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AFFIRMATIVE ACTION: BETWEEN THE OIKOS AND THE COSMOS
REVIEW ESSAY: RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW
AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY
UNIVERSITIES WON'T ADMIT IT

Harry G. Hutchison *

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* Professor of Law, George Mason University School of Law, Visiting Fellow, Harris Manchester College, University of Oxford. Earlier drafts benefited from generous comments provided by Elizabeth McKay, Joseph Hartman, and Robert Sedler. The usual caveat applies. My research was funded by the Law & Economics Center, GMUSL.
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I. INTRODUCTION

Plainly, one need not be an absolutist about justice in order to accept that sometimes justice, perhaps even cosmopolitan “justice[,]” has to be sacrificed . . . for the sake of certain political considerations, including the avoidance of a nation’s disintegration.” At the same time, even a nonabsolutist must realize that the United States has made progress toward the realization of a therapeutic culture and the creation of what Philip Rieff calls the “psychological man,” who is indifferent to the ancient question of legitimate authority so long as the powers that be preserve social order and manage an economy of abundance. Within the boundaries of such a milieu, terms like racial progress, affirmative action, and racial preferences are increasingly explained in practice by the rationale of diversity. This move displaces the previously ascendant justification of race-conscious decision making as a form of remediation.


2. Id. at 25.

3. PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD 20 (40th Anniversary ed. 2006). Indifference to authority so long as the social order is preserved and the economy grows nicely may be consistent with detachment liberalism, which attempts to tame divisiveness by keeping the public sphere detached from strong belief and relegates such beliefs, including strong truth claims, to the private sphere in favor of a spirit of reasonableness. See Steven D. Smith, Educating for Liberalism, 42 U.C. DAVIS L. REV. 1039, 1042–43 (2009).

4. See Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”)

5. See, e.g., Nancy Leong, Racial Capitalism, 126 HARV. L. REV. 2152, 2161–62 (2013) (quoting U.S. COMM’N ON CIVIL RIGHTS, STATEMENT ON AFFIRMATIVE ACTION 2 (1977), available at http://www.usccr.gov/auction/state77.pdf) (observing that the concept of affirmative action emerged gradually, and that diversity was not always its express or implied rationale); see also Robert A. Sedler, Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California, 17 SANTA CLARA L. REV. 329 (1977) (supporting race-conscious affirmative action designed to alleviate the shortage of minority lawyers and as a vehicle to ensure the equal participation of African Americans and other racial minorities in all important areas of American life).
does not signify that as the concept of diversity marches across the undulating terrain of higher education, it is always and everywhere, incompatible with remediation. However, it does mean that not all forms of diversity are necessarily compatible with the goal of compensation or correction. That claim seems particularly true when diversity operates as part of a calculus designed to encourage students to adopt a stance of detached neutrality that produces “hollow” and highly standardized graduates, as opposed to an approach that encourages graduates to be highly conscious of the particularities of their birth as well as where they are situated in a particular history.

In our current epoch, evolving beyond the idea of correcting or compensating for past, present, or perhaps future discrimination, affirmative action is linked inescapably to much of the language and sentiments expressed by the Supreme Court in *Regents of the University of California v. Bakke.* 

Conjuring up notions of academic freedom and deferring to the expertise of university administrators, Justice Powell imagined the nation’s classrooms teeming with individuals of different races, and, thus, conducive to a robust exchange of ideas. Guided by this deduction, Justice Powell identified diversity’s worthy contribution to higher education and the nation as a substantial factor that could outweigh Equal Protection Clause challenges. Thus, characterized and premised on contemporary conceptions of academic freedom, diversity satisfied Justice Powell, and later the Supreme Court, as a compelling interest. Despite the fact that neither the principal nor amicus briefs justified the University of California’s program on the basis of educational diversity, Justice Powell’s identification of the pursuit of a diverse population as a defendable element of a university’s educational mission became part of a lengthy process that legitimized affirmative action and diversity as institutions of higher education. Institutions, following Douglass North, refer to the “humanly devised constraints that structure political, economic, and social interaction.” They consist of both informal constraints such as sanctions, taboos, customs, traditions, and codes of conduct, as well as formal rules such as

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7. Id. at 1047.
9. Id. at 313 (plurality opinion).
10. See id. at 310–15; see also Leong, supra note 5, at 2162 (citing Bakke, 438 U.S. at 306–14) (discussing how Justice Powell’s opinion specified that the educational benefits of diversity could justify race-conscious admission programs).
11. See infra Part II.C.
12. I am indebted to Professor Sedler for this observation. E-mail from Rober A. Sedler, Prof. of Law, Wayne State Univ. Law Sch., to Harry G. Hutchison, Prof. of Law, George Mason Univ. Sch. of Law (Aug. 12, 2014) (on file with the author).
13. Leong, supra note 5, at 2163.
constitutions, laws, and property rights.”

Whether the Bakke opinion, which gave rise to formal or informal codes of conduct, has or has not dimmed the fervor of the debate over race-conscious admissions, any tempered discussion of the wisdom and efficacy of the establishment of affirmative action and racial preferences as institutions of the late modern world likely requires an agreement on a common language and the ability to settle certain facts, coupled with some common notion of the good. Equally true, the intensity of this debate is unlikely to diminish unless and until the nation accepts some commonly agreed upon view that a particular people (African Americans) have a desire for justice.

The debate is made more problematic due to the presence of a few awkward facts. First, although the pursuit of diversity has been lauded by both universities and the Supreme Court as a compelling interest, the nation’s public schools are increasingly characterized by de facto segregation. Second, although talk of equality, including epistemic equality, and rights permeates the West, evidence surfaced showing that “inequality in America at the start of the twenty-first century is greater than in the slave-based economy of imperial Rome

15. Id.
16. James Davidson Hunter, To Change the World: The Irony, Tragedy, & Possibility of Christianity in the Late Modern World 200–12 (2010) (suggesting that for most of human history communities and societies existed in relative isolation and were thus insulated from exogenous social and cultural influences, but that pluralism exists in America today without a dominant culture).
18. See, e.g., Boaz Miller & Meital Pinto, Epistemic Equality 3 (Dec. 9, 2013) (working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365541 (asserting, among other things, that the social position, including race, gender, or economic power, of an individual or group in a community should not determine who or what perspectives are taken seriously in the community in question and accordingly the problem of epistemic equality is regarded as a distributive one that may be solved by encouraging participation according to the principle of “tempered equality of intellectual authority,” meaning that participation in the knowledge-generating discourse should be allocated according to members’ relevant expertise in the subject at hand, irrespective of social power, which is influenced by properties such as gender, race, and class).
19. See, e.g., John Gray, Post-Liberalism: Studies in Political Thought 14 (1993) [hereinafter Gray, Post-Liberalism] (suggesting that talk of anti-discrimination policy and minority rights only incidentally concerns remedies for past injustices but, in reality, has become a project of collective self-assertion); Nancy E. Dowd, Unfinished Equality: The Case of Black Boys, 2 Ind. J.L. & Soc. Equality 36, 36 (2013) (asserting that the most powerful way to achieve social justice is vulnerabilities analysis, which moves us away from a hierarchy of disadvantage and requires the state to explain and correct structural inequalities); Lia Egerson, The Promise and Pitfalls of Empiricism in Educational Equality Jurisprudence, 48 Wake Forest L. Rev. 489, 489 (2013) (stating that, during “the last half-century[,] there [was] a growing national support for racial equality”).
in the second century.”20 Third, while human rights are all the rage within the hallowed halls of academia, the forces of xenophobia are on the march throughout much of the Western world.21 Finally, “if belief in human rationality was a scientific theory[,] it would long since have been abandoned.”22 John Gray amplifies the paradox of contemporary confidence in the notion of rationality:

The evidence of science and history is that humans are only ever partly and intermittently rational, but for modern humanists the solution is simple: human beings must in [the] future be more reasonable. These enthusiasts for reason have not noticed that the idea that humans may one day be more rational requires a greater leap of faith than anything in religion.23

With this claim in view, a careful inspection of what is dead and what is living in liberalism indicates that doctrinal liberalism’s pursuit of a unique set of basic principles with universal prescriptive authority may have difficulty withstanding the force of strong indeterminacy and radical incommensurability among values, leaving us with only the hopeful prospect of a civil society24 as we confront the value-pluralism that defies philosophical attempts to arbitrate deep conflicts about ultimate values.25 Affirmative action is an exemplar of the deep conflicts that plague postmodern society, a society that toils to attain the good without necessarily committing to the true.26 The postmodern society is fittingly cognized as one where an individual is repelled by the notion of making contact with something larger and more enduring than oneself.27 Against this backdrop, even a tempered conversation regarding the often intractable issues surrounding affirmative action is likely to produce a rather fragile ecosystem. While ecological fragility may be partially alleviated by pondering the impact of similar policies outside of the comfort of one’s own country, perhaps as part of an inquiry that is necessary to understand an increasingly interlocking world28 it

21. Id. at 70.
22. Id. at 72.
23. Id. at 75. Of possible importance, Gray later shows that while Freud believed that “religion was the primary example of the human need for illusion, . . . [he] later . . . came to realize [that] the illusions of religion contain truths that cannot be conveyed in other ways.” Id. at 98.
25. Id. at 288.
28. Paul Schiff Berman, Conflict of Laws, Globalization, and Cosmopolitan Pluralism, 51 Wayne L. Rev. 1105, 1106-12 (2005) (citations omitted) (conceiving an expanded vision of community and citizenship that takes us beyond the nation-state, fixed attributes like geographical proximity, shared history, or face-to-face interaction and toward a community composed of
is equally likely that the pursuit of universalizing insights and values induces fracture when such explorations give way to moral superiority.  

Conceding that value-pluralism is in the postmodern air, this essay has two overlapping goals. First, to review Sander and Taylor’s book, Mismatch: How Affirmative Action Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It (hereinafter Mismatch), and second, to situate the authors’ claims in context. Context is supplied by concentrating on three things: (1) the contradictions embedded in the history of race relations in the modern world, a volatile coda that makes few things clear except that “race-blind” conservatives have thus far failed to make a moral case against allowing race to play some limited, but perhaps direct role in preferential programs, and that affirmative action supporters have failed to make the case that black Americans still live in an overtly racist purgatory patrolled by “white supremacy”; (2) the paradoxes of Supreme Court jurisprudence; and (3) the gulf between, the cosmopolitan ideal predicated on appeals to Americans as citizens of the world who are provoked by reason and love of humanity and bounded only by universal moral obligations, and on the other hand, a vision that sees citizens as individuals who are constrained by the primacy of their commitment to the nostos composed of the local community of one’s birth and the particularities of family and nation.

An examination of modern contradictions, judicial or otherwise, coupled with a somewhat speculative balancing of opposite views within the gulf that divides the cosmos from the oikos will neither settle the still simmering debate that surrounds affirmative action and its accompanying diversity rationale nor resolve all of the conflicting claims that originate with the publication of Mismatch. This review, however tentative its conclusions, may or may not succeed in lowering the temperature by encouraging a pursuit of deliberation that is shorn of the obfuscation and appeals to whimsy that surface when commentators endeavor to instantiate an ideal society predicated on an over reliance on Kantian abstractions that continue to bedevil commentators and jurists. Similarly, it is

symbolic identification and social psychology, which may give rise to the notion that jurisdiction is simply the articulation of a norm, thus empowering any community, including a supranational one that uses the language of law to articulate a norm as a basis to exercise authority.

31. See infra Part II.A.
32. Id.
33. See infra Part II.C.
34. Id.
35. See, e.g., Martha C. Nussbaum, Patriotism and Cosmopolitanism, in For Love of Country; supra note 29, at 6–11 (discussing how individuals are bound by the concentric circles of family, local groups, and an overall universal origin).
doubtful that *Mismatch*’s reliance on empirics and pursuit of abundantly available empirical evidence can solve America’s affirmative action wrangle. 

Several reasons spark this review of *Mismatch*. First, the authors contend they have “demonstrated that the present system of racial admissions preferences has grave problems and has shown a remarkable incapacity to heal itself,” a thesis that is made all the more puzzling given their corresponding claim that the “U[nited] S[ates] Supreme Court seems to be the only hope for serious and stable reform” of our current affirmative action system. Second, William Kidder and others have raised a number of serious issues indicating that Sander and Taylor have too often relied on either questionable data or incomplete data analysis. Although an examination of the data may be helpful in the same sense that Herder believed empirical results usefully benefit philosophic inquiry more so than apriorism, it is far from clear that the issues infecting the affirmative action debate can be sorted out solely or largely on the basis of empirics. Fourth, the Court recently upheld Michigan’s ban on racial preferences. Fourth, and finally, there is a possibility that diversity as practiced within leading American universities has been transmuted, whether defendable or not, into a potentially duplicitous form of commodification as part of the modern surrender to the power of racial branding and marketing. These factors, taken together, suggest that it is a propitious time to situate the authors’ scholarship in context. 

Part II places the concepts of affirmative action and diversity in context by examining modern contradictions, which include government policy volatility on issues of race, as well as the paradoxes that infect Supreme Court jurisprudence, particularly within the domain of the Equal Protection Clause. Part III inspects diversity, cosmopolitanism, and the pursuit of universal norms. Part IV considers the perspectives of commentators committed to the primacy of the

37. Id. 
40. See Kidder, supra note 38. 
41. Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623, 1624 (2014) (reversing the Sixth Circuit Court of Appeals and upholding Michigan’s racial preference ban). See also Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 470 (6th Cir. 2012) (declining to address the Grutter Court’s opinion allowing universities to continue to consider race or ethnicity flexibly within the context of individualized consideration, and holding that article 1, section 26, proposal 2 of the Michigan Constitution, which eliminated the consideration of race, sex, color, ethnicity, or national origin in individualized admissions decisions, was unconstitutional pursuant to a strict scrutiny test because it deprives plaintiffs of equal protection under the political process doctrine by placing special burdens on the ability of minority groups to achieve beneficial legislation). 
42. See, e.g., Leong, supra note 5, at 2206 (suggesting that the focus on acquiring, monetizing, and displaying diversity may preempt conversations about past racial injustice).
oikos. In Part V, notions of academic freedom, diversity and the First Amendment are considered. In Part VI, Sander and Taylor’s central claims and contentions are set forth. Part VII supplies preliminary analysis of Mismatch, a process that depends in part on an examination of the contours of the scholarly response to the authors’ empirical claims, and, also attempts to recoup the nation’s racial history with the contemporary demand for affirmative action, which, simply put, is a demand that began more than a century and a half ago.\(^43\) Part VIII deconstructs Mismatch, affirmative action, and diversity in a move that builds on Professor Deneen’s scholarship. Central to Part VIII’s analysis is an evaluation of the plea of the cosmopolitans and the Sirens on the one hand—calling us to become “citizen[s] of the world”\(^44\)—and the response from commentators, on the other hand, calling for a return to nostos, to a particular place and a people. A return to nostos, or alternatively put, a return to oikos, implies boundaries in politics that of necessity “constrain the seemingly limitless capacity for optimism in progress,”\(^45\) particularly progress led by hierarchs who may or may not have exceptional insight into the interest of others. Part IX places Mismatch, the Supreme Court and the prospect for racial healing in context. This Article will show that a contextualized examination of Mismatch, including a review of prevailing jurisprudential norms, provides ample room for skepticism regarding both the nation’s dependence on the diversity rationale as a basis for affirmative action, and Sander and Taylor’s appeal to the Supreme Court to resolve the confounding idiosyncrasies and contradictions that infect race-based decision making within the domain of higher education.

II. SITUATING AFFIRMATIVE ACTION IN CONTEXT

It seems clear that the pursuit of a proper contextual framework of analysis gives rise to the intuition that there are different types of knowing and understanding. Within such a framework, it is possible to conclude that “[s]cience studies the repeatable; history studies the unrepeatable.”\(^46\) Consistent with this conclusion, which hints at the importance of history, the Supreme Court

43. See RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION AND THE LAW 23–26 (2013) (showing that both the Fourteenth Amendment to the Constitution and post-Civil War legislation can be seen as a form of affirmative action).

44. PATRICK J. DENEEN, THE ODYSSEY OF POLITICAL THEORY: THE POLITICS OF DEPARTURE AND RETURN 219 (2000) [hereinafter DENEEN, THE ODYSSEY OF POLITICAL THEORY] (observing that “the very concept of kosmou politis—‘citizen of the world,’ a phrase coined by Diogenes the Cynic in the fourth century B.C.—would have represented a contradiction in terms in the Homeric world, inasmuch as a citizen . . . is necessarily a member of a city, or polis.”).


maintains that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.” The next two subsections offer context by focusing on both the presence of conflict as part of the nation’s racial odyssey, an essential feature of modern debates, and on the history of government volatility on matters of race. The final subsection offers a fairly lengthy inspection of judicial activity in the domain of race relations in order to advance a specific focus on diversity in its many guises as an essential contemporary component of affirmative action. Diversity, which is critically appreciated, is arguably a concept that undergirds the contest between Sander, Taylor, and their critics. Contextualization gives rise to doubts regarding Sander and Taylor’s hope that the Supreme Court has either the capacity or the willingness to heal what centuries of volatile race-conscious policies have combined to create.

A. Conflict or Consensus as Part of the Nation’s Racial Odyssey?

Whichever jurisprudential or policy standard is selected by the Supreme Court or by the public at large to assess the permissibility and wisdom of race-conscious decision making across the terrain of higher education, it seems clear that any examination of affirmative action takes place within a roiling arena that starts with a racial achievement gap in public elementary and secondary education. It is possible that this achievement gap in public schools, perhaps related to racial isolation, heralds a problem of seismic scope that contributes to a corresponding achievement and performance gap in higher education. Equally true, these gaps increase society’s appetite for turbulent conflict.

Consistent with the presence of turbulence in the affirmative action arena the late Ronald Dworkin, exasperated by the nation’s continuing racial isolation and convinced that affirmative action was the correct solution to this persistent problem, described the Supreme Court’s failure to follow Justice O’Connor’s leadership on a number of equal protection questions as nothing less than an alarming insurrection. It is argued that jurisprudential rebellion, ensues with a breathtaking impatience that is aided and abetted by the Court’s disdain for tradition and precedent. Given society’s persistent resort to irreconcilable interpretations of the guarantee of equal protection and affirmative action, it is

48. See Kidder, supra note 38.
49. See Sander & Taylor, supra note 30, at 273.
51. Id. (citing Katherine Kersten, Teach Character to Cut Racial Gap in School Results, STARTRIBUNE (Minneapolis, MN), Feb. 22, 2007, at B1).
53. Id.
improbable that Dworkin’s censure of the Court’s decision to decline to permit racial discrimination by government whenever the effects are seen as salutary is necessarily convincing. This observation is remarkably true in our modern age as some, but not all, citizens have been captured by the ideal of authenticity made perceptible by the claim that there is a certain way of being that is my way, since to do otherwise means that individuals will “miss the point of [their] li[ves].” In contrast with Dworkin’s unabashed certainty, a conviction that persisted despite the fact that formal discrimination against blacks has become marginal and readily prosecutable, philosopher Alasdair MacIntyre offers a more balanced perspective. MacIntyre submits that a perpetually unsettled character pertains to America’s contemporary moral and philosophical debates, a claim that clearly captures the current state of race relations in the nation. Predictably, such disputes are fastened to incompatible notions of justice, are embedded in irreconcilable conceptions of self-definition that exemplify the friction between the idea of belonging to a particular place (oikos) and the notion that we are all universally the objects of self-creation (the cosmos), and are therefore at least potentially animated by the transformative capability that emerges from a robust exchange of ideas.

Contestation is often linked to the debate over origins with some claiming that the nation was founded uniquely on the basis of documents such as the Constitution, while others point out the inherent weakness of the Constitution and express doubt that the documents can represent any population in its entirety. In reality, Patrick Deneen shows the dispute over origins indicates that the nation’s Left-Right divide is somewhat mistaken, at least in its


56. Garcia et al., supra note 32, at 15–16.

57. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 235 (Am. ed. 1981). See also Hutchison, Diversity as a Paradox, supra note 50, at 1061 (explaining MacIntyre’s perspective as balanced)

58. See infra Part III.

59. DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 1–6 (citations omitted); see also Patrick J. Deneen, State of the Union: Toqueville on the Individualist Roots of Progressivism, The AMERICAN CONSERVATIVE (Oct. 31, 2013), http://www.theamericanconservative.com/toqueville-on-the-individualist-roots-of-progressivism/ (showing that individualism is a distinctive phenomenon arising in liberal democracy and is tied to the social contract tradition that conceives of human beings in their natural state as beings that transcend their constitutive bonds, inherited roles, and given identities, whereas the idea of the individual is at least as old as Christianity, in contrast with individualism, which is a new experience of self that arises with being embedded in a familial, social religious, generational, or cultural setting that is largely fixed and unchanging).
In postmodern debates regarding rights, preferences, affirmative action, and diversity, it appears that the struggle to define ourselves as human beings or on a complementary level as members of a group “is deeply intertwined with commonly held stories about our respective beginnings as a person, a culture, or a polity.” Whatever the Founders meant when they created a nation characterized by liberty, it appears that in matters of race, justice, and mercy, it is probable that the past influences the creation of the present. Likewise, whether banal or revolutionary, just as “ripples from a stone thrown in water” travel back to shore, so too does our perception of the present influence our understanding of the past. This past includes the Framers’ conception of the Constitution itself as well as the nation’s unstable racial history, which taken together deepen the intensity of modern disagreements consistent with Karl Marx’s reflection that “conflict and not consensus [is] at the heart of modern social structure.” The potency of Marx’s remark is sharpened by noting that “barbarism is not a primitive form of life... but [rather] a pathological development of civilization.” Hence, in today’s therapeutic culture, amid a polity devoid of a binding public philosophy, it is imaginable that modern disputes will not be resolved short of authoritarianism or oblivion despite society’s frequent invocation of the language of pluralism, democracy, and antidiscrimination. The next two subsections show that language, including the text of the Constitution and especially the Equal Protection Clause guarantees, remains defeasible by reference to changeable majoritarian preferences.

