset than value diversity.[105] Assume also that these partners expend valuable time every year reviewing numerous employment applications. These partners would certainly like a more efficient method of sorting through applications.

According to the value-diversity race proxy argument, the partners should be able to summarily reject all black applicants if being black is generally a good proxy for holding values and judgments different from those sought after. Alternatively, black applicants could be rejected for not knowing how to interact with white clients.[106] The firm could answer any

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> the failure to keep this distinction in view is likely to produce a confused conception of the aims of liberal education generally.

Id.

103. *See id.* at 871-77.

104. By making this asserting part of the hypothetical, the hypothetical not only addresses race proxies generally, but the instant race proxy as well, the value-diversity race proxy.

105. *See* DINESH D'SOUZA, THE END OF RACISM 334 (1996).

106. Dean Kronman hypothesized that "a police department is better able to provide physical security to the residents of a mostly black neighborhood if it hires more African-Americans (on the reasonable assumption that a racially mixed police force will present a better image to, and have more authority within, the neighborhood in question)." Kronman, *supra* note 1, at 885-86. At first blush, it may sound antiquated to argue by analogy then that white attorneys would "present a better image to, and have more authority with" their white clientele. In fact, a civil society would look down on such a clientele as closed-minded and racist. In this light, it seems quite surprising to hypothesize that a majority black neighborhood would somehow be so closed-minded as to only accept a black police force. There are a couple of interesting cases addressing diversity within police forces. In *Hayes v. City of Charlotte*, 10 F.3d 207 (4th Cir. 1993), the Fourth Circuit affirmed a partial summary judgment for a group of white police officers who brought suit challenging the police department's use of racial preferences in the promotion process:

discrimination charges by merely running through the value-diversity race proxy syllogism: we did not discriminate based on race, but rather upon the underlying characteristics (*Major Premise*) for which race serves as a proxy (*Minor Premise*). Indeed, proponents of value-diversity could not even argue the weakness of this proxy because their own argument requires merely anecdotal evidence of a proxy connection. Of course, if the partners passed upon some qualified attorneys along the way (i.e., people for whom race was not an accurate proxy for values), that is the price of efficiency, so long as the proxy is "strongly linked" to the sought-after characteristic.

The proxy argument can be extended anywhere[107]—perhaps, if the institutional judgments were correct and the proxies were researched in good faith, the institution could perform its internal mission better, but the cost to the individual would be too great. This is precisely why the Supreme Court has almost unfailingly[108] required a "compelling governmental interest" before the state may discriminate based upon race.[109] As the following discussion on "racial profiling" shows, race proxies exact an immeasurable cost on society in other ways as well.

V. A CURRENT USE OF RACE PROXIES: RACIAL-PROFILING BY POLICE

There has been much discussion recently about "racial profiling" by police.[110] "Racial profiling" involves the police developing a physical

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> Without deciding whether achieving a greater racial diversity within the police department is a compelling state interest that might justify awarding promotions on the basis of race, when not directed at past discrimination, we agree with the district court that the evidence offered by the City to establish the benefits of such diversity is not sufficient to create the genuine issue of material fact necessary to survive summary judgment.

Id. at 213; *see also* Hiller v. County of Suffolk, 977 F. Supp. 202, 206 (E.D.N.Y. 1997) (stating that diversity is not a compelling state interest for purposes of justifying an affirmative action program in police cadet admissions).

107. For example, the proxy argument could be extended to public high schools as well. In the recent rash of school shootings, perhaps educational experts could come up with the perfect profile of a school shooter: certain GPA, lack of extra-curricular activities, white, male. Perhaps, they could even provide numbers that proved the statistical significance of this proxy such that it was even more plausible than the anecdotal race-values proxy. Certainly, if the vague and amorphous diversity of values argument justifies trumping individual rights, then this situation involving school safety should provide an even more compelling justification than value-diversity.

108. There was a brief period in which the Court experimented with a lower level of scrutiny for "benign" racial classifications. *See infra*, Part VI (discussing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)).

109. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

110. *See* Steve Strunsky, *A Weariness on the Street*, N.Y. TIMES, July 30, 2000, at 6(2) (explaining some of the outrage behind racial profiling).

profile of a criminal (i.e., what a criminal "looks like" such as dress, location, and importantly, race) and then carefully watching or stopping people who meet that profile.[111] The profiling of criminals generally has a fairly long history.[112] "The Supreme Court has never expressly approved or disapproved the use of such profiles."[113] Police officers who use racial profiling would no doubt justify their use based on these officers' extensive experience. Perhaps they would say, "We have arrested thousands of drug pushers, so we know what they 'look' like, including race. In fact, 75% of the time our suspicions are correct." Hypothesize for the moment that a study exists, based on arrest records, which proves that the officers' "racial profile" is 89%[114] accurate (to exceed the anecdotal threshold of the value-diversity race proxy argument).

The "racial profiling" argument set forth above would meet each premise of the proxy syllogism so that race may serve as a proxy for the underlying characteristic (criminal drug possession). Here is the argument placed squarely in the syllogism:

> *Major Premise.* Police have determined that they should arrest people who possess illegal drugs.
> *Minor Premise*: Based both on studies (our hypothetical) and on their own observations (anecdotal evidence), 89% of people who dress a certain way, loiter in a certain location, and, the clincher, are of a certain race, possess illegal drugs. In other words, these characteristics are "strongly linked" to drug possession.
> *Conclusion*: Therefore, the police are justified in using race (along with the other profile characteristics) to pay increased attention (e.g., "citizen's encounters"[115]) to these persons.

The syllogism may sound plausible, but before accepting racial profiling, we should go back and consider why there has recently been so

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111. *See id.*

112. *See* CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION 156-58 (2nd ed. (1998)). Professor Slobogin notes the early success of a "hijacker profile." *Id.* He also notes the success of the "drug courier profile." *Id.*

113. *Id.* at 157.

114. This number is completely hypothetical. The author chose a relatively high correlation to show that no matter how "strongly linked" the characteristic is, the cost on society is still too great.

115. A "citizen's encounter" is a level of police-citizen interaction much lower than an arrest, and even lower than a stop. An arrest requires probable cause and a stop requires reasonable suspicion. However, a "citizen's encounter" does not even require reasonable suspicion. A "citizen's encounter" may even be entirely random. *See* Pritchett v. State, 677 So. 2d 317 (Fla. 1st DCA 1996) (holding that vague tip based on race was not adequate to justify officer's raising the level of stop from a citizen's encounter to an investigatory stop).

much outrage over it.[116] Speaking of criminal profiling generally, Professor Slobogin states that "if a profile is proven to show the requisite correlation with crime, and it is clear that the profile was actually used by police in deciding to act, rather than made up afterward, then its use should not be prohibited."[117] The foregoing statement merely recognizes the increased efficiency which flows from using proxies. However, Professor Slobogin's specific response to criminal profiling using *race* as a proxy is starkly different:

> These stops should not be permitted, even in the unlikely event the aforementioned percentage rose to the level necessary to authorize a stop [i.e., the proxy was really accurate] (which, in addition to infringing the autonomy interest, involves the stigmatization associated with being singled out on the public street by the police, as well as the possibility of perceived harassment).[118]

The argument is simply that even if the character-race proxy is good and increases the ability of the police to perform its "internal mission"[119] of suppressing crime, the use of "factors such as race denigrates the *state's* interest in maintaining a democratic society and the allegiance of the population."[120] The societal costs of using race as a proxy are simply too great.

Racial profiling is generally against the fabric of our nation's character and history where a person should be judged by his government based on his individual merits and not based on perceived or "strongly linked" group propensities.

VI. REFINING DEAN KRONMAN'S PROPOSALS

A. *Dean Kronman's Proposals*

Dean Kronman suggested two developments to aid his position. He proposed "a national reaffirmation of our commitment to affirmative action as an instrument of distributive justice and the validation of this commitment in our courts."[121] In addition, Dean Kronman proposed that

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116. *See* Strunsky, *supra* note 110.

117. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 82 (1991).

118. *Id.* at 85-86.

119. *See* Kronman, *supra* note 1, at 865-66 (explaining the distinction and overlap between internal and external missions).

120. Slobogin, *supra* note 117, at 82.

121. Kronman, *supra* note 1, at 895.

"there would be explicit recognition, by the Supreme Court of the United States, of the constitutionality of using race-sensitive admissions programs to promote the internal educational good of diversity."[122]

This first proposal argues that *Hopwood* was wrong and that distributive justice is a compelling justification for government race-based discrimination. As Dean Kronman stated early in his essay, distributive justice requires "too many controversial assumptions, both factual and moral, to ever be fully convincing."[123] Therefore, this commentary leaves the distributive justice proposal at that, an amorphous argument with little hope of a reconciliation of views.

As to the second proposal, there seems to be more potential for consensus. Validation of the value-diversity race proxy argument by the U.S. Supreme Court could come about in either one or both of two ways. First, the U.S. Supreme Court could hold that this particular race proxy[124] meets the strict scrutiny standard. Alternatively, the Supreme Court could hold that the value-diversity race proxy is only required to meet some lower level of review and that it does indeed meet that level.

Dean Kronman does not suggest which of these two approaches is preferable or if a combination of both would be ideal. Based on Supreme Court decisions discussed in this commentary, it seems that the value-diversity race proxy could never meet strict scrutiny so long as such scrutiny remained strict in fact.[125] This commentary has already shown the danger of removing strict scrutiny review, especially where other more distasteful proxies may be statistically more valid than the vague and amorphous value-diversity proxy. In fact, *Korematsu* provides an excellent example of the mischief judicial proxies can cause when strict scrutiny is not strict in fact.[126] Now, this commentary turns to the second of the two possibilities, that of a lower standard of review for the *value-diversity* race proxy, instead of for all race proxies in general.

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122. *Id.*

123. *Id.* at 864.

124. Specifically the value-diversity race proxy, considered as a separate argument from race proxies in general.

125. Indeed, *Korematsu* is the only 20th Century Supreme Court case this author was able to locate where the Court found that a race proxy did in fact meet strict scrutiny. Korematsu v. United States, 323 U.S. 214, 223 (1944).

126. No doubt many people of the time believed the Japanese ancestry-espionage proxy to be fairly persuasive, especially in a time of war. In England, the government, rather than use a proxy, interviewed each and every citizen of close German or Italian ancestry to determine their threat to the country. America, however, relied on the race proxy. In England, very few English subjects of Italian or German ancestry were incarcerated after the interviews, whereas in America, the entire West coast Japanese-American population was interned. The race proxy left the individual out of the formula, and is forever a bleak spot on our American history. It would take nearly forty years for a follow-up *Korematsu* case to judicially acknowledge this error. *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

B. *A More Refined Proposal: A Lower Standard for Benign Discrimination*

In *Metro Broadcasting, Inc. v. FCC,*[127] the Supreme Court allowed a lower standard of review for "benign" racial classifications.[128] Under this approach, if the value-diversity race proxy were labeled "benign," it would need only pass rational basis scrutiny. This approach is not without problems, though, such as the definition of "benign" and who should be allowed to make this determination.[129] This was the primary reason the Court reversed itself only five years later in *Adarand Constructors, Inc. v. Pena,*[130] and reaffirmed its earlier position that all racial classifications are subject to strict scrutiny.[131]

Although the *Adarand* Court emphatically ruled out this use of a dual standard towards race proxies, it seems to present less problems than the

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127. 497 U.S. 547 (1990).

128. *Id.* at 564-65. *Metro Broadcasting* involved a suit by several plaintiffs challenging the validity of programs for distribution of broadcast licences administered by the Federal Communications Commission (FCC). *See id.* at 553. The plaintiffs alleged that these programs unlawfully discriminated against non-minorities because they gave special consideration to minority applicants. *See id.* at 597. The FCC defended its programs on the grounds that such programs were necessary to increase diversity of viewpoint over the broadcast airwaves. *See id.* at 552-54. Clearly, this is a proxy argument in that the FCC alleged that increasing diversity of race in ownership of broadcast licenses would increase diversity of programming.