B. Race in the Mirror of Government Volatility

An adequate understanding of the leading constitutional cases is advanced by briefly considering government’s role in either augmenting or shrinking the status of minorities in the United States. It seems clear that a “stable framework of behavioral expectations provided by government enables individuals to interact with less fear of physical or economic harm from one another.” A stable scaffold is constitutive of human flourishing, rather than the intrinsic

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60. DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 1–8 (citations omitted).
61. Id. at 1.
62. Id. at 5.
63. Id.
64. See infra Parts II.B–C.
65. MACINTYRE, supra note 57, at 235.
66. See GRAY, SILENCE OF ANIMALS, supra note 20, at 9–10 (citing JOSEPH CONRAD, HEART OF DARKNESS (1902)).
68. Hutchison, Diversity as a Paradox, supra note 50, at 1061.
69. See infra Parts II.B–C.
70. THOMAS SOWELL, MARKETS AND MINORITIES 104 (1981).
merits and composition of the framework’s specific provisions. The absence of stability can be illustrated: “Africans brought to the United States in the early seventeenth century became indentured servants, like most white immigrants, and were freed at the end of a few years.” The pattern then changed to one of perpetual slavery for blacks. “The post-Revolutionary War era led to abolition of slavery in the [N]orth, and a relaxation of restrictions on ‘free persons of color.’ But within a generation, new government restrictions began to be imposed on the occupations, mobility, [and the] legal status . . . of free [blacks].” Governmental policy instability on issues of race at the state level was equaled at the federal level. In the national government, perhaps exposing the Constitution’s inherent weakness, “the slow progress of black employees over the decades was suddenly reversed by the Woodrow Wilson administration, which introduced segregation among federal employees.” Woodrow Wilson, as president of Princeton University, claimed to be governed by the philosophy of equal opportunity rather than one that advanced privilege and exclusion. However, as President of the United States, Woodrow Wilson, like many American citizens of his era, was prepared to ignore the Constitution whenever he thought the policy at issue advanced the public good, even when it was clear that the policy favored exclusion. Representing a similar Wilsonian inclination—one that is congruent with Progressive Era raceology, exclusion, and Progressive labor legislation—it bears noting that during the War of 1812, twenty-five percent of Commodore Perry’s crew was African-American, although there were no African-American sailors in the navy by the 1920s.

Consistent with the history of governmental instability on issues of race, a history that reflects both the possibility of progress and the likelihood of disappointment, America’s first federal civil rights law, the Civil Rights Act of 1866, “declared all persons born in the United States to be citizens [and] clothed all persons with the same rights as whites” for a variety of purposes. Although this was a welcome development, it would be foolish to forget that “[p]rior to this legislation, the Supreme Court, pursuant to the notorious Dred Scott decision, had ruled that blacks, whether free or enslaved, were not citizens of the

71. Id.
72. Id.
73. Id.
74. Id. at 105.
75. See generally id. at 105–06 (discussing the volatility of government policy toward minority groups).
76. Id. at 105.
79. SOWELL, supra note 70, at 105.
80. KENNEDY, supra note 43, at 22.
Coherent with both state and federal government instability on issues of race, President Andrew Johnson vetoed the Civil Rights Act. Perhaps oblivious to the history of slavery and anesthetized to the fact that most, if not all, slaves were born in the United States, President Johnson was incensed by this so-called “special legislation” because it enabled blacks to immediately become citizens, while European born immigrants had to wait several years in order to qualify for citizenship via naturalization. Although President Johnson’s veto was eventually overridden, it bears observing that he “characterized the Act of 1866 as illicitly race-sensitive insofar as it contained, in his view, a ‘distinction of race . . . made to operate in favor of the colored and against the white race.’” To be sure, as Randall Kennedy explains, “the [A]ct is explicitly attentive to race, and its framers were moved primarily by a desire to help a particular sector of the populace: colored Americans.” Accordingly “[t]he Act of 1866 can thus be seen as a race-sensitive precursor of ‘affirmative action.’” More recently, the state of New York passed the first state law banning racial discrimination in 1945. This proposal was ironically and predictably attacked as an attempt to instantiate the Hitlerian rule of quotas. Similarly, when African Americans engaged in picketing for jobs in a predominantly African American area, this activity was banned on grounds that they had no First Amendment right to picket for proportional hiring. These various maneuvers appear to represent the then-consensus view that, as a matter of constitutional law, segregation was deemed consistent with the Equal Protection Clause so long as the facilities were ostensibly equal. The commitment to this policy survived in stark contrast with the desegregation that characterized Commodore Perry’s naval crew during the War of 1812, an event that occurred well before the onset of the civil rights revolution and the corresponding upsurge in the charge that civil rights were nothing more than an unmerited special benefit for blacks.

By and large, this brief exposition of government policy volatility is consistent with Thomas Sowell’s great claim that, “in broad historical terms, government has changed the rules of the game for blacks in virtually every

81. Id.
82. Id.
83. Id.
84. Id. at 23.
85. Id. at 23–24.
86. Id. at 24.
87. Id. at 27.
88. Id. at 27–28 (quoting Anthony S. Chen, ‘“The Hitlerian Rule of Quotas”: Racial Conservatism and the Politics of Fair Employment Legislation in New York State, 1941–1945,’ 92 J. AM. HIST. 1238, 1257 (2006)).
89. Id. at 30 (quoting Mark Tushnet, Change and Continuity in the Concept of Civil Rights: Thurgood Marshall and Affirmative Action, in REASSESSING CIVIL RIGHTS 151–52 (Ellen Frankel Paul et al. eds., 1991)).
90. Id.
91. Id. at 31.
generation,” a maneuver that is further reinforced by its similarly erratic treatment of Native Americans, Japanese Americans, and others.92 Unsurprisingly, volatility also surfaces in the leading constitutional cases.

C. The Constitutional Background: The Paradoxes of Equal Protection

Consistent with the government’s deliberate or inadvertent pursuit of policy instability on issues of race, it has been argued that the nation is only one vote away from a stance that would mirror Plessy v. Ferguson’s approach, suggesting that “virtually any discriminatory law that [the C]ourt believes was ‘enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class’”93 is defensible. Before issuing its decision in Plessy, the Supreme Court—in the course of invalidating parts of what was known as the Civil Rights Act of 1875—charged blacks with seeking preferential legislation.94 More specifically, in a series of cases known as the Civil Rights Cases,95 the Court, infuriated by legislation prohibiting discrimination in the provision of public accommodations,96 stated:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation, when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of [their] personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because [they were] subjected to discrimination[]. . . .97

Cleaving closely to the dominant voices of their generation and surrendering to the all too human penchant for duplicitous linguistics, the Justices accepted subordination as commonplace and permissible.98 Unequivocally contradicting the nation’s racial history, the Court observed that “[m]ere discriminations on account of race or color were not regarded as badges of slavery.”99

92. Sowell, supra note 70, at 105.
93. Lund, supra note 54, at 25 (citing Plessy v. Ferguson, 163 U.S. 537, 550 (1896)).
95. The Civil Rights Cases, 109 U.S. 3 (1883).
96. Id. at 25.
97. Id.
98. See Kennedy, supra note 43, at 24.
Constant with the tenor of the *Civil Rights Cases* and contrary to the thrust of contemporary scholarship stating that the application of strict scrutiny signifies the Court’s devotion to the principle of racial reciprocity, meaning that the “standard of review . . . is not dependent on the race of those burdened or benefited,” the Court upheld de jure segregation in its *Plessy v. Ferguson* decision in 1896. *Plessy* was issued in harmony with the Court’s approval of laws forbidding the intermarriage of the races, as well as with the “broad outlines of Progressivism and quasi-scientific racism” that became part of the nation’s prejudiced war on the “weak.” Apparently, *Plessy*’s acceptance of racial subordination reflected the majoritarian necessity of enforced racial isolation as part of the Court’s reification of the public good. Since majorities change over time, it is not entirely clear that either contemporary conceptions of public choice originalism or any other theory of judicial review, even one inspired by the claim that America has entered into a post-racial era with the election of President Obama, is capable of ensuring a different outcome in the future. In contrast to *Plessy*, the *Buchanan v. Warley* Court recognized that racial prejudice that propels segregation by law also offends the Constitution. Following this welcome decision, wherein the Court relied on substantive due process to invalidate a city ordinance mandating residential segregation, the Court confirmed in *Brown v. Board of Education* that state sponsored segregation is an impermissible weapon for enforcing racial subordination, an opinion that is fairly consistent with its earlier decisions in the domain of higher education. Having disallowed invidious forms of racial subordination, the


101. 163 U.S. 537 (1896).

102. Id. at 545 (citing State v. Gibson, 36 Ind. 389 (1871)).

103. See Harry G. Hutchison, Waging War on the “Unfit,” supra note 78, at 23.

104. See id. at 21–34 (citation omitted) (describing *Plessy*, *Buck* and New Deal Labor law as part of a pernicious pantheon that successfully waged war on the “weak,” a category that apparently included women and members of minority groups).

105. See id. at 1–2.


108. 245 U.S. 60 (1917).


111. See, e.g., McLaurin v. Oklahoma State Regents, 339 U.S. 637, 642 (1950) (finding impermissible the state’s differential treatment of a black graduate student); Sweatt v. Painter, 339 U.S. 629, 633, 636 (1950) (reserving the question of whether separate but equal was valid, but finding that the separate law school established for blacks was not substantially equal); Missouri ex
Court subsequently tackled the question of whether affirmative action or benign discrimination satisfies the commands of the Equal Protection Clause.\textsuperscript{112}

Benign discrimination can be defended, on one account, as a statutory modification that allows recipients of federal funds to “discriminate on the ground of race, color, or national origin whenever a majority of the Supreme Court concludes that the Constitution allows such discrimination.”\textsuperscript{113} Whether this startling remark is completely accurate or not, “[s]ince [the Supreme] Court’s splintered decision in \textit{Bakke}”\textsuperscript{114} and its comment that a state “has a substantial interest that may legitimately be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin,”\textsuperscript{115} elite “[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies.”\textsuperscript{116} They have done so despite Justice Powell’s observation that, as of 1978 at least, the Supreme Court had never “approved preferential classifications in the absence of proved constitutional or statutory violations.”\textsuperscript{117}

Affirmative action in university admissions was facilitated by Justice Powell’s dual deduction that while all racial discrimination is forbidden unless “precisely tailored to serve a compelling governmental interest,”\textsuperscript{118} a medical school’s interest in assembling a racially diverse student body is a compelling interest because it serves the First Amendment goal of promoting a “robust exchange of ideas.”\textsuperscript{119} However persuasive Justice Powell’s analysis may be, it is seems clear that “\textit{Bakke} settled almost nothing as a matter of constitutional doctrine,”\textsuperscript{120} a stasis that was continued by subsequent Burger and Rehnquist Court decisions.\textsuperscript{121}

Nonetheless, the daunting endeavor to cultivate a defendable foundation for evaluating race-conscious decision making at elite schools has lingered for several decades in the United States as a cultural and jurisprudential

\textit{rel. Gaines v. Canada}, 305 U.S. 337, 352 (1938) (holding that the state’s attempt to remedy the denial of admission of an admittedly qualified student to the state school reserved for whites through the payment of tuition to an out of state school did not satisfy equal protection). \textit{See also} Brent Rubin, Note, Buchanan v. Warley and the Limits of Substantive Due Process, 92 TEX. L. REV. 477, 477–78 (2013) (citing Buchanan v. Warley, 265 U.S. 60 (1917) (discussing how the Supreme Court first recognized segregation offended the Constitution in Buchanan v. Warley)).

\textsuperscript{112} Brown, 347 U.S. at 493. 
\textsuperscript{113} Lund, supra note 54, at 20. 
\textsuperscript{116} Grutter, 539 U.S. at 323. 
\textsuperscript{117} Bakke, 438 U.S. at 302. 
\textsuperscript{118} Id. at 299. 
\textsuperscript{119} Id. at 312–13 (citing Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)). 
\textsuperscript{120} Lund, supra note 54, at 21. 
\textsuperscript{121} Id.
The fervor of this dispute has only intensified since Justice O’Connor authored an enticing concurrence in *Wygant v. Jackson Board of Education* specifying that the Court might uphold a race-conscious hiring program designed to institute a racially diverse faculty. Although specific Justices in *Wygant* offered a range of positions on the appropriate standard of review regarding race-conscious layoffs, the Supreme Court invalidated the Board’s plan without supplying a majority opinion. Justice O’Connor’s concurrence in *Wygant* foreshadowed her opinion in *Grutter v. Bollinger*, wherein she deployed a strict scrutiny analysis to evaluate the University of Michigan Law School’s preferential admissions plan. Strict scrutiny, Justice O’Connor argued, is necessary to “smoke out” illegitimate motives for racial distinctions, such as notions of racial inferiority or racial politics disguised as benign ones. “[T]he distinction between illegitimate notions and benign policies remain[s] crucial....” Hence, race-based action is allowable “when necessary to further a compelling governmental interest.” Replying to the question of “[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities,” the Court voiced “grave misgivings about racial preferences” that manifest a university’s pursuit of a specified percentage of any racial group. Nonetheless, putting “an end to a quarter century of uncertainty about the constitutionality of racial discrimination in university admissions”, harnessing its understanding of Justice Powell’s analytical framework in *Bakke*, finding that racial diversity was a “permissible goal [that only]
requires . . . a good-faith effort . . . to come within a range demarcated by the goal itself;"134 and snubbing the prudent claim that "'[a]ttaining diversity,' whatever it means, is [merely] the mechanism by which the [University of Michigan] Law School obtains educational benefits, not an end of itself,"135 the Grutter Court ratified much, but apparently not all, of Justice Powell’s approach.136 Finding that the University of Michigan’s Law School’s admissions program bears the hallmarks of a narrowly tailored plan, including individualized consideration that ensures that race is used in a flexible, nonmechanical approach.136 the Grutter Court found that the University of Michigan Law School could consider race or ethnicity more flexibly as a “plus” factor in the context of individualized consideration of each and every applicant.137 Professor Lund summarizes the crucial elements of Grutter thusly:

First, the law school offered its desire for a “diverse student body” as the compelling governmental interest that justified its policy of ensuring the admission of a “critical mass” of blacks, certain selected Hispanics, and American Indians. The Court deferred to what it accepted as the state’s educational judgment, alluding to “a special niche in our constitutional tradition” occupied by universities and citing Powell’s reliance on the First Amendment.138

Although constitutional doctrine within the domain shaped by the intersection of race and education policy is rather byzantine as a historical matter,139 Grutter represents the end point of a three-fold process. First, “as the Court incrementally established strict scrutiny as the standard [of review] in all cases involving race-based affirmative action, remedial justifications became increasingly unlikely to succeed, with [the] narrow exception for an entity’s

because such measures would risk placing unnecessary burdens on innocent third parties ‘who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.’ . . .

Third, Justice Powell rejected an interest in ‘increasing the number of physicians who will practice in communities currently underserved,’ concluding that even if such an interest could be compelling in some circumstances the program under review was not ‘geared to promote that goal.’"

134. Grutter, 539 U.S. at 335 (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986)).
136. Id. at 324 (citing Bakke, 438 U.S. at 311–12, 314) (stating that “Justice Powell approved the university’s use of race to further only one interest: ‘the attainment of a diverse student body.’ With the important proviso that ‘constitutional limitations protecting individual rights may not be disregarded,’ Justice Powell grounded his analysis in the academic freedom that ‘long has been viewed as a special concern of the First Amendment.’”). But see Sander & Taylor, supra note 30, at 209 (citing Grutter, 539 U.S. at 333) (noting that the court “jettisoned Justice Powell’s focus on intellectual diversity as [a] compelling interest and instead concentrated on the “unique experience of being from a racial minority” as satisfying the compelling interest standard)
138. Lund, supra note 54, at 21 (citing Grutter, 539 U.S. at 329).
139. See Epperson, supra note 19, at 490.
implementation of remedial measures for its own past discrimination.”\textsuperscript{140} Second, the focus shifted to educational diversity that presumably depends on individualized consideration of race as a justification for affirmative action.\textsuperscript{141} Third, the Court accepted diversity as a compelling state interest despite its existence within a framework that ineluctably advances the University of Michigan Law School’s pursuit of elite status.\textsuperscript{142} The Court’s judgment ensued despite the lack of any evidence to show the state’s admissions policy was mandated by public necessity requiring: (a) the presence of a law school within the state;\textsuperscript{143} (b) the state of Michigan pursue the establishment and maintenance of an elite law school;\textsuperscript{144} and (c) graduates of the University of Michigan Law School actually serve the welfare of the people of Michigan, including, of course, its disadvantaged population.\textsuperscript{145} Taken as a whole, the Supreme Court’s three-pronged move hoisted diversity’s jurisprudential and political force beyond its capacity to withstand skeptical scrutiny, a maneuver that threatens to vitiate affirmative action’s potential justification as a form of redress for the nation’s undeniable history of subordination, even if formal discrimination has now ceased.\textsuperscript{146} Indeed, the Court’s justification of diversity may serve the cause of privilege rather than remediation.\textsuperscript{147}

Although the \textit{Grutter} Court’s examination of the Equal Protection Clause enabled diversity to withstand scrutiny,\textsuperscript{148} Samuel Estreicher, Nelson Lund, and Randall Kennedy offer piercing replies that command attention. Estreicher, in apparent sympathy with the \textit{Grutter} Court’s objectives, avers that “[a]s long as analysis of racial classification cases turns on the familiar two-pronged inquiry into whether government has a asserted a ‘compelling interest’ and, if so, whether the challenged program reflects ‘narrow tailoring,’ the Supreme Court jurisprudence in this area will prove deeply unsatisfying and difficult to predict.”\textsuperscript{149} This is so, he contends, because “[b]oth prongs have an ‘in-the-eye-of-the-beholder’ quality, particularly after the \textit{Grutter} Court . . . accepted as a compelling interest race-based viewpoint diversity, and the concomitant necessity of maintaining a ‘critical mass’ of the under-represented racial viewpoint. Once that hurdle was cleared, insistance on narrow tailoring seems

\textsuperscript{140} Leong, \textit{supra} note 5, at 2162–63 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989)).

\textsuperscript{141} \textit{Id.} at 2163.

\textsuperscript{142} \textit{Id.} at 2163–64 (citing \textit{Grutter}, 539 U.S. at 325).

\textsuperscript{143} \textit{Grutter}, 539 U.S. at 357–58 (Thomas, J., dissenting in part, concurring in part) (suggesting that since a significant number of states fail to operate a public law school at all, a presumption surfaces that this enterprise is not a public necessity and that therefore diversity within an unnecessary school cannot be a compelling state interest).

\textsuperscript{144} \textit{Id.} at 358.

\textsuperscript{145} \textit{Id.} at 360.

\textsuperscript{146} \textit{See} Hutchison, \textit{Diversity as a Paradox, supra} note 50, at 1081.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Grutter}, 539 U.S. at 337.

almost churlish,”150 which exposes the Court’s analysis as weak at best. This is particularly true if one notes that the canons of constitutional analysis allow university officials to benefit from judicial deference “in determining that they have a compelling interest in seeking diversity [but] they receive ‘no deference’ when the courts review their policies to ensure narrow tailoring.”151 Estreicher shows that Supreme Court instability could be obviated and narrow tailoring analysis could be avoided by noticing that “if racial diversity is what the state is seeking (and can lawfully seek), racial preferences may be the best way to get there.”152 Hence, a judicial requirement that a state refrain from using racial preferences to achieve its compelling interest, racial diversity, means that a state can only attain its “valid goal by the most circuitous route possible.”153 Unless some form of clever postmodern evasion is in play, a judicial approach favoring this kind of circuitousness seems bizarre.

Lund, in a somewhat similar albeit less sympathetic vein, argues that the Grutter Court “create[d] a safe harbor for... discrimination [against certain races such as whites and Asians] that extends over the whole ocean, except for one little cove that contains strictly unbending quotas and absolutely mechanical preferences like those at issue in Bakke and Gratz.”154 Lund further contends that Grutter implies five things: (1) that strict scrutiny is “now less strict than intermediate scrutiny had been only a few years before”;155 (2) that strict scrutiny as reshaped by the Court’s “conception of a compelling governmental interest, effectivley reduces strict scrutiny to something like rational basis review”;156 (3) that “outright racial balancing” is defensible unless procured through explicit quotas;157 (4) that the Supreme Court’s test mirrors Plessy v. Ferguson’s police power test for trumping the Fourteenth Amendment along with its obvious concern for the adverse effects “that might flow from judicial interference with a practice that was highly valued by politically powerful interests”;158 and (5) that

150. Id. at 243.
152. Estreicher, supra note 149, at 243.
153. Id.
155. Id. at 22.
156. Id.
157. Id. (citing Grutter v. Bollinger, 539 U.S. 306, 330 (2003)) (showing that over a period of several years, the law school admitted favored minorities in an almost perfectly exact proportion to their share of the applicant pool).
158. Id. (citing Plessy v. Ferguson, 163 U.S. 537, 551 (1896)) (“Plessy held that racial segregation laws were constitutionally permissible if they pass the following test: Every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.’ This is essentially the same test deployed in Grutter, which treated the Michigan Law School’s diversity plan as a reasonable means toward the ‘important and laudable’ goal of promoting classroom discussions that are ‘livelier, more spirited, and simply more enlightening and interesting.’” (citation omitted)).
the Court appears willing to subordinate its jurisprudential gifts to “the dominant opinion in contemporary elite culture.”159

Kennedy offers quite a different rejoinder. He argues that both the Court and society found the diversity rationale alluring because it facilitates the evasion of prickly subjects.160 It allows whites to avoid grappling with their status as beneficiaries of past wrongs . . . [and] facilitates the evasion of a subject that makes many blacks uncomfortable: the fact—not the biased perception, but the sometimes discouraging fact—that pursuant to affirmative action, blacks selected for valued positions often have records that are inferior to those of white competitors.161

Kennedy also notes that “[t]he diversity camp has long been dogged by allegations of insincerity or outright duplicity.”162 For example, “[w]hen Justice Powell announced his diversity rationale, detractors complained that he penalized the honesty of the University of California set-aside while valorizing the Harvard policy that reached essentially the same result under cover of an intentionally obtusatory rhetoric.”163 Kennedy shows that many proponents of affirmative action have reached the conclusion that “the diversity rationale is [simply] pretextual.”164 In response to perceived pretext, supporters of race-based preferences ask why diversity, as a compelling interest, is rarely practiced on behalf of Republicans, fundamentalist Christians, Muslims, or Neo-Nazis.165 Lastly, Kennedy doubts the social science “proof” of diversity’s value—an acclaimed centerpiece of the Grutter Court’s analysis—because much of it seems predetermined and exaggerated with litigation in mind.166 Taken together, Kennedy’s examination exposes the bifurcated nature of the Grutter Court’s analysis: (1) the pursuit of a “critical mass” of minority students, which is seen by opponents of this policy as a quota, and which can be seen by supporters and opponents as a disingenuous pursuit of racial equality sparked by an ostensible attempt to remedy the nation’s practice of racial subordination; and (2) the emergence of diversity as a goal that remains defendable largely due to judicial deference to an academic institution’s pursuit of elite status, a move that is fostered by wrapping the policy objective of institutional selectivity in the language of the First Amendment, which legitimates the institutional quest for

159. Id. at 23.
160. KENNEDY, supra note 43, at 98.
161. Id. at 102 (citing Kingsley Brown, Affirmative Action: Policy Making By Deception, 22 OHIO N.U. L. REV. 1291, 1291 (1996)).
162. Id.
163. Id.
164. Id. at 103.
165. Id. (citing Samuel Issacharoff, Law and Misdirection in the Debate Over Affirmative Action, U. Ctl. LEGAL F. 11, 18 (2002)).
166. Id.
internal goals such as a robust exchange of ideas made tangible via increased human sympathy and cross-racial understanding.\footnote{167. See Grutter v. Bollinger, 539 U.S. 306, 330 (2003); KENNEDY, supra note 43, at 103–04.}

Setting aside the correctness, honesty, and bifurcated nature of Grutter; the possible disingenuousness of its diversity rationale; and the gnawing rejoinders by Professors Estreicher, Lund, and Kennedy, it is worth noting that two significant things have occurred since Grutter. First, in a subsequent and highly fractured opinion, the Supreme Court held that when public elementary and secondary schools develop racial classification plans directed toward the achievement of racial balance, this objective is illegitimate and cannot be defended by the educational and social benefits that flow from racial diversity standing outside the notion of individualized treatment.\footnote{168. Parents Involved in Cnty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 726 (2007).} Second, echoing successful anti-affirmative action ballot measures in a number of states,\footnote{169. Darrell D. Jackson & Michele S. Moses, Understanding Public Perceptions of Affirmative Action, 22 KAN. J.L. & PUB. POL’Y 205, 231 (2013) (listing successful anti-affirmative action ballot initiatives in Arizona, Missouri, Nebraska, Oklahoma, and California).} and as part of the continuation of a long-running battle,\footnote{170. See Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 470 (6th Cir. 2012).} the citizens of Michigan countered the Grutter Court’s opinion by proposing a state-wide ban on racial preferences in university admissions.\footnote{171. Id. at 471 (citing Operation King’s Dream v. Connerly, 501 F.3d 584, 586 (6th Cir. 2007)).} The proposal passed by a margin of 58% to 42% and took effect in December 2006.\footnote{172. Regents, 701 F.3d at 471.} As a consequence of this move, the Sixth Circuit Court of Appeals, in Coalition to Defend Affirmative Action v. Regents of University of Michigan, considered whether the referendum violated the Equal Protection Clause’s guarantee that all citizens ought to have equal access to the tools of political change.\footnote{173. Id. at 470.} As enacted, “Proposal 2”\footnote{174. Id. at 471.} banned precisely what the Supreme Court found permissible, but declined to mandate in Grutter. Proposal 2 abolished consideration of race, sex, color, ethnicity, or national origin in individualized admissions decisions,\footnote{175. Id.} thereby constraining the discretion of university admissions officers at the state’s three leading public schools of higher education. Since outright quotas or racial balancing had already been outlawed by the Supreme Court, the enactment of Proposal 2 disallowed race-conscious decision making, including decision making tied to diversity as an admissions criterion.\footnote{176. Id. at 479.}

Responding to this move, the Sixth Circuit invalidated Michigan’s constitutional amendment. The court relied on Washington v. Seattle School District No. 1\footnote{177. 458 U.S. 457 (1982).} for the proposition that the “Equal Protection Clause
‘guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute . . . that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner.’”¹⁷⁸ The sole issue before the court was whether Proposal 2 violates “the constitutional guarantee of equal protection by removing the power of university officials to even consider using race as a factor in admissions decisions.”¹⁷⁹ Offering a hypothetical that compared the plight of an applicant pursuing legacy preference admission into one of Michigan’s esteemed public universities to the plight of a black student seeking a similar advantage based on race, the Regents court advanced the following syllogism.¹⁸⁰

First, it stated that a student endeavoring to transform her family’s alumni connections into a legacy conscious preference “could lobby the admission committee, . . . petition the [school’s] leadership, . . . seek to influence the school’s governing board, or . . . initiate a state-wide campaign to alter the state’s constitution.”¹⁸¹ On the other hand, a black student who pursued a race-conscious preference would have to engage in an arduous, lengthy, and expensive process to amend Michigan’s constitution.¹⁸² Stated another way, while the Grutter Court was consumed by the question of whether it was permissible to allow the University of Michigan’s Law School to grant preferences as part of its pursuit of both elite status and a robust exchange of ideas, the Sixth Circuit in Regents was animated by a black student’s inability to lobby for a racial preference.¹⁸³ Given this rather dramatic difference in focus, the Sixth Circuit found that Proposal 2 placed a distinct comparative structural burden on black students that “undermine[d] the Equal Protection Clause’s guarantee that all citizens ought to have equal access to the tools of political change.”¹⁸⁴ The court accordingly reversed the judgment of the district court and found Michigan’s Proposal 2 unconstitutional¹⁸⁵ because the proposal required minorities to surmount more formidable obstacles than those faced by other groups.¹⁸⁶ Further, the Court of Appeals established two necessary predicates for its holding: first, it found that Proposal 2 had a racial focus because the state constitutional amendment would deny benefits that primarily inure to the advantage of minorities;¹⁸⁷ and second, the court determined that, as a consequence of the proposal, racial minorities would face obstacles in their

¹⁷⁸ Regents, 701 F.3d at 474 (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982)).
¹⁷⁹ Id. at 473.
¹⁸⁰ Id. at 470.
¹⁸¹ Id.
¹⁸² Id.
¹⁸³ See id.
¹⁸⁴ Id.
¹⁸⁵ Id.
¹⁸⁶ Id. at 485.
¹⁸⁷ Id. at 478–79 (citing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472, 474 (1982)).
endeavor to procure beneficial legislation in the form of race-conscious admissions, a move that effectively reordered the state’s political process in a way that disadvantaged racial minorities.

In order to find the first predicate, the Regents court engaged in analysis to determine whether diversity, as allowed by the Supreme Court in Grutter, inures primarily to the benefit of racial minorities. The Sixth Circuit was satisfied to find that minorities may consider the repealed policy legislation to be in their interest. This less than clear statement seems to make two additional assumptions: first, a monolithic response to race-based action by minority group members that implicates Kim Forde-Mazrui’s understanding of racial essentialism; and second, that in order to find the initial predicate—that the race-conscious decision making engaged in by Michigan’s universities inures necessarily and primarily to the benefit of minorities—the court rejected what the Supreme Court made clear in Grutter. The Grutter Court accepted the contested admissions process on grounds that the school’s policy provided benefits that inured predominantly to the overall educational process, as opposed to finding that the program benefited members of racial minority groups. Whether the Supreme Court’s approach is an example of racial exceptionalism despite the bifurcated nature of its opinion, as suggested elsewhere, the Grutter Court preserves affirmative action on cosmopolitan grounds by declining to locate or even to require admissible evidence of the institution’s participation in racially discriminatory conduct, a finding that could otherwise justify affirmative action as a remedy. In addition, the Grutter Court refused to require the University of Michigan Law School to demonstrate that members of minority groups are the primary beneficiaries of the state policy. Stated differently, rather than offering a rationale that might legitimize the University of Michigan Law School’s admissions policy as a form of remedial justice tied to the state of Michigan’s dreadful history in educating

188. Id. at 488.
189. Id. at 485.
190. Id. at 479 (citing Washington, 458 U.S. at 472).
191. Id. at 479 (quoting Washington, 458 U.S. at 474).
192. Kim Forde-Mazrui, Learning Through the Lens of Race, 21 J.L. & Pol. 1, 4 (2005) (stating the tendency to overemphasize the relevance of race to the merits of law or policy, which means that a law or policy’s merits stand or fall on its racial implications regardless of its value in serving other purposes).
194. See Hutchison, Diversity as a Paradox, supra note 50, at 1081.
195. Id.
196. See, e.g., Forde-Mazrui, supra note 192, at 4 (describing racial exceptionalism as the tendency of some to minimize the relevance of race to the merits of the law, doctrine, or policy by viewing the law’s relationship to race as aberrational).
197. See Hutchison, Diversity as a Paradox, supra note 50, at 1081.
198. See id.
199. See id.
African Americans,\(^{200}\) or alternatively, taking up the challenge laid down by Dr. Martin Luther King, Jr. and reminding the nation of its unpaid debt to African Americans,\(^{201}\) the Supreme Court’s approach inverts this focus and tolerates\(^{202}\) race-conscious admission largely because it provides direct benefits to the institution itself. By contrast, in *Regents*, the Sixth Circuit Court found plausible evidence of discrimination in the passage of Proposal 2 and accordingly invalidated the referendum as a specific, if contestable, remedy for discrimination that damaged African Americans’ ability to pursue beneficial policies.\(^{203}\) In other words, discovering the need for remediation, the Sixth Circuit found what the Supreme Court maintains is absolutely unnecessary—actual discrimination—which seems to be a distinction that is more than a distinction without a difference, particularly for those interested in racial justice.\(^{204}\)

Nevertheless, the Sixth Circuit did not have the last word. In the fall of 2013, the Supreme Court heard arguments, and in the spring of 2014, the Court issued its opinion reversing the Sixth Circuit.\(^{205}\) The Supreme Court upheld Proposal 2, now article I section 26 of the state constitution, which prohibits the use of race-based preferences as part of the admissions process for state universities.\(^{206}\) Specifically, the Court held that “[t]his case is not about how the debate about racial preferences should be resolved. It is about who may resolve it.”\(^{207}\) Finding “no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters,” the *Schuette* Court determined that “[d]emocracy does not presume that some subjects are either too divisive or too profound for public debate.”\(^{208}\) Although this decision may disappoint affirmative action proponents, rightly cognized, the Court neither changed the rules of the game in the arena of racial preferences nor reexamined the merits of race-conscious admissions, which means that “the Constitution permits, though it does not require, the use of the kind of race-conscious programs that are now barred by the Michigan Constitution.”\(^{209}\) The Court did “not address the amendment insofar as it forbids the use of race-conscious admissions programs

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200. *Id.* at 1086.

201. *See* e.g., *Jackson & Moses*, *supra* note 169, at 231 (“King’s [speech begins by suggesting that] America still owes African Americans a debt—a debt based upon a bad check issued by America’s founding fathers. King clearly dreams of the day when skin color will not matter but states that America still has reparations to make to African Americans.”).


204. *See id.* (suggesting that actual discrimination is found in Proposal 2 and undermines Equal Protection).


206. *See id.* at 1629 (citing MICH. CONST. art. I, § 26).

207. *Id.* at 1638.

208. *Id.*

209. *Id.* at 1649 (Breyer, J., concurring).
designed to remedy past exclusionary racial discrimination or the direct effects of that discrimination." 210

At the end of the day, race-conscious admissions are still permissible pursuant to Supreme Court precedents. This means that Grutter is still the last word on the viability of affirmative action in states that allow racial preferences, 211 signifying that universities must still comply with strict scrutiny when using race for purposes of admissions. 212

Taken as a whole, the leading cases in responding to race-conscious decision making by legislators, administrators, or others reveal the courts' wide-ranging, if inconsistent, appreciation for the language of the Equal Protection Clause. 213 At times offering decisions that mirror federal and state government volatility on issues of race, and at other times representing conflicting conclusions arising from somewhat similar facts, the courts—in particular the Supreme Court—appear to be a consistent source of puzzlement, if not duplicity, rather than a venue that reliably safeguards rights for individuals and members of various groups that have faced deprivation as a result of the nation’s practice of enforced subjugation. 214

III. THE COSMOS, UNIVERSALITY, AND DIVERSITY

Before scanning Mismatch, it is helpful to specify cosmopolitanism, universality, and diversity. This specification will not be comprehensive. Instead, it will serve as a frail plinth on which to later examine diversity more closely and to consider whether diversity can sufficiently justify the affirmative action policies that Sander and Taylor dispute. Recall Justice Powell’s deduction that affirmative action complies with the mandate of strict scrutiny by offering a compelling interest, diversity, 215 which is an interest that has become virtually unassailable through its linkage to academic freedom. Diversity is, of course, a multi-dimensional and difficult to define concept. Before sketching the concept

210. Id.
211. Id. at 1630 (stating that its decision in Fisher did not disturb the principle that the consideration of race in admissions is permissible provided certain conditions are met).
212. See, e.g., Fisher v. University of Tex. at Austin, 133 S. Ct. 2411, 2415 (2013) (stating that the Court of Appeals did not hold the University of Texas at Austin to the strict scrutiny burden when considering race in the admissions process).
of diversity more directly, it is useful to briefly plumb the endless depths of cosmopolitanism.

A. Cosmopolitanism's Universalizing Impulse in the Mirror of Diversity

Bruce Ackerman, in tackling the conflicts that infected Europe during the early 1990s, stated “[i]f I were [a] European right now, I hope I would have the guts to stand up for rootless cosmopolitanism: forget this nationalistic claptrap, and let us build a world worthy of free and equal human beings.”216 Since building a “world worthy of free and equal human beings” has an eye of the beholder quality, it is possible that Ackerman’s form of liberalism correlates with despotism enabling elites to impose a single vision of the good on everyone else.217 Putting Ackerman’s idealism and bluntness aside, cosmopolitanism does not submit to easy categorization.218 In the context of this Article, it is only possible to provide an overview, one that hints at a range of views regarding citizens’ presumably cosmopolitan future. Mihaela Czobor-Lupp’s work provides a reasonable place to start. Czobor-Lupp’s orientation, as threnodic as it is analytic, builds on the work of Habermas and Herder as she accepts the necessity of cultural pluralism without abandoning belief in the unity of reason, and without allowing the universality of reason to degenerate into imperialism.219 On this view of the cathedral, the unity of reason is seen as being “perceptible only in the diversity of its voices,”220 a claim that may yet have to deal with the distinct possibility that “humans are as numinous and fugitive as those that appear in [the] forest shade.”221 From this foundation, it is possible to argue that political norms and principles, and even our conception of patriotism and citizenship, “can be shaped through . . . reflective and deliberate engagement of aesthetic creativity and imagination.”222 This account posits that national communities and cultures are not homogenous, but ever-changing, “constructing humanity out of the plurality of mankind’s forms of life.”223 From this perspective, “nations are first defined by mythology—‘a philosophical essay

216. Bruce Ackerman, Rooted Cosmopolitanism, 104 ETHICS 516, 534 (1994).
217. But see DELSOL, supra note 1, at 7 (“Why, therefore should one oppose this beautiful and generous idea, that of cosmopolitan justice? It should be opposed because it undermines politics and, more generally, human diversity, both of which must be preserved.”).
220. Id. at 6.
221. GRAY, SILENCE OF THE ANIMALS, supra note 20, at 174.
223. Id. at 8.
of the human mind, which dreams before it is awake.”\(^{224}\) Reason is thus intertwined with narrative imagination, and through narrative imagination and language, following Anthony Appiah, we can guide one another in the cosmopolitan spirit to shared responses that climax in the possibility of redrawing and expanding our horizons of understanding.\(^{225}\) Prescinding from formulating a definitive choice between the universal and the particular aspects of human life,\(^{226}\) despite much evidence that the universal trumps all,\(^{227}\) and refraining from the corpus of religious and historical truth,\(^{228}\) the aesthetic imagination as a source of post-national democratic solidarity furnishes us with the materials to construct a global culture.\(^{229}\) The richness of an individual’s place in this transformed society relies on the communicative and coordinating strength of one’s reason, which depends on the creativity and interactivity of one’s imagination.\(^{230}\) That is, “it depends on one’s poetic capacity to create and share images, symbols, and stories that enhance [one’s ability] to understand and, thus, [give rise to] the power to make and transform oneself.”\(^{231}\) Since the “imaginative capacity to create language is constitutive to the act of self-making and self-transformation, as well as the act of communicating with others” and with one’s inner self and ideas,\(^{232}\) then in this multidimensional process that may mimic Justice Powell’s elevation of the robust exchange of ideas, it follows that as people share more stories in ways that widen their sense and sympathy for humanity as a whole, they deepen their sense of solidarity and loyalty to the constitution they create without roots.\(^{233}\) Despite such cosmopolitan appeals to universal norms\(^{234}\) and the corresponding pursuit of universal goods, and notwithstanding continuing ambiguity about the meaning of cosmopolitanism itself, it may be possible to argue that some forms of diversity aid this transformative endeavor that is constant with Czobor-Lupp’s suggestion that the process of building solidarity and sympathy arises among people belonging to

\(^{224}\) Id. at 16 (citing JOHANN GOTTFRIED VON HERDER, Ideas for a Philosophy of the History of Mankind, Book VIII, in J.G. HERDER ON SOCIAL AND POLITICAL CULTURE 300 (F. M. Barnard ed. & trans. 2002)).

\(^{225}\) Id. at 13 (citing APPIAH, supra note 218, at 30).

\(^{226}\) Id at 11 (citing SANKAR MUTHU, ENLIGHTENMENT AGAINST EMPIRE 212 (2003)).

\(^{227}\) See, e.g., DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 215 (describing Martha Nussbaum’s view, which apparently gives rise to a universal conception of justice).

\(^{228}\) Czobor-Lupp, supra note 219, at 15.

\(^{229}\) See id. at 28.

\(^{230}\) Id. at 13.

\(^{231}\) Id.

\(^{232}\) Id.

\(^{233}\) Id. at 14.

\(^{234}\) See, e.g., DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 214–15 (describing David Hollinger and Nussbaum’s views that appear to culminate in appeals to universal norms).
differences, and the consequences of human, animated (1999)) reparations.

Examined more closely, the concept of diversity, which has produced an anaphora of rhetoric, “is itself remarkably diverse—and dynamic. Like a blastula of cells undergoing mitosis, American society constantly proliferates new divisions and differentiations.”

Equally true, diversity, in its various forms, cradles the dispute between those committed to the certainty supplied by a cosmopolitan future wherein humankind flourishes under the reign of the Good and True, and those commentators who assert the primacy of the oikos, a viewpoint that neither perceives the world from a single perspective nor sees progress as inevitable. Within this fissiparous arena, diversity appears to survive as a resilient goal that functions as a lively and, unmoored component of the new cosmopolitanism. At the same time, Deneen illuminates diversity as a linguistic device that separates individuals into various group identities in pursuit of recognition, acceptance, and perhaps reparations, a process that some may see as more consistent with rectification, but one which some cosmopolitans appreciate as nothing more than a simple fact. It appears that the deployment of diversity on reparative grounds, for instance, enables this concept to function very much like pluralism and to privilege already established groups. On this view, diversity as a source of privilege, whether justified or not, operates in

235. Czobor-Lupp, supra note 219, at 15 (citing Craig Calhoun, Constitutional Patriotism and the Public Sphere: Interests, Identity, and Solidarity in the Integration of Europe 18 INT’L J. POL., CULTURE, & SOC’Y 257, 258 (2005)).

236. PETER H. SCHUCK, DIVERSITY IN AMERICA 3 (2003).

237. DELSOL, supra note 1, at 65.

238. Id.

239. Diversity, like cosmopolitanism, is difficult to define and keep separate from pluralism and multiculturalism. See, e.g., DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 214 (contrasting universalism, multiculturalism, pluralism, and cosmopolitanism, and suggesting that universalists seek to find a common ground, multiculturalists would be inclined to find only differences, cosmopolitans appreciate diversity and accept differing identities, and pluralists view people primarily through their group identity).

240. See LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 169 (2005) (noting that this “conception of liberalism admits to being itself a way of life,” with “a diversity of religions, associations, occupations, ideas, and so forth . . . from which to choose”).

241. See DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 214 (discussing the ability of multiracial people to belong to and choose between differing racial identities).

242. See ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 2–3 (2006) (citing PHILIP B. KUNHARDT, JR. ET AL., THE AMERICAN PRESIDENT 28 (1999)) (describing the two basic arguments of the black redress movement as (1) the quest for redress tied to slavery and the slave-like conditions under which free blacks lived, which is animated to recapture reparations for the loss of life and liberty (basic capital) as well as financial, human, and social capital; and (2) the pursuit of redress because Jim Crow forced the descendants of black slaves into the worst jobs, housing, and educational systems and thereby produced consequences that remain today). Evidently, redress could be comprised of compensation through the tort model or apology under the atonement model. Id. at 1.


244. Id. (citing DAVID A. HOLLINGER, POSTETHNIC AMERICA 85 (1995)).
contrast to an alternative, universalist\textsuperscript{245} view that sees diversity as simply a component—but not necessarily a determinative one—of the cosmopolitan pursuit of human transcendence that can be attained through volition as individuals and groups give their first allegiance to the moral community made up by the humanity of all mankind.\textsuperscript{246} From this more universalist conception of cosmopolitanism, which is tied inescapably to a capacious conception of the Enlightenment sentiment, human volition gives rise to the contention that humans possess a shared rationality that surfaces in the form of universal morality.\textsuperscript{247} Forms of universal morality appear to be available in unconstrained versions of Kantian logic,\textsuperscript{248} the French “Declaration of the Rights of Man and Citizen,”\textsuperscript{249} Marxist-Leninist thought,\textsuperscript{250} or any other theory seeking the improvement and limitless perfection of humans.\textsuperscript{251}

Although cosmopolitanism, in its many versions, may prioritize the universal as a device that produces unity over the particular,\textsuperscript{252} a move that perhaps gives rise to a form of diversity without roots, or alternatively may acknowledge the multiculturalists’ pursuit of individual transcendence that elevates identity in the form of race, ethnicity, or gender,\textsuperscript{253} it seems clear that many cosmopolitan commentators view diversity as more of a disquieting problem than a fact.\textsuperscript{254} Cosmopolitanists appear reluctant to acknowledge that the pursuit of unity may reflect a deep-seated desire that is potentially violent.\textsuperscript{255} Despite deep differences in cosmopolitan views, it appears that diversity’s interaction with the universal has coalesced around a few cosmopolitan principles.\textsuperscript{256} First, there is the cosmopolitan preference for universality that eventually surfaces in the contention that humans ought to choose to transcend the limitations of locality and place of birth.\textsuperscript{257} Second, it appears that cosmopolitans “exhibit a confidence in science and technology to conquer natural challenges to human penury and to break down physical barriers

\textsuperscript{245} Id.

\textsuperscript{246} Nussbaum, Patriotism and Cosmopolitanism, in FOR LOVE OF COUNTRY supra note 29, at 7.

\textsuperscript{247} See DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 217 (interpreting Nussbaum).

\textsuperscript{248} DELSOL, supra note 1, at 9–15 (citations omitted) (distinguishing Kant’s views favoring a federation of states from an insistence on a cosmopolitan constitution that seeks universal peace, which initiates and legitimizes despotism through Habermas’s conception of cosmopolitan democracy, one with a world parliament).

\textsuperscript{249} DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 7.

\textsuperscript{250} Id. at 6 (describing Marxism as historically aligned with universal truths).

\textsuperscript{251} See id. at 7 (describing other philosophers’ theories regarding human perfection).

\textsuperscript{252} See id. at 214.

\textsuperscript{253} See id.

\textsuperscript{254} See id.

\textsuperscript{255} DELSOL, supra note 1, at 62 (suggesting that this kind of “Prometheanism revealed itself in the perversion of the Enlightenment thought found [in] the French Revolution”).

\textsuperscript{256} See DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 217.