129. The designation of a racial classification (herein read race proxy) as "benign" is largely subjective. Presumably "benign" is determined by the intention of the proxy proponent and would no doubt involve some type of cost/benefit analysis. For the value-diversity race proxy, the proponent would argue that the benefit is great: increasing diversity of values within the educational institution. He would further argue that the cost is slight: only those few "white" individuals who would have been admitted "but for" affirmative action paid any price. Therefore, the proponent would conclude that such a race proxy is "benign." The problem is that one could use the same reasoning to conclude that racial profiling by police is "benign." Police do not have time to stop everyone in the neighborhood. Perhaps the police are dealing with a relatively accurate proxy. The benefit is clear-safe streets for the kids to play. The cost, one might argue, is only imposed on those unfortunate individuals for whom the proxy was not accurate. So long as there are benefits, and those benefits are spread widely (as in both value diversity and neighborhood safety), and costs which are concentrated narrowly (one white applicant or a few unfortunate innocent motorists), it seems there can never be an objectively "benign" racial proxy.

130. 515 U.S. 200 (1995).

131. *See id.* at 227.

> [W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled.

Id.

other proposition[132] set forth by Dean Kronman. Indeed, had *Metro Broadcasting* not been overruled, there would be no question that benign race proxies (e.g., the value-diversity race proxy), would be permissible.[133]

VII. A JUSTIFICATION MADE FOR LITIGATION: SUBTERFUGE IS USUALLY A BAD THING

This commentary has demonstrated that race proxies have a lackluster judicial track record. Further, the thin line between a "strongly linked" race proxy and a stereotype necessarily makes civil people feel uncomfortable. As such, this commentary will now explore how it is that a race proxy is currently being held up as the only justification of affirmative action.[134]

It is appropriate to start this discussion with a passage from Oliver Wendell Holmes:

> The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career . . . .

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132. The recognition of "distributive justice" as a legal justification for affirmative action.

133. The *Metro Broadcasting* decision is exactly the type of approval Dean Kronman is seeking from the Supreme Court when he proposes: "The first would be an explicit recognition, by the Supreme Court of the United States, of the constitutionality of using race-sensitive admissions programs to promote the internal educational good of diversity." Kronman, *supra* note 1, at 895. In *Metro Broadcasting*, a majority of the Court specifically stated:

> We hold that . . . race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives . . . . We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective.

Metro Broadcasting, 497 U.S. at 564-66.

134. During his lecture, Dean Kronman pointed out that the value-diversity race proxy argument is the sole argument being relied upon by the University of Michigan in their current suit to defend their affirmative action program. *See* Gratz v. Bollinger, 183 F.R.D. 209 (E.D. Mich. 1998), *rev'd by* Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999); *see also* Anthony T. Kronman, 2000 Distinguished Dunwody Lecture: *Is Diversity in Higher Education a Value?* (April 2000) (transcript on file with the Florida Law Review).

> The subject under consideration illustrates this course of events very clearly.[135]

In the above passage, Holmes explains how a remedy may take on a life of its own, beyond the original justification for which it was created.[136] Dean Kronman agrees that affirmative action, which also started out as a remedy, followed this sort of sequence: the perceived problem of unequal distribution of opportunities lead to the creation of the affirmative action remedy.[137] Once the distributive justice justification failed, affirmative action was left as a remedy without any legal justification.[138] Seeking to preserve the remedy, affirmative action proponents came up with the value-diversity race proxy justification.[139] In more eloquent words, "[s]ome ground of policy [was] thought of, which 'seem[ed] to explain [affirmative action] and to reconcile it with the present state of things.'"[140]

The Supreme Court, speaking through Justice Ginsburg, has expressed disapproval of such justifications specifically manufactured for litigation: "The justification must be genuine, not hypothesized or invented *post hoc*

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135. OLIVER W. HOLMES, THE COMMON LAW 5 (Dover Publications 1991) (1881) (discussing early forms of liability).