\textsuperscript{257} Id.
separating humans and a belief in progress, not only in the ability of science to ameliorate humanity’s material and political condition but also in its moral capacities. Third, diversity, as a source of unease among some cosmopolitan commentators, can be limited by the presumption that deep differences—whether racial, religious, or ideological—are, or at least, ought to be, trivial as part of liberalism’s prolepsis: the instantiation of a new way of life that reflects the global tribe we have or ought to become. It is this latter sense of cosmopolitanism that this Article primarily deploys, but not always, for the purposes of reviewing Mismatch. Given this framework, the question becomes whether diversity, even if backed by social science data as a component of cosmopolitanism, can successfully transform one’s life or withstand constitutional scrutiny. Alternatively put, can diversity without roots and proffered as a protean defense of affirmative action be reconciled with a thick conception of cosmopolitanism beyond its rather obvious instrumental value in making the case for citizenship of the world? Rather, does diversity without roots find its defense in the oikos?

IV. THE OIKOS

Arguably defined by its opponents as nothing more than “nationalism” and by its supporters more positively as “communitarianism” or “patriotism,” the oikos is largely about homecoming. According to Deneen’s account, the Odyssey is an apt metaphor for the profound tension that lies between the attractions of homecoming and the mysteries of the unknown, between patriotism and cosmopolitanism. After all, Odysseus “is, in one guise, the universal man wandering the world and encountering the varieties of gods, beasts, and mankind above and below the earth.” In his other guise, Odysseus is the particular man: he is king, father, husband, son; his longing to return to the tiny kingdom of Ithaca, his home, is the paramount goal that fuels the action of the Odyssey.” Though the Odyssey may seem very far from contemporary debates on affirmative action, diversity, and the accompanying dispute about the capacity of social science to ease progress and to end debate on contested issues, based on Deneen’s telling, Homer’s poem is at the center of the contest between cosmopolitans like Martha Nussbaum and defenders of more local allegiances.
like Charles Taylor and Michael Walzer.\textsuperscript{266} Defenders of the *oikos*, responding to the seemingly unlimited recommendation of choice posed by the immoderate Enlightenment position,\textsuperscript{267} have argued for the very “‘situatedness’ of individuals and on behalf of boundaries in politics and restraint on the seemingly limitless capacity for optimism in progress.”\textsuperscript{268} While cosmopolitans contend that each of us is “born involuntarily as a citizen of a particular place, . . . our more fundamental commonality demands that we devote our [energies] to humanity at large.”\textsuperscript{269} Defenders of the *oikos* respond by arguing that cosmopolitanism is not a real possibility for limited human beings.\textsuperscript{270} It is into this gulf that this Article hopes to situate *Mismatch*, affirmative action, and its accompanying diversity rationale. This process is advanced by considering the notion of academic freedom.

V. \textsc{Academic Freedom and Diversity?}

Although it is clearly possible that academic freedom at public universities cannot be derived from the First Amendment,\textsuperscript{271} a claim that ultimately destabilizes the diversity rationale, the *Grutter* Court, accepting Justice Powell’s analysis, stresses that academic freedom is grounded in the First Amendment.\textsuperscript{272} This observation inevitably elevates educational autonomy, including a university’s right to make its own judgments on its education practices such as the selection of its student body.\textsuperscript{273} As specified by the Court, a university’s educational mission is advanced through the selection of students “who will contribute the most to the ‘robust exchange of ideas’”\textsuperscript{274} and, hence, enhance humanity at large. A robust exchange, so the hopeful argument goes, flows from a diverse student body, which thereby ensures “that public institutions are open

\textsuperscript{266} \textit{Id.} at 14.

\textsuperscript{267} \textit{See} DELSOL, *supra* note 1, at 34–36, 62 (suggesting a contrast between the thoughts of Montesquieu, a defender of pluralism, tolerance, and the ability to think for one’s self, as a moderate form of the Enlightenment on the one hand, and the universalizing impulses of Condorcet, who sought the pursuit of uniformization on the other; and further suggesting that the Enlightenment in some of it various immoderate variations is, in reality, a perversion of Enlightenment thought found at the time of the French Revolution).

\textsuperscript{268} DENEEN, \textsc{The Odyssey of Political Theory}, *supra* note 44, at 15 (citing SANDEL, *supra* note 44; ELSHTAIN, \textsc{Real Politics}, *supra* note 45; ELSHTAIN, AUGUSTINE, *supra* note 45; LASCH, \textsc{Heaven supra note 45; LASCH, REVOLT, supra note 45}).

\textsuperscript{269} \textit{Id.} (citing Nussbaum, \textsc{Patriotism and Cosmopolitanism, in For Love of Country, supra note 29, at 14).

\textsuperscript{270} \textit{Id.}

\textsuperscript{271} \textit{See} Larry Alexander, \textsc{Academic Freedom}, 77 U. COLO. L. REV. 883, 884 (2006) [hereinafter Alexander, \textsc{Academic Freedom}].


\textsuperscript{273} \textit{Id.} (quoting Bakke, 438 U.S. at 312).

\textsuperscript{274} \textit{Id.} (quoting Bakke, 438 U.S. at 313).
and available to all segments of American society,”275 a move that may simultaneously expand the boundaries of human sympathy276 and protect the institution’s pursuit of elite status.277

Although it seems clear that a diverse student body cannot guarantee that a university will actually create educational benefits for such a grouping of students, academic freedom as a constitutional concept originated in a concurring opinion of Justice Frankfurter in Sweezy v. New Hampshire.278 Although there is reason to doubt that Justice Frankfurter thought about the Constitution’s ban on racial discrimination,279 he contends that a free society depends on free universities. This conclusion apparently “warrants the exclusion of governmental intervention in the intellectual life of a university.”280 Surely such a broad and deferential approach, resting as it does on an ill-defined tradition of academic freedom,281 could neither preclude the Supreme Court from preventing invidious discrimination on the basis of race282 nor bar judicial intervention when a state university mandates the denial of the Holocaust by newly admitted students.283 The question becomes whether the courts should be excluded from intervening when and if academic freedom, in the form of a robust exchange of ideas, is advanced by a critical mass of students who were selected, at least in part, because of race. Alternatively, is academic freedom—skeptically seen as “the freedom to believe anything at all, provided you feel better for it”284—merely a convenient evasion that grants extensive deference to the university for instrumental reasons that facilitate the avoidance of justice based approaches, including rectification?285 Examining the persistence of

276. See id. at 330 (adverting to diversity’s contribution to improved cross-racial understanding and more enlightening classroom discussions).
279. See Grutter, 539 U.S. at 364 (Thomas, J., concurring in part, dissenting in part) (“I doubt that when Justice Frankfurter spoke of governmental intrusions into independence of universities, he was thinking of the Constitution’s ban on racial discrimination.”).
280. Sweezy, 354 U.S. at 262 (Frankfurter, J., concurring).
281. See Grutter, 539 U.S. at 362–64 (Thomas, J., concurring in part, dissenting in part) (citations omitted) (explaining that Justice Powell’s conception of academic freedom rests on only two Supreme Court cases and apparently provides no answer to the question of whether the Fourteenth Amendment’s restrictions are relaxed when applied to public universities).
283. See, e.g., Kenneth Lasson, Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society, 6 GEO. MASON L. REV. 35, 85 (1997) (arguing that, even under the First Amendment, demonstrably false ideas can be prohibited).
gender inequality within the academy, scholar Scott Moss notes that “it is odd that the academic deference doctrine has drawn such broad judicial adherence yet so little judicial questioning. Courts treat it as generally accepted, even though there are powerful arguments against it.”\textsuperscript{286} In a somewhat complementary vein that moves analysis forward, Larry Alexander contends that academic freedom facilitated by academic deference produces little actual diversity.\textsuperscript{287} Alexander states that:

the degree of political homogeneity in the academy is mind-boggling. Usually, it seems to me that the same people who loudly extol the virtues of diversity for the academy draw the line at the rather superficial diversity markers of race, ethnicity, and gender and want to have no truck with the more profound markers of diversity such as politics and religion. The last thing these diversity proponents desire is an actual diversity of views. Rather, they want people of different skin tones who believe what they believe.\textsuperscript{288}

This is an intuition that coheres with cosmopolitans’ pursuit of unity, if not unanimity, and may pave the way for realization of moral superiority. Alexander’s sharp critique of diversity as actually practiced in academia appears congruous with the pursuit of institutional uniformity, an occurrence that is steadfast with cosmopolitanism’s universalizing impulse and may operate to limit the ideas that can actually be exchanged within academia, thus diminishing rather than advancing academic freedom. Even diversity defenders are troubled by the notion that academic freedom actually produces real diversity.\textsuperscript{289} Defending diversity, Professor Anita Bernstein, tracking Justice Powell’s analysis in Bakke, accepts his claim that “[b]ecause dialogue produced by a diverse student body relates closely to what institutions teach even when it takes place outside the classroom . . . choosing diversity in admissions is also a matter of academic freedom, ‘a special concern of the First Amendment.’”\textsuperscript{290} Still, Bernstein admits that “[m]any empirical claims about diversity—though by no means all [claims]—rest on a shaky foundation,” an assertion that is reinforced

\textsuperscript{286} Scott A. Moss, Against “Academic Deference”: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine, 27 BERKELEY J. EMP. & LAB. L. 1, 21 (2006). Moss asserts that deference is inappropriate because defendant universities rely on self-interested testimony and utilize subjective reasoning that may reflect unconscious discrimination, while ignoring the persistence of gender segregation in the academy, a trend compounded by virtue of the inability of social norms to police academic labor markets. See id. at 10–20 (citations omitted).

\textsuperscript{287} See Alexander, Academic Freedom, supra note 271, at 889.

\textsuperscript{288} Id. (footnote omitted).

\textsuperscript{289} See Bernstein, supra note 285, at 220 (implying that at least some empirical claims about diversity are justified).

\textsuperscript{290} Id. at 210 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).
by the likely presence of self-selection bias. Bernstein therefore concludes that “[e]mpirical claims about the benefits of diversity might be accurate, but they have also begged questions, confused correlation with causation, and rested on dubious methodologies and insufficient precision.”

As a practical and historical matter, the notion of “academic freedom originally derives from Catholic tradition” rather than from the First Amendment. Evidently, academic freedom has been defended in recent times by both Pope John Paul II and Benedict XVI. But both articulated a defense of academic freedom in the context of also asserting the truth of Christianity and that academic freedom was necessarily limited to efforts to better understand and articulate the truth of Faith.

Against the notion that both academic freedom and freedom as a whole are only possible in light of that truth, including the truth of the human person, and favoring a contentless freedom that reflects a subjective basis for morality, John Stuart Mill altered the Western conception of academic freedom. “Freedom of inquiry (including academic freedom) was justified, [Mill] argued, in order to liberate humans from the dead hand of the past. What governed most human affairs was mere Custom; what the liberation from custom and tradition through free inquiry would entail was the unleashing of Progress.” Progress, on this account, was found in the liberation to engage in a multiplicity of “experiments in living,” which is conducive to the liberation of the people from societal norms in favor of “individuality.” This cosmopolitan maneuver can be seen as part of an explicit obligation to foster an open and vigorous marketplace of ideas, which, on Professor Lasson’s account, enables universities to stray from truth or even the pursuit of truth. When universities stray from truth, this may impair the detection of provable evidence showing rectifiable injury, a move that likely advances privilege and expands opportunities for subjugation.

291. Id. at 220 (citing Stanley Rothman et al., Does Enrollment Diversity Improve Education?, 15 INT’L J. PUB. OP. 8, 8 (2003)) (showing that researchers cannot readily distinguish between causes and effects because those individuals open to engagement, creative thinking, and learning from new people may have opted to seek admission to environments that offer what they prefer).
292. Id. at 252.
294. Id.
295. Id.
296. Id.
297. Id.
298. See Lasson, supra note 283, at 85–86 (referencing Holocaust deniers within a university setting).
299. See id.
Taking these sundry claims as a whole, it is possible to deduce that contemporary conceptions of academic freedom and their jurisprudential corollary academic deference may support “experimental thinking,” forms of cosmopolitan interchange, and universality favored by Czobor-Lupp that evolve from constrained conceptions of diversity.\textsuperscript{300} It is possible that this move leads to classroom uniformity, which Ackerman and other liberals crave. In addition, contemporary conceptions of academic freedom may lack actual First Amendment support,\textsuperscript{301} despite Justice Powell’s claims to the contrary,\textsuperscript{302} while failing to produce “academic freedom” as the pursuit of truth.\textsuperscript{303} The foregoing examination, whether completely correct or not, says something about the legitimacy of academic freedom and academic deference within the context of American history and Supreme Court jurisprudence that patrols the boundaries of affirmative action and racial preferences in this current epoch. The next section supplies additional context.

VI. THE MISMATCH EFFECT

A. Highly Contested Wrangle Redux

Various claims and contentions infect the affirmative action debate. In response, commentators are provoked to plumb the complexities of race, responsibility, remediation, and racial progress.\textsuperscript{304} Few observers doubt that the concept and reality of race\textsuperscript{305} remain a persistent puzzle no matter how often facts are recapitulated or how commonly the Constitution’s Equal Protection Clause is invoked. Presently, this debate inflects around a constellation of divergent visions. “What is intellectually interesting about visions are their assumptions and their reasoning, but what is socially crucial is the extent to which they are resistant to evidence.”\textsuperscript{306} Discussions regarding the verifiability of empirical evidence give rise to doubt over whether the evidence matters more than the suppositions and presuppositions tied to such discussions.\textsuperscript{307} Predisposition and inclination frequently precede evidence and, accordingly, evidence alone is unlikely to produce consensus, although an agreed upon

\textsuperscript{300} See supra Part III.A.

\textsuperscript{301} Alexander, Academic Freedom, supra note 271, at 884.


\textsuperscript{303} See Alexander, Academic Freedom, supra note 271, at 884.

\textsuperscript{304} See supra Part IV.

\textsuperscript{305} See, e.g., DERRICK BELL, RACE, RACISM AND AMERICAN LAW 1 (5th ed. 2004) (noting consistent debate about the effects of racism, while implicitly accepting the existence of race); see also supra Part IV.


\textsuperscript{307} See SANDER & TAYLOR, supra note 30, at 83–88 (discussing the dearth of accurate empirical data that forms the basis of much of the affirmative action debate).
consensus can certainly find evidence in support of its prevailing sentiment.\textsuperscript{308} Thus, it is deducible that modern society is poised for continuing conflict and volatility despite the empirical tools that are at its disposal.\textsuperscript{309}

Sander and Taylor, unvaryingly with the contemporary quest for organizational predictability predicated on generalizations that ascend from the manipulation of the tools of social science,\textsuperscript{310} attempt to unscramble the dilemma of affirmative action through various metrics. Based on data analysis, the authors seek to reform and thus constrain the availability of preferences premised on the intuition that reformation benefits minority group members by enabling them to avoid the gap between their level of preparation and the prevailing level of academic preparation within selective institutions of higher learning.\textsuperscript{311} On a preliminary level, the authors’ focus on whether affirmative action inures to the benefit of minorities is arguably consistent with the Sixth Circuit Court’s approach in \textit{Schuette} and is incongruous with the approach—focused on institutional advancement—taken by the Supreme Court in \textit{Grutter}.\textsuperscript{312}

\textbf{B. Sander and Taylor’s Data Analysis and Central Claims}

Sander and Taylor maintain that affirmative action, erected on the foundation of the civil rights revolution and premised on the goal of social mobility, promised to smooth the path of opportunity for all.\textsuperscript{313} The authors argue that affirmative action was catalyzed by America’s history of racial discrimination and was initially calibrated as a backward looking remedy that implied “‘white racism’ was the root cause of urban black riots.”\textsuperscript{314} Still, this remedy “emphasized the importance of helping the disadvantaged in a race-neutral way.”\textsuperscript{315} Sander and Taylor insist that this remedial principle became the initial driving force behind preference programs that spread briskly across American higher education.\textsuperscript{316} At its inauguration, individuals receiving racial preference largely came from economically modest backgrounds or were the first in their families to attend college.\textsuperscript{317} As applied, affirmative action expanded

\textsuperscript{308} See \textit{id.} at 87.

\textsuperscript{309} See Epperson, \textit{supra} note 19, at 490.

\textsuperscript{310} See \textit{generally} MACINTYRE, \textit{supra} note 57, at 88–102 (discussing the human search for predictability through social science generalizations); see also Epperson, \textit{supra} note 19, at 490 (“Social science evidence has been used as a major tool in the litigation arsenal on both sides of the [affirmative action divide].”).

\textsuperscript{311} See \textit{SANDER & TAYLOR, supra} note 30, at 33–48.

\textsuperscript{312} See \textit{supra} Part II.C.

\textsuperscript{313} \textit{SANDER & TAYLOR, supra} note 30, at 247.

\textsuperscript{314} \textit{Id.}

\textsuperscript{315} \textit{Id.}

\textsuperscript{316} \textit{Id.}

\textsuperscript{317} \textit{Id.} at 247–48.
opportunities for previously disenfranchised individuals and groups, a move that coheres with elementary notions of justice.

Today, Sander and Taylor perceive that the nation’s affirmative action approach has been altered, and not for the better. Relying on a wealth of empirical analysis in support of such claims, and ignoring the tortured nature of public dialogue about race in the country and the taboos associated with a frank discussion of awkward statistical facts, the authors offer a straightforward explanation for the current system’s failings, building on Sander’s prior empirical work. Sander previously argued that the costs imposed on minority students from the practice of affirmative action in the law school arena include lower performance, increased struggles, higher attrition rates, lower bar passage rates, and difficulties in the employment market. Consistent with this perspective, “racial preferences produc[e] fewer black lawyers each year than would be produced by a race-blind system.” The authors mourn the possibility that affirmative action as currently practiced will encourage the nation’s future leaders to believe that blacks are slow learners and conclude that for many black and Hispanic students, preference has proved to be a curse. The shortcomings of the current approach are illuminated by the mismatch thesis, which opines that affirmative action as presently applied produces a cascade effect that harms its beneficiaries by placing them in settings where they often cannot compete academically. Briskly summarized, the authors contend that minority students would benefit from placement in appropriate schools, that is, schools and universities whose median standardized test and undergraduate grade point average scores are closely matched with those of the applicant.

The authors’ data analysis indicates that the most elite colleges set racial diversity goals and admit blacks with the highest academic indices, then continue to use preferences as necessary to reach down into the pool of black students until they achieve their admissions goals. This maneuver by elite schools,

318. Id. at 247.
319. See id. at 248.
320. See id.
322. Id. at 371–72.
323. Id. at 372.
324. SANDER & TAYLOR, supra note 30, at 7 (quoting CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 63 (1992)).
325. Id. at 19–20.
326. Id. at 46 (suggesting that minority students who attended schools where their academic index put them at or above the average freshman had an excellent experience, and that such well matched students were about twice as likely as their ill-matched peers to sustain their plans to join academia). But see Jackson & Moses, supra note 169, at 222–23 (explaining and contesting such claims).
327. SANDER & TAYLOR, supra note 30, at 19; see also id. at 21–24 (citations omitted) (illustrating the process graphically).
evidently defended as part of Grutter’s approval of the pursuit of a “critical mass” of minority students, is then followed by a “second tier of colleges that start where their more elite competitors [have] left off.”328 However, the data show that even the second tier schools’ strongest black admittees will have academic indices well below the white average.329 In order to avoid academic index gaps that are too large, second tier schools end up admitting a smaller proportion of blacks than do their counter-parts at the most elite schools.330 This process, part of the cascade effect, continues to third tier schools and so on down the line, with an added challenge arising from the fact that the gap between minority and nonminority students rises, at least as measured by academic indices.331

After presenting data on the cascade effect, the authors further explicate mismatch. Relying in part on the work of Dartmouth psychologists Rogers Elliot and A. C. Strenta, Sander and Taylor explain why, for instance, leading schools produce few black or American Indian scientists.332 Evidently, “poor minority representation in science does not reflect these students’ precollege aspirations.333 “As seniors in high school, blacks were somewhat more likely than whites to report an interest in majoring in science, technology, engineering, or math . . . (collectively known as STEM).”334 After experiencing high attrition rates in elite schools, this interest waned.335 “Blacks who entered these elite schools pursuing STEM majors were only slightly more than half as likely as whites to finish college with a STEM degree.”336 These troubling results are explained not by the absolute levels of academic preparation but by the relative levels, meaning that the competition for talented minority students among universities337 led to mediocre or bad grades and dampened student aspirations.338 Sander and Taylor remark that affirmative action, often correlating with large absolute preferences, is a counterproductive and self-

328. Id. at 19 (“The elite schools get their pick of the most academically qualified minorities, most of whom might have been better matched at a lower-tier school. The second tier schools, deprived of students who would have been good matches, must then in turn use preferences to produce a representative student body, and so on down the line.”).
329. Id.
330. Id. at 19–20; see also id. at 22 (illustrating the academic index gap between blacks and nonblack students and median academic index by race).
331. Id. at 20 (showing that lower-ranking schools use larger and larger racial preferences).
332. Id. at 33. See generally Rogers Elliott et al., The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, 37 RES. HIGHER EDUC. 681 (1996) (discussing the role of different standards of selection for black students on their success in science curricula).
333. SANDER & TAYLOR, supra note 30, at 34.
334. Id.
335. Id.
336. Id.
337. See id. at 34–40.
338. Id. at 46 (citing STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 101–02 (2003)).
defeating policy.\textsuperscript{339} Linking their analysis with this claim, the authors disentangle the mismatch problem by agreeing with scholars Cole and Barber who encourage high school counselors to recommend that minority students avoid going to the most prestigious school they can get into.\textsuperscript{340} In order to avoid a lack of fit, such students should consider where they would likely do well academically.\textsuperscript{341} Contending that the central purpose of racial preferences is to increase the presence of successful minorities in society, Sander and Taylor emphasize that the practice of granting large racial preferences in admissions essentially guarantees that many members of racial minorities will not perform as well as they would have in less selective institutions, thus harming the economic and social advances of racial minorities in the United States in a number of ways.\textsuperscript{342} The authors insist that if the mismatch effect were eliminated, then the success rate for contemporary black law students, such as the percent becoming lawyers, would increase from a baseline of forty-seven percent to seventy percent.\textsuperscript{343}

Sander and Taylor intensify these various claims by inspecting the events that occurred in California during the 1990s.\textsuperscript{344} Following a tense national conversation about the need to reform racial preferences because of the “admitted disadvantages of preferences, such as stigma for the beneficiaries, unfairness to whites and (increasingly) Asians, and the general departure from race-neutral ideals,” the Board of Regents of the University of California (UC) voted to end racial and gender preferences in 1995.\textsuperscript{345} This decision was followed by the adoption of Proposition 209 by California’s voters in 1996,\textsuperscript{346} a referendum that affirmed and extended the preference ban to all state programs.\textsuperscript{347} After Proposition 209 was enacted, race-blind admissions commenced during the 1997–98 season and the authors report that, rather than producing a reduction in minority applicants, applications from blacks and Hispanic rose.\textsuperscript{348} This observation allows the authors to conclude that the elimination of preference did not chill the interest of minorities in attending the UC system.\textsuperscript{349} The authors highlight the fact that “the so-called yield rate—the rate at which blacks and Hispanic accepted offers of admission from the various

\textsuperscript{339} See id. at 4.
\textsuperscript{340} Id. at 47 (quoting COLE \& BARBER, supra note 338, at 249).
\textsuperscript{341} Id. (quoting COLE \& BARBER, supra note 338, at 249).
\textsuperscript{342} See id. at 3–7, 33–48 (citations omitted) (suggesting that the main victims of large racial preferences are not whites and Asians who get passed over, but the many blacks and Hispanics who receive preferences and perform poorly).
\textsuperscript{343} Id. at 61.
\textsuperscript{344} Id. at 115.
\textsuperscript{345} Id.
\textsuperscript{346} Id. at 115.
\textsuperscript{347} Id. at 115.
\textsuperscript{348} Id. at 132–33.
\textsuperscript{349} Id. at 134.
UC schools rose,"350 and contend that minority applicants now believe the likely long-term benefit of attaining a college degree has soared because it is untainted by any affirmative action stigma.351 As Part VII shows, such claims have provoked an intense reaction.352

VII. ANALYZING MISMATCH: A PRELIMINARY REVIEW

In Part VII, the following analysis is offered (1) an analysis of the introductory section of Mismatch; (2) a response to Sander and Taylor’s dependence on empirical analysis as well as the analysis offered by their critics; (3) a consideration of the question regarding who benefits from affirmative action as currently practiced; and (4) Sander and Taylor’s recommended reforms are set forth.

A. Assessing the Major Themes of Sander and Taylor’s Introduction to Mismatch

It is beyond dispute that Sander and Taylor’s various claims implicate race, racialization, and status as well as issues of socio-economic disadvantage.353 It is possible that these issues have evolved, at least in part, through the process of modern social and cultural construction.354 Although the contention that all categories are merely socially constructed gives rise to the observation that the concept of social construction is simply a dead end,355 it is argued that the progression of race and racial construction has been an important part of humankind’s quest for social rank.356 Against this backdrop, it is noticeable that Sander and Taylor’s introduction, while largely accurate in some of its reflections, remains deficient in others.

First, the authors suggest that affirmative action, in its many guises, is driven by an academic performance gap as measured by standardized testing that disfavors racial minorities.357 Randall Kennedy agrees, stating that “[t]he bad news is that racial minorities typically eligible for affirmative

350. Id.
351. See id. at 140–141.
352. See infra Part VII.B.
353. See generally SANDER & TAYLOR, supra note 30 (discussing race, racialization, status, and issues of socio-economic disadvantage in relation to the affirmative action debate).
354. BELL, supra note 305, at 1–2 (citing ROGER SANJEC, The Enduring Inequalities of Race, in RACE 1 (Steven Gregory & Roger Sanjek eds., 1994)) (arguing that there are three concepts that necessarily developed in tandem with “race,” implying a framework of ranked categories that segment the population with racialization and denote the process by which individuals are assigned membership in those categories, with racism being a product of the two).
356. See BELL, supra note 305, at 1–2.
357. See generally SANDER & TAYLOR, supra note 30, at 3–4 (introducing the concept of “mismatch”).
action . . . consistently perform less ably than others across a wide range of standardized tests and other widely accepted markers of knowledge and skill.”

Rather than favoring the abolishment of affirmative action, Kennedy argues instead for the abolishment of “the conditions that create the stark, predictable racial gaps that [are] all too familiar.” Consistent with this view, Kennedy counsels proponents of affirmative action to “see racialized gaps in performance as signs of a difficulty to be overcome—the ongoing effect of insufficiently remedied . . . injustice.” In concert with this observation, the performance gap standing alone does not necessarily support Sander and Taylor’s inclination to use this differential as ground to impugn reasonably designed preferences that are designed to act as remedial measures. Still, it is necessary to balance that conclusion with Kennedy’s disavowal of any affirmative action regime that “knowingly or negligently over-promotes beneficiaries, placing them in settings in which they are conspicuously less prepared than nonpreferred peers, a situation rife with risks of demoralization and the creation [and] reinforcement of racist stereotypes.”

Second, Sander and Taylor contend that contemporary affirmative action in higher education functions primarily as a vehicle to enact racial preferences. Despite Grutter’s contrary insistence that affirmative action is only permissible as a form of individualized treatment necessary to attain a critical mass of minority students, the authors’ submission is essentially correct but remains profoundly incomplete. Completeness requires a full-blooded examination of the Thirteenth and Fourteenth Amendment, the Civil Rights Act of 1866, and the Civil Rights Act of 1875, as well as the early and late judicial opinions aimed at enforcing or constraining the remedial and compensatory effects of such provisions. Mismatch is devoid of such an examination. A more balanced consideration of the origins of affirmative action would show that the above-referenced constitutional amendments were principally conceived of as a deliberate and distinct response to slavery, and that the statutory enactments assailed as “illicitly race-sensitive” by President Andrew Johnson were designed to give needed content to such amendments. See from this perspective,

358. KENNEDY, supra note 43, at 122.
359. Id. at 123.
360. Id.
361. See id. at 145.
362. Id.
363. SANDER & TAYLOR, supra note 30, at 15–16.
365. See KENNEDY, supra note 43, at 104–05.
366. For a brief introduction to the nation’s attempt to give content to the Fourteenth Amendment, see generally id. at 22–26 (quoting The Civil Rights Cases, 109 U.S. 3, 25 (1883); Andrew Johnson, Veto Message, in 6 Messages and Papers of the Presidents, 1789–1897, 406, 413 (James D. Richardson ed., 1897); JAMES OAKES, THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS 233 (1982); HEATHER COX RICHARDSON, THE DEATH OF
affirmative action as a concept preceded the elevation of the contemporary concept of diversity by almost a century. Equally true, the attempt to enact race-conscious policies today may represent a highly imperfect effort to instantiate approaches that are arguably designed to give substance to the unfinished work commenced by post-Civil War legislation.

Beyond Sander and Taylor’s failure to adequately acknowledge America’s variable racial history, it is likewise clear that they fail to acknowledge the record of government policy volatility on issues of race, which are complemented by the nation’s equally pervasive instability in the domain of jurisprudence. Instability arguably precipitated the untimely termination of the post-Civil War work of remediation and compensation that corresponds with widely held notions of justice. Although cause and effect remain speculative, the tangible achievement of remediation during the post-Civil War era would have diluted the undeniable moral force of many of Martin Luther King, Jr.’s claims. Given the absence of sustained remediation, Kennedy quotes King to good effect, noting that King observed in 1963:

Our society has been doing something special against the Negro for hundreds of years.... How then can he be absorbed into the mainstream of American life if we do not do something special for him now, in order to balance the equation and equip him to compete on a just and equal basis?

Sander and Taylor’s analysis and the force of their claims would be augmented if they conceded this history. Rightly appreciated, history supplies a case for affirmative action that fulfills the promise of the Fourteenth Amendment. Although that statement alone fails to provide guidance on which form of race-based decision making ought to be chosen, it does provide a remedial rationale that is thoroughly justified by past policy and jurisprudential failures.

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368. See KENNEDY, supra note 43, at 11.

369. See supra Part II.B.

370. See supra Parts II A–B.

371. See supra Part II.B.

372. See generally MARTIN LUTHER KING, JR., WHY WE CAN’T WAIT (1963) (discussing many of King’s claims).


374. See id. at 11.

375. See id.
The potency of Sander and Taylor’s claims would also be bolstered if they conceded a few facts on the ground. For instance, the historical record shows that when the nation decided to tackle racial oppression through efforts to end it through law or judicial opinion, such efforts have been frequently hampered by the accusation that these actions are nothing more than a form of racial favoritism.\textsuperscript{376} Such largely majoritarian oriented accusations, deftly debunked by both Justice Harlan’s dissent in the \textit{Civil Rights Cases}\textsuperscript{377} and Randall Kennedy’s analysis,\textsuperscript{378} are mistaken if not duplicitous. Equally true, the deployment and exploitation of such accusations conflates the genuine pursuit of redress by African Americans with the illegitimate quest for unjustified economic rents by labor or business cartels,\textsuperscript{379} a move that inflicted additional and unnecessary privation on those who were seen as racially inferior.\textsuperscript{380} Conflation implies that both the Supreme Court and the nation’s policymakers have often been unable or unwilling to distinguish the effects of enforced subjugation from the instantiation of special favors through the capture of government power that benefits large economic entities.\textsuperscript{381} Taken together, conflation exemplifies the modern world of contradictions wherein the pursuit of justice by African Americans is delegitimized and the pursuit of a corrupt corporate policy by government officials, labor hierarchs, and corporate officers is applauded.\textsuperscript{382}

To be fair, Sander and Taylor rightly observe in their introductory chapter “[t]hat racial preferences have been widely supported by American elites and widely opposed by the American public.”\textsuperscript{383} This gap may contribute to the nation’s current incapacity to enter into a civil discussion about affirmative action, an inability that is only strengthened by an absence of transparency about the existence and size of preferences, as well as the predictable participation by publicly funded universities in efforts designed to conceal from inspection the actual state of affairs within admissions departments.\textsuperscript{384} While this Article will examine this issue in more depth in subsequent sections, it is largely on these grounds that Sander and Taylor’s most convincing arguments rest, offering a

\textsuperscript{376} See \textit{The Civil Rights Cases}, 109 U.S. 3, 25 (1883).
\textsuperscript{377} Id. at 26–62 (Harlan, J., dissenting).
\textsuperscript{378} See \textit{Kennedy}, supra note 43, at 22–39 (citations omitted).
\textsuperscript{380} Id. at 483.
\textsuperscript{381} Id. (citing \textit{David E. Bernstein, Rehabilitating Lochner} 7, 109 (2011); Ilya Somin, \textit{Voter Knowledge and Constitutional Change: Assessing the New Deal Experience}, 45 WM. & MARY L. REV. 595, 650 (2003)).
\textsuperscript{382} See \textit{id.} at 494 (citing Somin, supra note 381, at 656) (suggesting that New Deal courts became willing partners in a process that enabled judges to impose their policy preferences by ignoring constitutional precedent and public opinion).
\textsuperscript{383} \textit{Sander & Taylor}, supra note 30, at 11.
\textsuperscript{384} Id. at 7–9.
basis for the nation and the courts to reconsider policies designed to provide preferences.

Sander and Taylor’s introduction to Mismatch correctly states that affirmative action originated as part of a prevailing social consensus refreshed by the recognition that the civil rights revolution was necessary for the nation to live up to its constitutional ideals, to pursue justice in the form of equal opportunity, and to jump start integration. Nevertheless, the authors’ analysis is marred because they fail to adequately note that the origins of such a consensus were embodied in the language and history of the Equal Protection Clause, as well as in most major steps toward undoing racial oppression in America. Although Sander and Taylor justly unmask the irony of law schools providing four times as much scholarship aid on a per capita basis to high-income blacks as to low-income whites, a policy that may be part of higher education’s lack of transparency, the authors’ exposure of such policy choices is compromised by their failure to acknowledge what is self-evident to most observers. This is a truth that Randall Kennedy convincingly excavates by stating that “[e]very major step toward [reversing America’s racial history] has been met with the charge that it constitutes [a form] of reverse discrimination.” It is out of this charged history that affirmative action arose in its many guises. A critical assessment of this history suggests that courts, observers, and policy makers ought to separate the undeniable appeal to justice that is embedded in such a history from the contemporary notion that affirmative action more or less represents the pursuit of cosmopolitan aims and depends, for its logical force, on Justice Powell’s predisposition favoring a robust exchange of ideas. It is not clear that either cosmopolitan justice or the presumed necessity of a robust exchange of ideas is connected to the lives all Americans live. On normative grounds, it is doubtful that either concept ought to be so linked to the nation’s charged racial history. The quest for cosmopolitan justice and the judiciary’s commitment to finding a compelling interest that legitimizes the quest for a robust exchange of ideas ought to be required to find a separate justification that is free of conflation with the nation’s racial history.

B. Persistent Wrangle Over Social Science

It may be impossible to settle the debate between the authors of Mismatch and their various critics on empirical grounds for a number of reasons, yet a few things are clear. Recall that Sander and Taylor insist that what principally

385. See id. at 3.
387. SANDER & TAYLOR, supra note 30, at 9–10.
388. KENNEDY, supra note 43, at 22.
determines students’ chance of success is not their absolute credentials, but relative credentials, which on the authors’ telling signifies that large racial preferences have the large-scale effect of placing promising minority students in settings where they are least likely to achieve their goals. The authors were thus not surprised to find that historically black colleges and universities (HBCUs), where blacks are often well matched to their peers, play a disproportionately positive role in producing black scientists. Evidently, “HBCUs produced [forty] percent of blacks with bachelor degrees in science and engineering even though they accounted for only [twenty] percent of black college enrollment.” Premised on these and similar data-based observations, Sander and Taylor emphasize the possibility that racial preferences are not benign primarily because they increase the relative academic preparation gap that minority students must surmount. It is possible that the authors’ observations are completely true. More likely, however, in order to vindicate the authors’ claim that preferences have pernicious effects on minorities, the authors as social scientists ought to first attempt to control for all endogenous variables. In the absence of such controls, most social scientists would be reluctant to reach any conclusions about their data.

Although a number of alternative explanations have surfaced in response to Sander’s earlier piece, Systemic Analysis, scholars Jackson and Moses concentrate their critique on what appears to be missing from Sander’s analysis: the explanatory power of invidious effects of racism, including, racism associated with lowered expectations, the legal curriculum itself, and economic hardships. Additional doubts arise because “attempted replications of Sander’s [earlier piece] have raised [questions] about the accuracy of his reported correlations.” Since Sander and Taylor rely directly on Systemic Analysis, distrust seeps into any balanced assessment of Mismatch as well. Moreover, Jackson and Moses’s systematic appraisal responds directly to Sander and Mismatch’s central argument that affirmative action shrinks the number of black lawyers in comparison with a race-blind system. Jackson and Moses counter Sander’s contentions by unearthing scholars Rothstein and

390. Sander & Taylor, supra note 30, at 36 (discussing STEM students).
391. Id.
392. Id.
393. Id.
394. Id.
395. See id. at 40–41, 46–47.
397. Id. (citing Delgado, Rodrigo’s Riposte, supra note 396, at 644).
399. Id. at 223 (quoting Sander, supra note 321, at 372).
Yoon’s empirical work. Rothstein and Yoon show that the elimination of affirmative action leads to a sixty-three percent enrollment decline in all law schools and a ninety percent enrollment decline in elite law schools. Indeed, Rothstein and Yoon demonstrate in a simulation that African Americans did not shift down to “appropriately matched” law schools as Sanders and Taylor suggest; rather, they disappeared.

William Kidder’s analysis appears to be equally devastating. In stark contrast with the findings in Mismatch, Kidder shows that: (1) higher graduation rates by black students at HBCUs “may plausibly [be] due to campus climate or other variables having nothing to do with [the] mismatch effect;” (2) African American and Latinos enjoyed “large benefits in the labor market from enrolling at highly selective colleges,” a finding that has been corroborated by a number of studies; and (3) after the passage of Proposition 209, a larger share of top black students admitted to the University of California campuses chose to reject offers from the university in favor of selective private universities that utilized affirmative action—an observation that contradicts the tenor and tone of Sander and Taylor’s evaluation and implies that after the elimination of preferences the University of California system became more appealing to minority applicants. Whether Kidder’s contradiction is accurate or not, Justice Thomas offers evidence that supports some of Sander and Taylor’s claims. Drawing on publicly available sources, Justice Thomas observes that Boalt Hall at the University of California Berkeley enrolled slightly more minorities, such as blacks and Hispanics, after the passage of Proposition 209. Nonetheless, Kidder’s overall analysis echoes Holzer and Neumark’s empirical results, implying that the mismatch thesis is based on interesting data and a provocative argument. However, at least with regard to law schools, the empirical case for mismatch has not been made.

Beyond the specific issues that reflect the persistent tussle between Sander and Taylor’s empirics and the largely empirical critique offered by their scholarly critics, some commentators argue that Mismatch also fails to give sufficient weight to the potential advantages of attending elite schools. Three possible advantages prompt attention: (1) the possibility that when minority “students are overmatched by their classmates, they appear to be carried along to

400. See id.
402. Id. (citing Rothstein & Yoon, supra note 401, at 701).
403. Kidder, supra note 38.
404. Id.
405. Id.
406. SANDER & TAYLOR, supra note 30, at 135.
408. Kidder, supra note 38.
409. See KENNEDY, supra note 43, at 129.
more [academic] success” than they might otherwise achieve;\textsuperscript{410} (2) the likelihood that minority students benefit from being socialized into the habits and possibilities of eliteness, including lifetime membership in elite networks,\textsuperscript{411} and (3) the possible benefits achieved by a minority community as a whole when members of such communities attend the most elite schools and thereby provide the community access to elite networks,\textsuperscript{412} a claim that may or may not be difficult to corroborate.

In the absence of evidence proving that the critics have simply cooked the books, it is reasonable to conclude that serious doubts infect \textit{Mismatch}’s empirical analysis.\textsuperscript{413} Nonetheless, as Randall Kennedy shows, the pugnacious response to Sander’s \textit{Systemic Analysis}, and to Sander and Taylor’s work in \textit{Mismatch} may have provoked conduct and attempted suppression that undercuts the goals of affirmative action proponents.\textsuperscript{414} Such attempts may be a boon to Sander and Taylor’s claims by implying that affirmative action defenders have something to hide, and may facilitate the denial of important facts that warrant the nation’s attention.\textsuperscript{415} Still, this dispute regarding empirical results will not completely resolve conflicting visions of affirmative action. Instead, a focus on empiricism may fuel future debate and raise the temperature. On balance, Sander and Taylor may have made a huge mistake in believing that their overwhelmingly statistical approach to affirmative action can sort out the intractable problems of race without apparent regard for the nation’s history.\textsuperscript{416} In a similar vein, Kidder concedes that Sander and Taylor delve into a “[fundamentally] important issue where our values (individually and collectively) may be in conflict.”\textsuperscript{417} Kidder admits that “[s]ome of these differences cannot be resolved empirically, [even if] other clashes can be . . . illuminated by sound social science.”\textsuperscript{418} Taken together with Part II’s inspection of the nation’s volatile record on matters of race, commentators should admit that American values and actions have been in a state of nonlinear flux for quite some time, thus raising the issue of whether empirical analysis

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\textsuperscript{410} \textit{Id.} at 129 (citing Ian Ayres & Richard Brooks, \textit{Does Affirmative Action Reduce the Number of Black Lawyers?}, 57 STAN. L. REV. 1807, 1824 (2005)).
\textsuperscript{411} \textit{Id.} at 129–30 (quoting David B. Wilkins, \textit{A Systematic Response to Systematic Disadvantage: A Response to Sander}, 57 STAN. L. REV. 1915, 1931 (2005)).
\textsuperscript{412} \textit{Id.} at 133.
\textsuperscript{413} \textit{See generally} Ayres & Brooks, supra note 410, at 1809 (refuting Sander’s mismatch hypothesis); David L. Chambers et al., \textit{The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study}, 57 STAN. L. REV. 1855, 1877 (2005) (stating that Sander has not shown any benefits from ending affirmative action); Wilkins, supra note 411, at 1916 (providing empirical analyses of mismatch issues).
\textsuperscript{414} \textit{Kennedy, supra note 43, at 132.}
\textsuperscript{415} \textit{Id.}
\textsuperscript{416} \textit{See, e.g.,} Kidder, supra note 38 (stating that some differences cannot be resolved empirically); \textit{see also} \textit{Wright, supra note 46, at 64 (“Science studies the repeatable; history studies the unrepeatable.”)).
\textsuperscript{417} Kidder, supra note 38.
\textsuperscript{418} \textit{Id.}
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alone can adequately inform this debate. Lastly, Sander and Taylor’s approach is consistent with, and elevates, the modern belief that objective scientific evidence leads inevitably to progress, a doubtful enterprise that John Gray has already exposed.\footnote{419. \textit{See} GRAY, \textit{SILENCE OF ANIMALS}, \textit{supra} note 20, at 75.} Against this backdrop, Jackson and Moses “re-assert the need for deliberate democratic discussion, dialogue, and debate.”\footnote{420. JACKSON \& MOSES, \textit{supra} note 169, at 223.} A crucial part of any such debate compels a fresh assessment of the justification for affirmative action, which, requires a balanced understanding of the nation’s history, the demand for remediation tied to such a history, as well as a new evaluation of whether diversity can plausibly serve as an ultimate trump within the domain of higher education. As the next subsection shows, the diversity rationale faces fresh doubt when observers consider the question of who benefits from such a program.

\textit{C. Who Benefits from Affirmative Action?}

Initially, preference programs were invariably race-based.\footnote{421. SANDER \& TAYLOR, \textit{supra} note 30, at 247.} Still, Sander and Taylor show that universities often tried hard to reach low-income and moderate-income blacks.\footnote{422. \textit{Id.} at 247–48.} The authors point to “data sources [showing] that a very large proportion of those receiving large racial preferences either were from economically modest backgrounds or were the first in their families to attend college.”\footnote{423. \textit{Id.} at 248–49.} Today, the ground beneath affirmative action has shifted rather dramatically. This shift favors affluent African Americans. Indeed, the evidence shows that two-thirds of the 1992 cohort of blacks at elite colleges came from the top quartile of American socioeconomic distribution, up from only twenty-nine percent in 1972.\footnote{424. \textit{Id.} at 250 (citing Anthony P. Carevale \& Stephen J. Rose, \textit{Socioeconomic Status, Race/Ethnicity, and Selective College Admissions}, in \textit{AMERICA’S UNTAPPED RESOURCE: LOW INCOME STUDENTS IN HIGHER EDUCATION} 101, 106 (Richard D. Kahlenberg ed., 2004)); Richard H. Sander, \textit{Class in American Legal Education}, 88 DENV. U.L. REV. 631, 639 (2011)).} Based on socioeconomic data, the record shows that most students at elite undergraduate schools and law schools come from privileged backgrounds that seem to defy the notion of economic diversity or most generalized conceptions of disadvantage.\footnote{425. \textit{Id.} at 251.} This retreat from focused remediation, predicated on the historical disadvantages that blacks have encountered, can be made more tangible.\footnote{426. \textit{Id.} at 251.} Sander and Taylor demonstrate that a large fraction of affirmative action beneficiaries come from immigrant, mixed-race, or affluent backgrounds, an unsurprising finding given the predictable self-
interest of admissions officers\textsuperscript{427} in selecting people who either look like them in some way or who come from similar, perhaps privileged, socioeconomic backgrounds.\textsuperscript{428} Randall Kennedy substantiates Sander and Taylor’s observations, indicating that some scholars worry that “‘blacks whose predominate ancestry is traceable to the historical oppression of blacks in the United States are likely more underrepresented in affirmative action than most . . . [people] realize.’”\textsuperscript{429} This problematic development could fuel demand for a different approach to affirmative action. Hence, if racial preferences are to retain their connection to notions of justice, Sander and Taylor’s analysis of this important issue deserves wide attention. Affirmative action’s disparate impact on the economically disadvantaged sector of minority populations inarguably fuels skepticism for some, but not necessarily all, racial preference regimes.\textsuperscript{430} Whether or not a sustained demand for a different approach to affirmative action surfaces, any such demand ought to be considered concurrently with Sander and Taylor’s conviction that the Supreme Court is capable of becoming the nation’s racial healer.\textsuperscript{431} The next subsection develops this claim.