136. *See id.*

137. Kronman, *supra* note 1, at 863.

> The Common aim of these programs [Affirmative Action] was to increase the share of various social and economic goods—jobs, contracts, educational opportunities and the like—that disadvantaged minorities enjoy, and thereby change the background conditions that frustrate the achievement of racial justice .... [A]ffirmative action is essentially a program of redistribution whose goal is to increase the wealth and opportunities that disadvantaged groups possess ....

Id.

138. *See id.* at 867 ("In recent years, moreover, the appeal of the diversity argument has grown as the defense of affirmative action on external grounds has been rejected in the courts and repudiated at the polls.").

139. If affirmative action were a sincere remedy for a deficit of value diversity, one would have expected to see the following phenomenon: Due to a deficit of value diversity, a university would have invented the remedy of race-conscious affirmative action. Neither Dean Kronman nor other supporters of value-diversity race proxies purport this to be so. Rather, value diversity proponents readily admit affirmative action came before the diversity justification, and that the race proxy justification had its inception with Justice Powell's comments in *Bakke*. *See* Kronman, *supra* note 1, at 864-65 (explaining that this "new argument, emphasized by Justice Powell in his concurring opinion in the *Bakke* case, advanced a simple and attractive claim: that the presence of minority students in significant numbers is itself vital to the success of the educational enterprise in which colleges and universities are engaged").

140. The portion in quotations is borrowed, out of context, from Justice Holmes' seminal work. *See* HOLMES, *supra* note 135, at 5.

in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences . . . ."[141]

This phenomenon of the justification coming after the remedy may help to explain judicial hostility towards the value-diversity race proxy justification.[142] Even more to the point, this phenomenon explains the demonstrated ill-fit of the use of a race proxy as the justification for the progressive notion of affirmative action.[143] Indeed, this is because the value-diversity race proxy has existed, from its inception, as nothing more than a subterfuge for other judicially-rejected justifications.[144]

VIII. CONCLUSION

While accepting that diversity of values is essential to a liberal education, this commentary has demonstrated that the value-diversity race proxy argument will fail as a justification for affirmative action. Analogous race proxies have already been rejected by the Supreme Court. In addition, the societal costs of recognizing "race proxies" are simply too great. Judicial recognition of the value-diversity race proxy justification would, as shown throughout this commentary, imperil our right to be judged as individuals, the one unquestioned legacy of our nation's founding.

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141. United States v. Virginia, 518 U.S. 515, 533 (1996).

142. *See* Hopwood v. Texas, 78 F.3d 932, 944-48 (expressing disapproval of the value-diversity race proxy).

143. It also helps to explain why affirmative action supporters would latch onto the concept of a proxy, instead of seeking out value diversity by way of individual inquiries. The *Hopwood* Court makes this point:

> Instead, individuals, with their own conceptions of life, further diversity of viewpoint. Plaintiff Hopwood is a fair example of an applicant with a unique background. She is the now-thirty-two-year-old wife of a member of the Armed Forces stationed in San Antonio and, more significantly, is raising a severely handicapped child. . . . We do not opine on which way the law school should weigh Hopwood's qualifications; we only observe that "diversity" can take many forms. *To foster such diversity, state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race.*

Id. at 946-47 (emphasis added).

144. During the question-answer period of Dean Kronman's lecture, one professor noted the similarity in results achieved through programs based on strict quotas (distributive justice) and the value-diversity race proxy justification. The professor posited that this seemed to indicate that the race proxy argument is a mere "subterfuge" argument to placate the courts in light of the failure of the distributive justice argument. Dean Kronman replied, "Sometimes, subterfuge is a good thing." *See* Author's Original Notes of Dean Kronman's Lecture. While it is true that "sometimes subterfuge is a good thing," as this commentary has shown, most of the time, it is not.