\textbf{D. Pursuing Reform through the Courts?}

Sander and Taylor evidently believe that the Supreme Court has sufficiently flexible tools to engineer serious reform of affirmative action, short of an immediate ban.\textsuperscript{432} Although this Article has more to offer regarding Sander and Taylor’s reforms, the Sander and Taylor offer three specific reforms that are outlined before providing analysis. First, tracking the late Senator Ted Kennedy’s effort to expand disclosure regarding legacy preferences, the authors contend that universities should be transparent about preferences.\textsuperscript{433} Second, Sander and Taylor recommend that universities target economic need before racial identity when dispensing preferences.\textsuperscript{434} Finally, the authors would outlaw race-based aid awards because such awards produce little, if any, diversity benefits.\textsuperscript{435}

\begin{itemize}
\item \textsuperscript{427} Id. at 252. (showing that admissions officers are drawn to the following facts: (1) the academic indices of each of these groups are much higher, on average, than those of American blacks in general, (2) these groups are easy to find, and (3) if one is focused on a numbers game, then anyone with the appropriate racial markers will serve).
\item \textsuperscript{428} STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 80 (1991) (quoting Dreyfuss and Lawrence who suggest that when the Supreme Court imposed limits on preferential admissions, the winners were the country’s economically and educationally privileged).
\item \textsuperscript{429} KENNEDY, supra note 43, at 143 (quoting Kevin Brown & Jeannine Bell, Demise of the Talented Tenth, 69 OHIO ST. L.J. 1229, 1230 (2008)).
\item \textsuperscript{430} SANDER & TAYLOR, supra note 30, at 253, 258.
\item \textsuperscript{431} Id. at 273.
\item \textsuperscript{432} Id. at 274.
\item \textsuperscript{433} Id. at 281.
\item \textsuperscript{434} Id. at 284.
\item \textsuperscript{435} Id. at 285.
\end{itemize}
E. The Power of Transparency

On Sander and Taylor’s account, the sequence of racial healing would be advanced by a directive that requires universities to disclose the size of racial preferences employed and supply admitted students with data on the academic outcomes of past enrollees with similar credentials, as well as information about the process used to create the student body, its characteristics, and its outcomes. As part of full disclosure, the authors state that schools ought to be required to supply any information they have or can reasonably obtain on learning outcomes that detail how well similar students perform within an admitted student’s intended major, including information on attrition and what percentage of similar students went on to complete graduate school. Lastly, Sander and Taylor believe that the Supreme Court ought to mandate that all of the above-referenced data on outcomes, as well as on the size of all admissions preferences, should be made publicly available so that researchers, legislators, the media, and all other citizens can evaluate the accuracy and completeness of the information provided to applicants.

F. Targeting Economic Need Before Racial Identity

Sander and Taylor note the Supreme Court’s insistence “that racial preferences must not unduly harm members of any racial group.” Although undue harm is actually a function of how large the preferences are, “the Court has never imposed a specific size limit.” Convinced that large preferences harm intended beneficiaries, and persuaded that socioeconomic diversity is every bit as compelling an interest as racial diversity in tandem with the intuition that affirmative action ought to reclaim its original social mobility goal, the authors offer a straightforward solution to the dilemma of outsized racial preferences that would “require that the racial preferences a university uses be no larger than the average size of preferences based on an individual applicant’s financial need or socioeconomic status (SES).” Preferences ought to be capped in order to “ensure that pursuit of campus diversity includes meaningful consideration of each applicant’s individual circumstances rather than just her skin color . . . [and to] ensure that universities actually pay attention to race-neutral ways of pursuing diversity and, thus, would inhibit unconstitutional racial balancing.” Sander and Taylor argue that an “SES cap on racial preferences

436. Id. at 281.
437. Id. at 281–82.
438. Id.
439. Id. at 284.
440. Id.
441. Id.
442. Id. (emphasis omitted).
443. Id.
would also foster simple justice to the economic have-nots who have been so sorely neglected by our selective universities.\textsuperscript{444} This reform proposal builds on Sander’s successful work in devising a sophisticated system of SES preferences at the University of California after the passage of Proposition 209.\textsuperscript{445}

1. Outlawing Race-Based Aid Awards

Sander and Taylor’s final reform proposal would “reinforce the effectiveness of the second.”\textsuperscript{446} The authors contend that the Supreme Court “should, in a proper case, prohibit state schools from using racial preferences in awarding financial aid and scholarships [because] [s]uch awards produce little if any diversity benefit.”\textsuperscript{447} Sander and Taylor assert that “the main function of race-based financial aid is to fuel zero-sum bidding wars among competing campuses for the limited supply of blacks with strong academic qualifications.”\textsuperscript{448}

Cognizant of the nation’s history, the next part places Mismatch and affirmative action into the gulf that separates cosmopolitans and adherents to the oikos, and reaches tentative conclusions. Amidst this gulf, the Article concentrates on whether the diversity rationale, which has been used to legitimize most affirmative action policies in the nation, can be fully justified by reference to the chasm that separates the cosmos from the oikos. This focus facilitates the deconstruction and contextualization of Mismatch and affirmative action, and prepares a way forward. It also allows the Article to respond directly to Sander and Taylor’s claim that the Supreme Court is the only hope for serious reform of race-conscious policies in the nation.

VIII. DECONSTRUCTING AFFIRMATIVE ACTION: THE COSMOS IN THE MIRROR OF THE OIKOS?

A. Affirmative Action in the Chasm

Martha Nussbaum stipulates that one of greatest barriers to rational deliberation and discourse regarding politics, including the politics of affirmative action and the controversy that consumes Mismatch, is “the unexamined feeling that one’s own preferences and ways are neutral and natural.”\textsuperscript{449} Particularities of country, locality, and ethnicity, it is argued, may reinforce an irrationality that is ultimately tied to characteristics that are no more morally salient than an accidental collision of an occupied vehicle with a doe in search of a nighttime...
Perhaps accepting or reacting to Tocqueville’s intuition that the advance of liberal “democracy make[s] men forget their ancestors [and] clouds their view of their descendants” while isolating them from their contemporaries, Nussbaum suggests that rather than finding comfort from local truths, and from the warm, nestling feeling of patriotism, individuals ought to engage in the often lonely business of becoming citizens of the world, a process advanced by looking at ourselves through the lenses of others and by recognizing our moral obligation to the rest of the world. That is, “[i]f we really do believe that all human beings are created equal and endowed with certain inalienable rights, we are morally required to think about what that conception requires us to do with[] the rest of the world.” From such a cosmopolitan perch, one that is predicated on reason and love of humanity, abstracted from place, and apparently detached from the presumptively accidental contingencies that divide us, justice and equality surface. Although such poetic claims appeal to the fact that present day political societies exist in a global context and correspond with the notion that all of us are no longer self-sufficient, and while cosmopolitan justice appears both beautiful and generous, doubts surface. First, if one looks backward at the available evidence from the twentieth century, the idealized cosmopolitan plinth of reason and love abstracted from place appears somewhat unsteady because it is not clear that justice and equality are instantiated in the many cultures that make up the world. Instead, what are often instantiated are quite different values. This claim is unexceptional, particularly when we speak of “rights as the civil rights of minorities,” a claim that equally contradicts Nussbaum’s contention that national boundaries lack moral salience and the prevailing melioristic-cosmopolitan-liberal worldview that disables many commentators from learning from experience.

450. See id. (suggesting that education that takes national boundaries as morally salient reinforces the tendency to give moral weight to what is an accident of history).


453. Id. at 11, 13.

454. Id. at 13.

455. Id. at 4.

456. DELSOL, supra note 1, at 6.

457. Gertrude Himmelfarb, The Illusions of Cosmopolitanism, in FOR LOVE OF COUNTRY supra note 29, at 72, 75.

458. Id.

459. Id.


its corresponding sense of universal justice seems to undermine politics and actual human diversity, which, on Delsol’s account, must be preserved if the nation intends to stray from the pattern of most governments.462 “Most governments . . . are [simply] despotical in the sense that a single vision of the common good is imposed as a matter . . . of certainty.”464 On the other hand, the “specifically Western form of politics [inherited by the United States] admits a plurality of views of the common good and lets them govern in turn.”465 This intuition may explain the history of governmental and judicial volatility on issues of race, a particular history that coincided with the pursuit of freedom by the Framers, as well as by those individuals and their descendants who initially appeared to exist beyond the reach of the Declaration of Independence.466 This history and the pursuit of freedom by “others” preceded the written substantiation of the discovery of self-evident truths.467 This history also has consequences that ought to inform the American moral outlook, pursuit of justice, and moral imagination, as well as the defensibility of affirmative action and its corresponding reliance on competing versions of diversity.

Against this background, it is imaginable that the cosmopolitan notion that children and adults ought to be taught that their “fundamental allegiance” is as citizens of a world of human beings rather than as citizens of [a particular place, the United States] may give rise to an education that is more destructive than constructive.468 An unreflective commitment to the cosmos as the source of the nation’s cultural and legal ecology may undermine the notion of a coherent moral education, which, in the real world, is arguably rooted in particular moral communities that fuse sentiments with the pursuit of the good and are hopefully reinforced by notions of truth. To put Mismatch and its accompanying affirmative action riddle in a somewhat narrower context, the question becomes whether the simmering debate regarding racial preferences and diversity can be resolved by reference to the universalizing impulses tied to the cosmos. Alternatively, must the solutions, if any, be rooted in the particularities of place of the founding documents of a particular nation and the wrenching history of a particular people yearning to be free? For many, though certainly not for all, the latter viewpoint produces a perspective that expresses itself in an unwillingness to truckle to the cosmopolitan view that all human and social relations are

462. DELSOL, supra note 1, at 7.
463. See id. at 100.
464. Id.
465. Id.
466. See supra Part II.B.
467. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . .”).
468. McConnell, supra note 29, at 79.
469. Id. at 79–80.
fundamentally fungible, or to accept the cosmopolitan charge that any perspective arising from the nostos is more or less irrational. Against the limitless interchangeability of relations and the risible claim that rationality necessarily favors the cosmopolitan’s view, both the African American experience and its collective interaction as peoples who occupy the nation’s space militate against reliance on the Sirens of the cosmos and instead call us to return, at least on a provisional basis, to the oikos. Actual experience gives rise to additional questions regarding the seemingly boundless cosmopolitan capacity for optimism in progress, an infection that expands because of the corresponding assertion of infinite choice governing the fashioning of identities and relationships. This analysis lends itself to the conclusion that, for many African Americans, indeed for many Americans, the prospect of an endless menu from which to shape identity becomes difficult to conceive of rationally. Casting a gulf featuring these opposing conceptions in moral terms, it appears that the cosmopolitans seek unity by minimizing any differences, even when those differences are based on the distinctly dissimilar histories of individuals and groups since such histories have little moral salience in the quest for the universal. On the other hand, differences and particularities of birth have a place within the nostos.

B. Affirmative Action: The Oikos and the Cosmos—the Odyssey Continues

1. Grounding Affirmative Action

Perhaps the best way to ground affirmative action within the gulf separating the oikos from the cosmos is to return to Grutter. Preliminarily, it seems clear that diversity discourse, as currently practiced within the academy, signifies more or less a capitulation to the racial and ethnic variety defended by the notion of academic freedom. It bears reiterating that the Grutter opinion endorses Justice Powell’s view that affirmative action made tangible through a diverse student body is a compelling state interest even when the university “[does] not purport to remedy past discrimination, but rather” endeavors “to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination.” This approach to diversity, whether sufficiently catholic or not, may find itself

470. DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 15 (summarizing the view that social relations are fundamentally fungible).
471. See id.
472. Id.
473. Id.
474. See id.
476. Id. at 319.
ravaged by its incapacity to rectify. This is because both the Grutter Court and the universities appear to emphasize integuments that lend themselves to an ostensibly robust, but arguably abstract, exchange of ideas as opposed to the flesh and blood realities of racial justice.\footnote{477} This outcome is made more likely in our putatively post-racial era, one that may or may not correspond with a cosmopolitan future.\footnote{478} Putting aside the possibility that the University of Michigan Law School’s admissions officers were simply attempting to evade the force of Supreme Court precedents that disallow outright racial balancing, it appears that the law school’s specific approach—emphasizing a focused examination of “each applicant as an individual, and not simply as a member of a particular racial group”\footnote{479}—has a lyrical and imaginative ring to it. Wisdom, however, calls attention to the force of Professor Rodriguez’s cautionary reflection that individualized consideration of the kind that selective public universities prefer does not restrain race-based judgments so much as it unbridles them.\footnote{480} Rodriguez’s intuition hints at the possibility that individualized consideration has less to do with the pursuit of racial justice and more to do with an institution’s internal reasons, which arguably limits rather than expands minority participation.\footnote{481} Consistently with Professor Rodriguez’s claim, the Grutter Court disregarded the record showing “that more than two-thirds of the students from underrepresented minority groups ultimately admitted [on racial grounds] were in fact initially excluded,”\footnote{482} by the law school’s core admissions’ policy, which gave preeminence to selectivity. This means that the school’s dedication to selectivity,\footnote{483} like similar exclusionary policies elsewhere, appears to disproportionately disfavor minority applicants ab initio. Whether Professor Rodriguez’s defenestration is correct or not, the Grutter Court’s acceptance of Justice Powell’s approach was ostensibly influenced “by its belief that America needs to produce a racially diverse cadre of future leaders.”\footnote{484} This outcome is

\footnotesize{477. Id. at 324 (quoting Bakke, 438 U.S. at 313) (insinuating that diversity promotes the “robust exchange of ideas” necessary for a university to fulfill its missions and goals).}


\footnotesize{480. Hutchison, Diversity as a Paradox, supra note 50, at 1078 (quoting Christina M. Rodriguez, Against Individualized Consideration, 83 IND. L. REV. 1405, 1409 (2008)).}

\footnotesize{481. See id. at 1088 (citing Richard Delgado, Affirmative Action as a Majoritarian Device: Do You Really Want to be a Role Model?, 89 MICH. L. REV. 1222, 1224–25 (1991)) [hereinafter Delgado, Affirmative Action] (“[T]he cultural meaning of diversity rhetoric symbolizes a constraint on minority participation while providing a firewall to protect an institution’s pursuit of status.”)).}

\footnotesize{482. See id. at 1081–82.}

\footnotesize{483. See Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322 (1986) (describing the work of unconscious racism).}

\footnotesize{484. Lund, supra note 54, at 21.}
purportedly advanced by a robust exchange of ideas—an experiment in thinking and perhaps living—that does not oblige the school to exhaust the race-neutral alternatives that might have achieved its racial diversity goals.\textsuperscript{485}

The Supreme Court’s conception of affirmative action proceeds without apparent regard for whether this concept advances or retards either income disparity or intellectual diversity,\textsuperscript{486} issues that some may see as important. The Court also declined to advance a conception of justice that actually recognizes America’s volatile racial history and its corresponding subordinating effects, which are made manifest in contemporary times by the worsening economic disadvantage faced by some, but not all, minorities.\textsuperscript{487} As an alternative, the Court was persuaded to accept the view that the law school, without direct supervision by the courts, was entitled to engage in a narrowly tailored, race-conscious admissions policy putatively designed to achieve a compelling and constitutionally permissible objective: diversity.\textsuperscript{488} Moreover, there is no evidence that the \textit{Grutter} Court was concerned in the least with the fact that affirmative action at selective public institutions tends to operate as a device that favors the affluent, possibly at the expense of the economically disadvantaged.\textsuperscript{489} Accordingly, the Court explicitly declined to consider alternatives that might compromise a university’s allegiance to selectivity and expand its sympathy for disadvantaged individuals.\textsuperscript{490} Rejecting the proposition that a school was required to engage in “a dramatic sacrifice of . . . academic quality of all admitted students,” the Court instead unlocks the door to the probability that the Justices were prepared to accept some reduction in the academic quality of admitted minority students, if necessary, to achieve the university’s objective.\textsuperscript{491} Rather than shrink the overall force of the law school’s exclusionary admissions policy because the pursuit of elite status has a disproportionately negative effect

\textsuperscript{485} Id. (stating “[t]he obvious and facially race-neutral alternative would have been to hold an admissions lottery among all applicants who had the minimum qualifications deemed necessary for successful law school performance; another alternative would have been to decrease the emphasis for all applicants on undergraduate GPA and LSAT scores”).

\textsuperscript{486} See SANDER & TAYLOR, supra note 30, at 284.


\textsuperscript{488} Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (finding that the law school’s narrowly tailored use of race in admissions does not violate the Equal Protection Clause of the Constitution); see also Jackson & Moses, supra note 169, at 216 (citing \textit{Grutter}, 539 U.S. at 343).

\textsuperscript{489} See SANDER & TAYLOR, supra note 30, at 286 (contending that a large portion of blacks receiving preferential admissions also come from well-off families yet are more likely to receive financial aid than less well-off Asians and white students).

\textsuperscript{490} \textit{Grutter}, 539 U.S. at 340.

\textsuperscript{491} Id.; see also Lund, supra note 54, at 21.
on members of minority groups, the Court constructively furnishes the law school with a relatively cost-free approach to branding itself as racially diverse, a process that seems inconsistent with the racial healing that Sander and Taylor crave. Rather, as the next paragraph demonstrates, the Court advances the University of Michigan Law School’s pursuit of racial capitalism.

To the extent that the University of Michigan Law School brands itself as a racially diverse ecosystem consistent with its own assessment of its internal values, the prospect of racial capitalism and commodification surfaces. “[R]acial capitalism—the process of deriving social or economic value from the racial identity of another person”—often involves predominantly white institutions that pursue and evidently derive social and economic value from associating with individuals who have nonwhite racial identities. Apparently, the Grutter Court sanctioned this quest for racial capitalism by authorizing the University of Michigan Law School’s race-conscious polices, not for the sake of the educational benefits available to the minority students admitted under the program, but largely for the sake of the school’s own internal goal of affording educational benefits to other students. These students, through interaction and discourse might, in cosmopolitan terms, expand their sympathies for the whole of humanity. The Court’s doctrinal abandonment of the previously ascendant “remedial rationale for race-based affirmative action in favor of an exclusive [emphasis] on educational diversity appears to correlate with scholars Shin and Gulati’s approach. They explicitly argue that affirmative action can be framed outside of the principles of justice and equality and, instead, can be seen as a way to foster deep learning and critical thinking. Thus, this policy choice can be understood distinctly not in terms of external goals of social justice or racial equality but in terms of internal values that fundamentally define academic institutions. Although there is no evidence that the Supreme Court’s understanding of affirmative action was influenced by views that implicate Shin and Gulati’s claims, judicial acceptance of their approach would permit highly selective academic institutions to defend the pursuit of selectivity through status


493. Leong, supra note 5, at 2153–54.


495. See Czobor-Lupp, supra note 219, at 14 (explaining Herder’s approach to the development of “good government and good laws [that] require the support of a culture that forms the citizens’ imaginative and cosmopolitan capacity to interact . . . and share with others” which, from a cosmopolitan perspective, can presumably be analogized to higher education).


enhancing racial preferences that may be difficult to truthfully defend externally on grounds of justice, even though the academic institution’s race-based policy facilitates the institution’s quest for minority students as a trifling part of its fierce pursuit of its own internal values.\textsuperscript{498} Indeed, it seems quite possible that Shin and Gulati’s defense of diversity as a way to foster deep learning and critical thinking corresponds with how diversity is actually practiced at elite public universities such as the University of Michigan Law School.\textsuperscript{499} An emphasis on an institution’s internal values enables the admission of a variety of students who, whether black, white, brown, or yellow, reward the school’s core pursuit of eliteness.\textsuperscript{500} This maneuver, in the long run, is likely to manifest itself in monetary contributions to the school’s alumni fund or, alternatively, to provide the university with scope to market its fundraising activities in a society more preoccupied with diversity rhetoric than with advancing equality.\textsuperscript{501} Skeptically understood, diversity facilitates the exploitation of nonwhiteness for its esteemed market value,\textsuperscript{502} rather than for its contribution to academic freedom as defined by a search for truth or justice, values that may be missing from an academic institution’s goals. This exploitive process appears to advance the institution’s interests while simultaneously supplying financial and status benefits to selected students through the university’s highly publicized pursuit of marketable forms of human sympathy.\textsuperscript{503}

Additional skepticism of diversity is warranted because institutional selectivity appears to be part of an evasive process to transmute the legitimate claim for remediation proffered by minority group members into something that appears orthogonal to the history of actual racial oppression encountered by African Americans, but which may be partially congruous with Nussbaum’s claim that “we should not confine our thinking to our own sphere.”\textsuperscript{504} The Court’s doctrinal abandonment of remediation, its acceptance of racial capitalism tethered to the internal goals of the institution, and the Court’s potential, if understated, embrace of our collective cosmopolitan future can be amplified. This is so because the Court refused: (1) to pursue available evidence supporting affirmative action as a remedial and constitutionally permissible mechanism for eradicating the effects of Michigan’s public school segregation;\textsuperscript{505} (2) to see racial preferences, at least with regard to blacks, as a remedy for societal

\textsuperscript{498} See Hutchinson, Diversity as a Paradox, supra note 50, at 1085 (emphasis added).
\textsuperscript{499} See Shin & Gulati, Cultivating Inclusion, supra note 497, at 118 (citing Mari J. Matsuda Who is Excellent?, SEATTLE J. SOC. JUST. 29, 32, 36–37 (2003)).
\textsuperscript{500} See id. at 118 (citing Matsuda, supra note 499, at 36–37).
\textsuperscript{501} See Hutchinson, Diversity as a Paradox, supra note 50, at 1069.
\textsuperscript{502} Leong, supra note 5, at 2134–55.
\textsuperscript{503} See, e.g., id. (suggesting the “systematic phenomena” present when “white institutions” seek to benefit from promoting diversity within their admissions process).
\textsuperscript{504} Nussbaum, Patriotism and Cosmopolitanism in For Love of Country, supra note 29, at 13.
\textsuperscript{505} Hutchinson, Diversity as a Paradox, supra note 50, at 1084.
discrimination, a perception that might invigorate Justice Thurgood Marshall’s decades-old observation that “the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact,” or (3) to accept Professor Charles Lawrence’s path-breaking understanding of unconscious racism. If this account is correct, it appears that if the Court has taken any side in the debate between cosmopolitans and those committed to the primacy of the oikos, it has taken the side of the cosmopolitans, a move that could also instantiate a new way of life and perhaps reflect the global tribe that we ought to become without, of course, requiring the university to proclaim it. Within this context, uncertainty arises as to whether a cosmopolitan approach to affirmative action simply amounts to an elegant redescription of racial justice or, alternatively, the culmination of its extinction. It follows that questions would arise as to whether rootless cosmopolitanism nurtures rootless diversity, a possibility that begs the question of whether rootless diversity justifies affirmative action within university admissions.

2. Can Rootless Diversity Justify Affirmative Action?

Affirmative action has been part of American mythmaking for some time. Many such myths insinuate that affirmative action, even in its post-Civil War dimension, is nothing more than the illicit pursuit of racial favors, a claim amply deflated by Randall Kennedy. As we have seen, affirmative action is not a new phenomenon, but a process that began more than century ago. Thus, the nation’s present dispute about affirmative action is simply an epiphenomenon that reflects the epic dimensions of the hopeful struggle by black Americans and others to shrink the power of subordination through a welter of short-term and long-term strategies that evidently include: litigation; conflicting and variable interpretations of the Constitution; protest, violence, and strategic acceptance of duplicity; unconstrained appeals to the diversity rationale; a willingness to

508. See Hutchison, Diversity as a Paradox, supra note 50, at 1074 (citing Lawrence, supra note 482, at 322).
509. See, e.g., ALEXANDER, supra note 240, at 169 (stating that liberalism as a form of cosmopolitanism promotes a “rich menu of ways of life” by encouraging diversity in society by providing diverse religions, associations, occupations, and ideas to its members).
510. APPLAH, supra note 218, at xiii.
511. See KENNEDY, supra note 43, at 78–79.
512. See generally KENNEDY, supra note 43, at 78–146 (citations omitted) (arguing that racial affirmative action does aid racial minorities).
513. Id. at 25–26.
514. See id. at 102 (citing Brown, supra note 161, at 1291) (“The diversity camp has long been dogged by allegations of insincerity or outright duplicity.”).
accept the absence of candor regarding the diversity rationale;\textsuperscript{515} the possibility of progress; the power and weakness of empirics; the recognition that diversity may not be the strongest justification for race-conscious policies;\textsuperscript{516} and the “locus of conflict[ing views] involv[ing] the allocation of benefit between, on the one hand, the offspring of American-born black parents and, on the other, the offspring of interracial couples and foreign born blacks,”\textsuperscript{517} as well as the allocation of benefit between the affluent and the less well-off. Although this history has been messy and arguably unique, it appears to generate a morally salient call for justice. But, if so, for whom? While many will agree that this history sustains affirmative action in its remedial dimension—primarily for individuals who are descendants of American-born blacks and who have suffered deprivation because of the nation’s prior surrender to subordination—the question becomes whether this history also obliges such descendants to refrain from a reparative focus generated by the particularities of birth and deprivation, and to concentrate instead, as cosmopolitan reasoning may suggests, on safeguarding the right of all human beings—be they whites, Asians or foreign-born blacks—to pursue life, liberty, and happiness in order to instantiate the uniform moral universe that cosmopolitans favor.\textsuperscript{518} Although it may appear overly xenophobic, this question is morally salient and extends beyond appeals to rationality alone. Hence, on a reading of history, the pursuit of justice that seems inarguably connected to a particular place becomes problematic when this defensible quest is converted into a pursuit of transcendence advanced either by capitulation to an academic institution’s internal goals or, alternatively, through a seemingly whimsical love of humanity, however broadly understood.

3. Attaining the Moral High Ground in Affirmative Action Debates?

It is conceivable that some observers will see the contest between the cosmopolitans and oikopolitans over the moral high ground very much like the contest between objectivity and subjectivity that animates philosophers of the mind.\textsuperscript{519} Although the idea of objective reality is arguably a masterpiece of Western thought, “the only view of the world that we can ever entirely have from inside our own heads is subjective.”\textsuperscript{520} However, the current effort by some, including scientists, empiricists, and philosophers, to either banish or diminish subjectivity, including one’s private experiences, beliefs, pains, hopes

\textsuperscript{515} Id. at 104 (quoting Guido Calabresi, Bakke as Pseudo-Tragedy, 28 CATH. U.L. REV. 427, 429 (1978)).
\textsuperscript{516} Id. at 104.
\textsuperscript{517} Id. at 143.
\textsuperscript{518} Nussbaum, Patriotism and Cosmopolitanism in For Love of Country, supra note 29, at 13–14.
\textsuperscript{520} Id. at 19.
and fears\textsuperscript{521} in exchange for stoically objective reasoning in service of humanity appears to be an effort to banish the very substance that has made African Americans and others who they are. While the internalization of America’s racial history is far from uniform, internalization does exist. Since all stories represent real human lives that cannot be completely measured, reasoned, weighed, tracked, photographed, or subjected to data driven empirical verification,\textsuperscript{522} it is possible that the modern cosmopolitan world may be poised to reject the salience of a particularized human history because it cannot be fully be objectified. Reality includes: (1) our mental states existing in a room that no one else can ever enter, and (2) the world perceived through the window of a mind—the objective world.\textsuperscript{523} Both worlds, the subjective and objective, coexist and have currency. Hence, when African Americans, and perhaps all Americans, look out through their eyes into the natural world, they look backwards at the same time to a history that they are attached to forever.\textsuperscript{524} From such subjective yet also collective memories, and from our individual and collective perception of the continuing effects of subordination, a cry emerges that is simply a demand for justice. Although it is unlikely that this appeal results in a single perception of the world, nor that it perceives progress as inevitable, it nevertheless remains probable that the movement toward a shared understanding of justice is likely to occur only within the framework of a tradition and a community whose primary bond is a shared understanding of the good for man and for a community wherein individuals identify their primary interest with reference to those goods.\textsuperscript{525} It is possible, but perhaps only speculative, to hope that such a shared understanding of the good can accommodate the contrasting views of Estreicher, Lund, and Kennedy. With these observations in view, it remains possible that the call for justice can be expressed in cosmopolitan terms that prioritize the universal over the particular as humans choose to transcend the limitations of locality and place of birth,\textsuperscript{526} and as they endeavor to break down barriers separating humans, aided by the transformative potential of science to ameliorate humanity’s material and political conditions as well as heal its moral capacities.\textsuperscript{527} This contention can be seen as particularly true since citizens currently live in a postmodern society that appears to be falling apart,\textsuperscript{528} a world where people are waiting but do not know what they are waiting for.\textsuperscript{529} Nonetheless, one reading the terms of the affirmative action debate and its

\textsuperscript{521} Id.
\textsuperscript{522} Id. at 19–20.
\textsuperscript{523} Id. at 20.
\textsuperscript{524} Id.
\textsuperscript{525} MACINTYRE, supra note 57, at 240.
\textsuperscript{526} See DENEEN, THE ODYSSEY OF POLITICAL THEORY, supra note 44, at 217.
\textsuperscript{527} See id.
\textsuperscript{528} See Fredrick Mark Gedicks, Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity, 54 DEPAUL L. REV. 1197, 1197 (2005).
\textsuperscript{529} Chantal DELSOL, ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD xxvii (2003).
accompanying historical record—a reading that concedes “there is no neutral ground, no island in the middle of the epistemological ocean as yet uncolonized by any of the warring continents”—the call for justice appears to be more morally salient when viewed from the perspective that accords primacy to the oikos rather than the perspective that accords predominance to “experimental thinking” and the forms of cosmopolitan interchange and universality favored by Czobor-Lupp and others. If this is true, then this call warrants more than a robust exchange of ideas instantiating a university’s own internal values, a uniform and universalizing respect for humanity and reason, a commitment to rootless diversity, and the reification of selectivity favoring the affluent as part of the process of individualized consideration. The next subsection applies these claims to Sander and Taylor’s recommendations, including their claim that the Supreme Court remains the nation’s only hope for racial healing.

IX.Mismatch, the Supreme Court, and the Prospect for Racial Healing in Context

Sander and Taylor, after censuring the current practice of preferential admissions, have proposed a number of reform initiatives including: (1) recognizing the power of transparency, (2) targeting economic need before racial identity, and (3) abolishing race-based aid awards. The authors assert that the third reform reinforces the effectiveness of the second reform, hence this Article simply collapses them into one for analytical purposes. The authors’ initial proposal—deploying the power of transparency to smoke out harmful preferences—fails to deal with the internal institutional incentives and the intellectual capacity of university admissions officers to engage in evasion. In the face of evasion, the question becomes whether the Supreme Court would be prepared to engage in aggressive monitoring of colleges and universities even if the Justices accepted Sander and Taylor’s claim that Grutter already provides the framework necessary to advance full disclosure of preferences, as well as a platform from which to encourage good faith efforts to develop race-neutral alternatives to preferences. The authors’ claims are plainly ironic given the extensive description of their own encounters with academic evasion, encounters that are forcefully echoed by Professor Anita Bernstein’s analysis.

530. WRIGHT, supra note 46, at 64.
531. See, e.g., Deneen, Academic Freedom, supra note 293, at 2 (describing how the “freedom of inquiry” can be disfavored when discussing what are considered already “settled” matters).
532. See Czobor-Lupp, supra note 219, at 9–28 (citations omitted).
533. SANDER & TAYLOR, supra note 30, at 281–86.
534. Id. at 285.
535. See id. at 281–84.
536. Id. at 283 (suggesting that the narrow tailoring language of Grutter supplies a basis to ensure institutional good faith in developing workable race-neutral alternatives to racial preferences).
537. See Bernstein, supra note 285, at 252.
shows, for example, that when proponents are “challenged in court by individuals who say that a diversity measure hurts them, users of the rationale have responded with evasion. For good instrumental reasons, they prefer bland affirmation to specifics.”538 Indeed, Sander and Taylor devote almost seventy-five pages of their book to direct and indirect examples of evasion by universities and their co-conspirators,539 including a chapter on why academics avoid honest debate about affirmative action as well as the tangible absence of transparency that surfaced when the authors attempted to extract data relating to the academic background of bar-takers from the California Bar.540 This latter effort led the authors to conclude that opacity reigns supreme within the academic arena.541 Hence, their proposal to transform Grutter’s framework into a monitoring device for racial preferences appears to be somewhat helpful in theory, but doubtful in practice.542

Taken together, the second and third reforms Sander and Taylor advocate would, if implemented, arguably go a long way toward extirpating racial preferences, a move they counsel against in the short-run.543 In the long-run, Sander and Taylor’s proposed reforms would effectively replace racial preferences with a focus on economic need, which appears to be their objective.544 Still, problems arise if Stephen Carter’s analysis is correct. Carter asserts that “the most disadvantaged black people are not in a position to benefit from preferential admission[s].”545 If Carter’s observation remains verifiable, and if scholars Rothstein and Yoon’s command of empirical analysis is confirmable, then the elimination of affirmative action would lead to a dramatic decline in the enrollment of blacks in all law schools and an almost a 100% decline in elite law schools546 unless alternatives to elimination emerge. Dramatic decline of the kind that Rothstein and Yoon forecast would be more than a quotidian quandary, and it is doubtful that even the current Supreme Court would countenance that possibility. Still, it is conceivable that preferential university admissions of some sort would not be foreclosed by the authors’ reforms. Sander and Taylor’s scholarship implies that Professor Carter’s assertion is contestable since the authors observe that Sander has “actually devised and implemented a sophisticated system of SES preferences at University of California at Los Angeles (UCLA) after the passage of Proposition

538. Id.
539. See SANDER & TAYLOR, supra note 30, at 175–244.
540. Id. at 233–44.
541. Id. at 235 (explaining the difficulty researchers have experienced in extracting data on admissions and student outcomes, and the efforts engaged in by the Law School Admissions Counsel to obscure relevant information).
542. See id. at 235–44.
543. Id. at 273.
544. Id. at 284.
545. CARTER, supra note 428, at 80.
546. Jackson & Moses, supra note 169, at 223 (citing Rothstein & Yoon, supra note 401, at 711).
209, and the system worked exceedingly well.”\(^{547}\) If this claim is accurate, then Sander and Taylor’s reform initiatives such as targeting economic need before racial identity and abolishing race-based financial awards have the power to topple rootless diversity from its perch as a defense to racial preferences, even though the actual parameters of Sander and Taylor’s proposals are quite complex.\(^{548}\) To be sure, Sander and Taylor’s approach would not abolish racial preferences, but would place a cap on them.\(^{549}\) In addition, this approach might foster simple justice for economic have-nots who have been neglected by selective universities.\(^{550}\) That said, it appears that Sander and Taylor’s proposal favoring improved university access to lower-middle class students may compromise elite institutions’ precommitment to exclusion and selectivity, a risk that the authors do not adequately excavate.\(^{551}\) Sander and Taylor’s analysis presumes that elite institutions are actually interested in the success of disadvantaged members of underprivileged communities as a form of justice, when it is just as likely that such institutions have an overwhelming commitment to internal values that are inconsistent with reducing the effects of racial subordination and are coherent with the organization’s internal priorities.\(^{552}\) Such priorities can be advanced through racial branding and the pursuit of broadly understood cosmopolitanism.

Nevertheless, presuming that institutional insincerity, evasion, and exclusionary focus can be successfully extinguished, it is possible to sympathize with Sander and Taylor’s recommendation that affirmative action ought to focus more on income and class than on race. In a somewhat similar vein, Randall Kennedy counsels that “[p]roponents of racial equity should enthusiastically support initiatives aimed at securing more equity along the class divide.”\(^{553}\) He therefore suggests that “’[r]ace and class’ is thus a suitable banner for affirmative action reform.”\(^{554}\) Kennedy cautions, however, that although there is much to commend in the effort to mitigate the racial effects caused by the passage of Proposition 209 in California\(^ {555}\) and he agrees with the effort to channel affirmative action more directly to poorer racial minorities, he nonetheless asserts that a focus on socioeconomic diversity is, in reality, “a version of racial affirmative action regardless of efforts to hide that fact.”\(^ {556}\) Although a focus on income and class rather than on race may have the salutary effect of promoting justice at the expense of institutional status, efforts to create so-called race-

\(^{547}\) Sander & Taylor, supra note 30, at 285.
\(^{548}\) See id. at 284–85 (citing authors’ detailed efforts to compare the sizes of socioeconomic versus racial preferences in their footnotes).
\(^{549}\) Id. at 284.
\(^{550}\) Id.
\(^{551}\) See id. at 285.
\(^{552}\) See id. at 284–85.
\(^{553}\) Kennedy, supra note 43, at 91.
\(^{554}\) Id.
\(^{555}\) Id. at 92.
\(^{556}\) Id.
neutral programs, appropriately understood, are simply “an example of race-conscious, class-focused redistribution with racial indicia erased from its exterior.”557 Hence, proponents of “class not race” have to acknowledge that “the absence of overt racial selectivity in programs they propose is merely strategic: the price to be paid for white support and the avoidance of white opposition.”558 Moreover, Kennedy brilliantly shows that “even when concern with race is not the primary driving force behind a program, if it turns out to assist racial minorities disproportionately, one can expect it to be attacked as racial affirmative action in disguise,”559 an observation that reflects the difficulty of ever progressing beyond race and the permanency of President Andrew Johnson’s reasoning that any effort to help disenfranchised blacks constitutes “illicitly race-sensitive” legislation.560 Taken together, these observations provide ground for some skepticism with regard to the instrumental value of Sander and Taylor’s focus on income inequality as opposed to a direct focus race, even if the normative appeal of this reform initiative remains intact.

Additional skepticism emerges with regard to Sander and Taylor’s claim that the Supreme Court is the logical venue for the nation’s racial healing; indeed, the prior paragraph overlaps with observations that are offered here.561 As deduced elsewhere in this Article, optimism regarding the Justices’ capacity to resolve pressing issues appears inarguably doubtful since neither the Constitution nor the Court’s interpretation of the Constitution remain reliable in a world where political liberalism exists outside of a boundary cabined by a shared understanding of truth.562 Since the Court has demonstrated a tendency to engage in endless postmodern elucidation,563 a possibility that infects the Grutter Court’s jurisprudence, grounds for optimism are likely to be further diminished. Recall that the Grutter Court constructively furnished the University of Michigan Law School with a relatively cost-free approach to branding itself as a racially diverse institution. This process may be inconsistent with racial healing, strict scrutiny, and the eidetic memories of individuals who are descendants of American-born blacks.564 Instead, the Court found the University of Michigan Law School’s apparent pursuit of racial capitalism, concurrent with its pursuit of

557. Id.
558. Id. at 93.
559. Id.
560. Id. at 23.
561. See Sander & Taylor, supra note 30, at 273 (stating that elected officials are often incapable of adequately addressing the preference problem, and therefore the U.S. Supreme Court seems to be the best available venue for serious and stable reform).
563. See id.
564. See Douglas M. Raines, Grutter v. Bollinger’s Strict Scrutiny Dichotomy: Diversity is a Compelling State Interest, but the University of Michigan Law School’s Admissions Plan is Not Narrowly Tailored, 89 MARQ. L. REV. 845, 866 (2006).
exclusionary selectivity, to be defensible. The Grutter Court’s decision should surprise no one. The Supreme Court’s institutional history has often been one that coincides with the judiciary’s precommitment to majoritarianism. One need not solely examine the Court’s opinion on contemporary conceptions of affirmative action to reach such a conclusion.

As Kennedy has previously shown, the Supreme Court ruled in the nineteenth century that blacks, whether free or enslaved, were not citizens of the United States. Complementing President Andrew Johnson’s veto of the Civil Rights Act of 1866, the Supreme Court invalidated parts of a federal law prohibiting racial discrimination in 1883. In doing so, the Court accused blacks of seeking preferential treatment. These and similar moves by the Court, signaled by editorials published in leading newspapers of the day, reproduce majoritarianism. For example, disapproving the federal legislation that became the subject of the Civil Rights cases, the Chicago Tribune asked whether, “‘it is not time for the colored race to stop playing baby?’”

Evidently, the Supreme Court yielded to such sentiments as well. Similarly, the Court rejected an equal protection and due process challenge by Carrie Buck to involuntary sterilization, thus valorizing a national campaign organized by leading elites to cleanse society through the compulsory evisceration of the reproductive capacity of individuals that were seen as defective. This so-called cleansing program, issued forth in law reform schemes maintaining the innate inferiority of women and favoring scientific racism and in similar campaigns—most notably in progressive labor legislation—were often upheld by the Supreme Court. In 1944, the Court upheld the conviction of Fred Korematsu, an American-born son of Japanese immigrants because he failed to enter a relocation center, which was, of course, a “euphemism for a prison.”

The Korematsu Court’s deeply deferential capitulation to majoritarian

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567. KENNEDY, supra note 43, at 22.
568. Id. at 24.
569. Id.
570. See id. (quoting HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH 1865-1901, at 137 (2004)).
571. Id. (quoting RICHARDSON, supra note 570, at 137).
572. See id.
573. Hutchison, Waging War on the “Unfit,” supra note 78, at 3 (citing Buck v. Bell, 274 U.S. 200, 207 (1927)).
574. Id. (citing Mark V. Tushnet, Progressive Era Race Relations Cases in Their “Traditional” Context, 51 VAND. L. REV. 993, 993 (1998)).
575. Id. at 31–34 (citations omitted).
577. Id. at 230.
sentiments is richly ironic coming a few years after the Court’s ostensible defense of “discrete and insular minorities.” This catalog of cases is not meant to impugn the integrity of the Court, but to further suggest that the Court’s inclinations cannot be fully separated from prevailing, and often terribly wrongheaded, social and cultural currents.

Today, for instance, eliteness and selectivity have achieved new currency. It should surprise no one that the Grutter Court decided to defend the goal of selectivity and defer to the prerogatives of elite public institutions rather than pursuing racial justice by recognizing the State of Michigan and the University of Michigan Law School’s prominent participation in an educational system that disadvantages minorities. The Justices’ undeviating preference for selectivity may or may not correlate with “the fact that, as of 2012, every member of the Supreme Court attended law school at either Harvard or Yale.” Although proof of cause and effect remains speculative, it seems possible that the Justices’ own self-interest may be implicated by any candid attempt to reform affirmative action along the lines that Sander and Taylor recommend. This conclusion acquires added force when recognizing that the Grutter Court and the admissions officers at the University of Michigan Law School, like admissions officers everywhere within the domain of selective public education, represent a commitment to diversity rhetoric that may paradoxically confine minority participation within acceptable limits and protect an institution’s pursuit of status. These observations in conjunction with evidence implying that the pedagogical significance of racial diversity remains debatable confirms Richard Delgado’s contention that “race-conscious remedies were designed by members of dominant groups and produce scarce results,” thus reinforcing the continued economic and political dominance of the masses by the elites. This claim undergirds some, but certainly not all, of Sander and Taylor’s analysis.

Nevertheless, in this current epoch, one that perhaps teeters between the oikos and the cosmos, it remains probable that the diffusion of sentiments that

578. See, e.g., Hutchison, Achieving our Future, supra note 487, at 528 (citing Korematsu, 323 U.S. at 224) (demonstrating the Court’s overall deference to Franklin D. Roosevelt and Congress).

579. See id. (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1937)).

580. See Hutchison, Diversity as a Paradox, supra note 50, at 1086 (explaining how both the state and the university participate in an educational system that includes university admissions, and how educational malpractice at both the elementary and secondary levels appears to valorize minority inferiority).


582. See Hutchison, Diversity as a Paradox, supra note 50, at 1088.

583. See Bernstein, supra note 285, at 220 (showing that researchers cannot readily distinguish between causes and effects associated with diversity because those individuals open to engagement, creative thinking, and learning from new people may have opted to seek admission to environments that offer what they prefer).

584. Hutchison, Diversity as a Paradox, supra note 50, at 1088 (citing Delgado, Affirmative Action, supra note 481, at 1224.

have generated the nation’s affirmative action policy may prevent its extinction for some time to come.\textsuperscript{586} A contextualized inspection of governmental and jurisprudential volatility on issues of race confirms that either in the hands of the Supreme Court or, alternatively, in the hands of Sander and Taylor, affirmative action and its corresponding diversity justification will remain very much like an injured bear—too strong to succumb to its wounds but too weak to attain justice.\textsuperscript{587} At the end of the day, this review essay submits that contemporary Supreme Court jurisprudence on affirmative action and race, like postmodern society itself, remains dazed\textsuperscript{588} and confounded\textsuperscript{589} amidst the enigmatic paradox of post-Enlightenment liberalism.\textsuperscript{590} Post-Enlightenment liberalism, which was arguably birthed as a reaction against arbitrary and unlimited rule by autocrats, but today seems less about limited government and more about the pursuit and exercise of potentially limitless power toward the attainment of preferred ends, which are ends that may or may not include justice.\textsuperscript{591} This assessment remains true despite the fact that over-reliance on immoderate conceptions of Kantian or other abstractions has frequently been reinforced by the thoroughly progressive hope that progress is advanced through the modern emphasis on the acquisition of knowledge through science, which presupposes human rationality and reason as the sole ground on which modern disputes must be fought.\textsuperscript{592}

Contextualization also indicates that universities, far from pursuing academic freedom directed toward the search for truth, have now become bastions of institutional self-interest that focus less on racial justice for disadvantaged minorities than on profiting from racial capitalism.\textsuperscript{593} This maneuver can be expressed as an institution’s quest for status enhancing forms of racial rent-seeking that may preempt conversations about past racial injustice.\textsuperscript{594} This development—the monetization of race, color, and ethnicity in order to advance the fusion of a selective institution’s finances and its internal values that appear to advance uniform thinking—has been insulated from condemnation by judicial deference to often whimsical cosmopolitan claims

\textsuperscript{586} KENNEDY, supra note 43, at 15.
\textsuperscript{587} Id.
\textsuperscript{589} See generally Gedicks, supra note 528, at 1197 (suggesting that, metaphysically speaking, our world is “fall[ing] apart”).
\textsuperscript{592} See generally ROBERT NISBET, HISTORY OF THE IDEA OF PROGRESS 306 (1980) (discussing various forms of science and progress).
\textsuperscript{593} See Leong, supra note 5, at 2154.
\textsuperscript{594} See id. at 2206.
interwoven with the notion of academic freedom, despite the fact that higher education “is a field calling for special scrutiny, not special deference.”595 It is equally true that an examination of contradictions within the modern world, which straddles the gulf between the cosmos and the oikos, may imply that durable rectification within the domain of academia’s race relations is impossible and that chaos is likely, thus signifying that the achievement of actual progress in the form of cross-racial understanding remains a chimera.

X. CONCLUSION

After assessing the legitimacy of the various currents that infect the nation’s affirmative action debate, Mismatch and its correlative claims when placed in context, elevate the primacy of the oikos rather than the cosmos. Any such examination shows that diversity, despite its current position as higher education’s inamorata, remains a malleable term—like affirmative action itself596—that is difficult to define and often fails to evoke a shared purpose.597 Malleability and obfuscation appear to advance within a framework designed to further cosmopolitan justice. Seen from a perspective that is enriched by United States history, a defensible cry for remediation and repair surfaces. At the same time, this cry is muffled by the evasion, duplicity, and insincerity that are tightly attached to selective public universities’ admissions policies that materialize as diversity, a race-conscious admissions program that protects institutional status. Shielded from critical review by the cloak of complexity attached to the dual acceptance of cosmopolitan linguistics and Woodrow Wilson’s claim that the “nation ‘needs efficient and enlightened men’ [and] that the ‘universities of the country must take part in supplying them,’”598 diversity and its accompanying rhetoric emerge unscathed from less than strict judicial review.599 Hence, it is probable that when public universities encounter race, particularly elite ones, the resulting policy choices are poised to retain an ephemeral connection to justice. The placement of affirmative action in the chasm dividing the oikos from the cosmos reveals that the concept of diversity persists as “a serious distraction in the ongoing effort to achieve racial justice,”600 despite the fact that we live in a country that neither generates human disadvantage solely through government policy nor is patrolled by white supremacy. Given the nation’s cultural commitment to indifference and its

595. Moss, supra note 286, at 22 (focusing on gender discrimination in the academy).
596. See, e.g., Shin & Gulati, Cultivating Inclusion, supra note 497, at 122.
597. See, e.g., Selmi, supra note 478, at 79 (“Diversity, on the other hand . . . can be anything to almost anyone: a slogan or a mandate, a program or a label, but there need not be any shared purpose because diversity also implies allowing a thousand flowers to bloom without regard to which of those flowers might have the best soil.”).
598. BERG, supra note 77, at 138.
599. Hutchison, Diversity as a Paradox, supra note 50, at 1074.
ongoing surrender to the existing social order, so long as it provides us with an economy of abundance, the question of whether the pursuit of justice must be sacrificed for the sake of political and economic considerations that pander to the preferences of elite public institutions remains an open one.
TORT AS A DISRUPTER OF CULTURAL MANIPULATION: NEUROMARKETING AND THE DAWN OF THE E-CIGARETTE

Karen C. Sokol

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At least since the 1920s, corporate actors have acquired an increasingly greater capacity for actions that can harm individuals throughout the nation.

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and even the world. This has resulted, to a significant extent, from their abilities on the one hand: (1) to present more serious risks to large numbers of people through the use of often quite astounding scientific and technological developments and the mass-marketing of products; and (2) to exercise significant control over public perceptions of their products and other business activities through highly sophisticated advertising and other public relations campaigns. As a result of these two developments, many corporate actors have amassed significant power and influence over our environment and our choices about what we consume and use on a regular basis.

This Article, will focus on: (1) one method by which companies are trying to influence public perception of their products, so-called “neuromarketing,” a new interdisciplinary field that aims to tap into the human mind as directly as possible by using sophisticated technological developments in neuroscience and cognitive science; and (2) one increasingly popular product that presents risks to human health, namely, electronic cigarettes (or “e-cigarettes”), which are battery-powered devices that vaporize liquid nicotine and other undisclosed chemicals, allowing users to inhale (or “vape”) the mixture.

This Article argues that in this postindustrial era of widespread human threats presented by products and other business activities such as e-cigarettes, and of companies’ concomitant ability to obscure these dangers and induce people to use their products by manipulating societal cognition through techniques such as neuromarketing, tort law serves a “disruption function.” This function is in addition to the two competing ideas about the primary function of tort: (1) imposing a fair result individual disputes (moral function); and (2) making public policy efficient (instrumental function). The first function fulfills a private need; the second, a public one. Judges and scholars tend to favor one over the other, and that preference has driven outcomes in certain kinds of legal disputes, like those involving federal preemption of state tort law. But this dichotomy of tort functions overlooks a third function of tort law—the disruption function—which serves both a private need and a public one. More specifically, the tort system provides a much-needed space away from pervasive corporate manipulation of societal cognition. This space permits society—represented by litigants, judges, and juries—to examine closely and consider whether corporate activities should be subject to some legal oversight in a given case after hearing the story of the occurrence of the particular harm or harms relatively free of the “noise” of the corporate cognitive manipulation that so often pervades society and culture.

Finally, the Article explains how the traditional tort function dichotomy underlies many of the calls for limiting the tort system and that the third function, the hybrid disruption function, must be recognized if the tort system is to remain viable in the current era of expansive corporate activities that can cause widespread harms. This is particularly true if neuromarketing and other increasingly sophisticated techniques for manipulating societal cognition regarding products that present significant risks to human health, such as e-
cigarettes, are as successful as the business literature indicates that companies hope them to be.

We decided [in the early 1920s] that public relations advice is more important than legal advice, because legal advice is based on precedent but public relations advice might actually establish precedent.

Edward L. Bernays

I. INTRODUCTION

The manufacturing of legal precedent through public relations has soared in importance and sophistication since Edward Bernays first squeezed a line of young, beautiful, cigarette-smoking women from church services along New York’s Fifth Avenue into the city’s 1929 Easter Parade. Bernays, the so-called “father of spin,” grasped before nearly anyone else the power of mass culture to shape law. Lawyers and judges have been rushing to catch up ever since.

Law can sometimes be used to disrupt the mass culture spin cycle that has the power to manipulate societal cognition and thus to transform, and eventually


2. See Tye, supra note 1, at 28–30 (quoting Edward L. Bernays, Biography of an Idea 386–87 (1965) (describing how Bernays orchestrated a march of female smokers along Fifth Avenue on Easter Sunday to attack the cultural taboo against women smoking in public); see also generally Michele DeStefano Beardslee, Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?, 23 GEO. J. LEGAL ETHICS 1119, 1121–23 (2010) (noting lawyers’ increased public relations role and the ethical concerns it raises).

3. See Tye, supra note 1, at viii (“Edward Bernays almost single-handedly fashioned the craft that has come to be called public relations.”). In the preface to his biography of Bernays, Tye points out:

Although most Americans had never heard of Edward L. Bernays, he nevertheless had a profound impact on everything from the products they purchased to the places they visited to the foods they ate for breakfast . . .

Indeed, the very substance of American thought was mere clay to be molded by the savvy public relations practitioner, or so it seemed.

This, then, is a book [not only] about Edward L. Bernays[, but also] a book about America. It is about how public thought is routinely shaped or, some might say, manipulated by singular powers in our culture. And so it is by necessity a book about democracy in the era of the spinmeister.

Id. at viii, xi (emphasis added).

establish, precedent. This Article examines how tort law exemplifies this concept. The process is not obvious and has not been directly studied. Indeed, to accommodate this function of tort law, this Article carves out a hybrid space in the current understanding of tort law’s functions. However, once room is created for viewing it, the Article will argue that this hybrid disruption function is as hard to ignore as Bernays’s elegant debutantes waving Lucky Strikes to the crowd.

Tort law functions to disrupt corporate manipulation of societal cognition by uncovering and providing some legal control of that manipulation, particularly in areas involving scientific knowledge about risks to human health and the environment. More specifically, this Article argues that in the postindustrial era of widespread human and environmental harms resulting from the various products and other business activities, tort law serves a function that falls between, and is separate from, the two traditional categories of tort theory: (1) moral/individual and (2) instrumental/public. Some tort scholars argue that tort law is or should be designed to serve one function or the other, and other tort scholars argue that it serves both. This Article argues that there is a third, hybrid function of tort law, the disruption function. This function cannot be characterized as moral/individual or instrumental/public because it is inseparably both.

Further, this Article suggests that the existence of this third function calls into question the traditional compartmentalization of tort law theory—whether by arguing for one function or the other, or by arguing that tort law serves both functions. As evidenced by Edward Bernays’s quote above, the desire to control the public’s perception of products and business activities is long-standing. In light of developments in neuroscience, the science of human cognition and behavior, and so-called neuromarketing or “consumer neuroscience,” the disruption function of tort law may be a more essential protective measure than ever.

5. See infra Part IV.A.
6. It bears emphasizing that this Article is not suggesting that tort law is the only, or even the best, legal way to address such problems. Rather, this Article’s argument is that: (1) tort law serves this role as a descriptive matter, and (2) tort law should be allowed to continue to do so as a prescriptive matter.
7. See infra Parts IV–V.
8. See Richard A. Posner, Instrumental and Noninstrumental Theories of Tort Law, 88 IND. L.J. 469, 469 (2013) (“There is the idea that law is an instrument of social policy, and the idea that instead law is an expression of rights and duties regardless of the instrumental value of those rights and duties.”)
9. See infra Part V.A.
10. See supra text accompanying note 1.
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Since at least the 1920s, corporate actors have acquired an increasingly greater capacity for actions that can shape culture across the nation, and even across the world.12 This has resulted, to a significant extent, in their ability to: (1) present more serious risks to large numbers of people through the use of often quite astounding scientific and technological developments;13 and (2) exercise significant control over public perceptions of their products and their other business activities through highly sophisticated advertising and other public relations campaigns.14 As a result of these two developments, many corporations—in particular the tobacco, agriculture, oil, pharmaceutical, and food processing industries—have amassed significant power and influence over the environment and over our choices about what the public consumes and uses on a regular basis.15 With such power and influence comes a great capacity to present considerable risks to human health and the environment, and thus to effect widespread harms.16 Although the extent of the ability of these business interests to use neuromarketing to exert even greater control over consumer choices remains uncertain, the potential for their doing so bears examination.

The tort system has consistently been called upon to respond to such changes in technology and scientific knowledge. Further, the relationship between consumers and powerful industries as litigants have brought claims based on massive environmental and public health harms that have been caused by the often complex activities of large corporate entities.17 Such harms include

[has] resulted in the birth of a new interdisciplinary field commonly referred to as ‘consumer neuroscience.’”); see also infra Section III.A (discussing marketers’ use of psychology and neuroscience to influence consumers).

12. See Herbert I. Schiller, Culture, Inc.: The Corporate Takeover of Public Expression 3 (1989) (“Through all the political and social changes of the last fifty years, the corporate sector in the American economy has hardened its economic, political, and cultural role in domestic and international activities.”).


14. See Schiller, supra note 12, at 46 (citing Valentine v. Chrestensen, 316 U.S. 52 (1942); Robert Sherrill, Haggling the Constitution: Big Business & Its Bill of Rights, 15 Grand Street, Autumn 1987, at 95, 98 (describing how the scope of corporate influence expanded during the twentieth century as corporations were granted greater free speech rights).


an epidemic of tobacco-related death and disease;\textsuperscript{18} deaths and debilitating injuries caused by defective drugs and medical devices;\textsuperscript{19} illnesses and environmental destruction resulting from oil and chemical spills;\textsuperscript{20} and, most recently, the devastating environmental impacts of climate change.\textsuperscript{21} Such uses of the tort system, in turn, have led to significant developments in tort doctrine as well as in arguments in tort law scholarship, and in the political arena, about the appropriate functions of tort law and its role in the United States (U.S.) legal system.\textsuperscript{22}

This Article argues that these cultural, political, and legal developments have made clear that tort law also serves a role that is inseparably both moral and instrumental, and thus occupies its own area that lies between the two traditional functions of tort law. Specifically, the tort system provides much needed space away from pervasive corporate manipulation of societal cognition, namely tort’s disruption function. This space permits society—represented by litigants, judges, and juries—to examine closely and consider whether corporate activities should be subject to some legal oversight in a given case after hearing the story of the occurrence of the particular harm or harms relatively free of the “noise” of corporate cognitive manipulation that so often pervades society and culture, and getting further information through the civil justice system’s powerful discovery system. This Article also argues that tort’s disruption function can, and often does, provide the impetus for the public to consider whether other, more comprehensive legal mechanisms such as statutes or administrative regulations might be necessary.

Part II of this Article shows how the tort system has been called upon more and more to address widespread harms as significant portions of the population are increasingly exposed to large-scale, potentially catastrophic threats posed by

\textsuperscript{18} See Jon S. Vernick et al., Public Health Benefits of Recent Litigation Against the Tobacco Industry, in PUBLIC HEALTH LAW AND ETHICS 215, 215–16 (Lawrence O. Gostin ed., 2d ed. 2010) (citing United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006), aff’d in part, vacated in part, 566 F.3d 1095 (D.C. Cir. 2009); Engle v. Liggett Grp., Inc., 945 So. 2d 1246 (Fla. 2006)) (noting the large number of lawsuits filed against tobacco companies and the $20 billion settlement between the major tobacco companies and forty-six states to reimburse the states for smoking-related healthcare costs).

\textsuperscript{19} See Lawrence O. Gostin, The Deregulatory Effects of Preempting Tort Litigation, in PUBLIC HEALTH LAW AND ETHICS, supra note 18, at 225, 227 (“Tort law assists patients who have been harmed by defective products, providing compensation for medical costs, pain, and disability. Currently there is no government compensation program for patients injured by defective drugs or medical devices . . . .”).

\textsuperscript{20} Cf. Tom Christofel & Stephen P. Teret, Epidemiology and the Law: Courts and Confidence Intervals, in PUBLIC HEALTH LAW AND ETHICS, supra note 18, at 204, 205 (“Exposure to asbestos, toxic waste, radiation, and pharmaceuticals have led to large numbers of lawsuits in the past [fifteen] years.”).

\textsuperscript{21} Douglas A. Kysar, What Climate Change Can Do About Tort Law, 41 ENVTL. L. 1, 2 (2011) (“Plaintiffs in several cases have pressed tort claims . . . seeking monetary damages and injunctive relief to lessen the threat and financial burden of climate change’s harmful impacts.”).

\textsuperscript{22} See generally Rustad & Koenig, supra note 17, at 347–73 (citations omitted) (discussing and responding to criticisms of public health torts).
profit-driven, technologically complex, and often extremely high-risk activities, including the sophisticated marketing of products such as automobiles, food, drugs, and other products marketed for consumption containing ingredients about which the public knows very little. Further, these threats also include the production of energy from carbon-based sources that not only contaminate the environment surrounding the production source in the normal course of production as well as when accidents occur, but also contributes to the alarming increase in the warming of the entire planet.

Part III elaborates on the marketing strategy of many business interests developed in a previous Article on the tobacco product industry—called the strategy of “disinformation plus path-dependence”—by incorporating the practice of neuromarketing. The Article then shows how U.S. tobacco companies have continued this strategy with their recent development and widespread marketing of so-called electronic cigarettes, or e-cigarettes. This Part summarizes the background of the development of neuromarketing, explains why companies find it so attractive, and stresses the dangers in the context of e-cigarettes.

Part IV describes the moral/individual and instrumental/public dichotomy that dominates in tort law theory. The Article then explains how this dichotomy has been employed in the corporate campaign to place limits on the tort system, a campaign launched in response to the increased use of the tort system to seek redress and accountability for widespread and catastrophic harms that the public increasingly faces.

23. See, e.g., ERIC SCHLOSSER, FAST FOOD NATION 125 (2001) (“The Food and Drug Administration does not require flavor companies to disclose the ingredients of their additives, so long as all the chemicals are considered by the agency to be [safe]. This lack of public disclosure enables the companies to maintain the secrecy of their formulas ... [and] hides the fact that flavor compounds sometimes contain more ingredients that the foods being given their taste.”); David A. Kessler & David C. Vladeck, A Critical Examination of the FDA’s Efforts to Preempt Failure-to-Warn Claims, 96 GEO. L.J. 461, 495 (2008) (“Statutory gaps in the FDA’s authority to gather information [from drug companies] ... hamstring its ability to ensure the safety of the drugs on the market.”).

24. See, e.g., Blaine LeCesne, Crude Decisions: Re-examining Degrees of Negligence in the Context of the BP Oil Spill, 2012 MICH. ST. L. REV. 103, 104 (“The Deepwater Horizon oil rig explosion was the worst man-made environmental disaster in United States history. This singular event caused the death of eleven rig workers, damaged, perhaps irreversibly, the coastlines and ecosystems of five Gulf States, and imposed financial ruin on the tens of thousands who relied upon a functional Gulf of Mexico for their livelihood.”).

25. See, e.g., ROBERT R.M. VERCHICK, FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD 6 (2010) (“Anthropogenic climate change has the potential to influence a wide range of disasters ... This is not a book about climate change, but nearly every issue I address is backlit by its presence.”).

26. Karen C. Sokol, Smoking Abroad and Smokeless at Home: Holding the Tobacco Industry Accountable in a New Era, 13 N.Y. U. J. LEGIS. & PUB. POL’Y 81, 94 (2010) (describing the strategy as “consist[ing] of (1) the pervasive dissemination of disinformation to encourage nonrational decisionmaking ... and (2) the subsequent deprivation of free choice on the part of those who become addicted to the products, even if the disinformation problem is corrected”).
Part V argues that this dichotomy in tort law theory is wrong as a descriptive matter, and advances that tort law serves the disruption function, a function that cannot be slotted into either the “moral” or “instrumental” tort function category. Further, this Article argues that the dichotomy is problematic as a prescriptive matter, as it underlies many of the calls for limiting the tort system. Accordingly, tort theory must allow for hybrid private and public functions, such as the disruption function, if the tort system is to remain viable in the current era of expansive corporate activities that can cause widespread harms. The need for such a rethinking of tort theory is particularly important if neuromarketing and other increasingly sophisticated techniques for manipulating societal cognition regarding high-risk products such as electronic cigarettes are as successful as the business literature indicates that companies hope them to be.

Part VI concludes by emphasizing that the need has never been greater for effective legal mechanisms, including tort law, to provide oversight of risky business activities with the potential to cause widespread harms across space and time. It is already clear that, due to the hybrid disruption function of tort law, tort litigation based on widespread harms serves essential individual and public needs at the same time. It is thus imperative that such litigation be allowed to continue playing itself out, potentially in cases involving neuromarketing and harms caused by e-cigarettes and beyond.

II. DEVELOPMENTS IN THE TORT SYSTEM IN RESPONSE TO WIDESPREAD PUBLIC HEALTH AND SAFETY HARM

In the 1916 landmark case of MacPherson v. Buick Motor Co.,27 Judge Benjamin Cardozo was faced with the task of applying the principles of tort law to the drastic changes in the relationship between consumers and manufacturers that had taken place in the wake of the Industrial Revolution.28 With the development of mass production and marketing, consumers rarely purchased products directly from manufacturers as they had in the past.29 Recognizing this

27. 111 N.E. 1050 (N.Y. 1916).
28. See id. at 1053 (“Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.”).
29. See KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 141 (2008) (“In the nineteenth century, . . . craftsmen tended to make and sell their products directly to those who would use them. . . . In contrast, with the rise of mass-produced goods, . . . [t]he very people who were most likely to be affected by a defective product were not the middlemen who purchased it directly from the manufacturer, but consumers who purchased it from a retailer, or innocent bystanders who were not in the chain of distribution at all.”).
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reality. Cardozo concluded that it was necessary to abolish the requirement that the person injured by a product be in a contractual relationship with the manufacturer in order to bring a tort claim for negligent manufacturing. Cardozo justified this holding based on his portrayal of the trajectory being carved out by previous cases in light of the inherently adaptable nature of the common law of torts. As Cardozo put it, the general “principle” identifying the nature of the “danger” presented by the given societal activity “does not change, but the things subject to the principle do change.”

Three decades after MacPherson, Justice Roger Traynor expanded upon Judge Cardozo’s reasoning in another landmark opinion by a member of a state’s highest court applying tort principles to new types of conduct and harms in the post-industrial era. By this time, the phenomenon of the mass production of consumer products dealt with by Cardozo was coupled with increasingly sophisticated marketing that included, inter alia, public relations and other

30. See MacPherson, 111 N.E. at 1053 (“The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet [Buick] would have us say that he was the one person whom it was under a legal duty to protect.”).

31. As Cardozo resoundingly stated: “We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.” Id.; see also MacPherson, 111 N.E. at 1052 (noting that nineteenth century precedents can be ineffectual in addressing twentieth century situations). There is a very rich body of scholarship on the import of MacPherson, and other opinions written by Cardozo, for the concept of “duty” in tort law. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, The Moral of MacPherson, 146 U. PA. L. REV. 1733, 1735–77, 1812–47 (1998) (citations omitted) (providing an overview of the way in which MacPherson has been invoked in support of various conceptions of the role of duty in tort law and arguing for a different “moral” of the case regarding duty). This Article does not take a position in that debate; rather, the focus is on the significance of the case for the development of modern tort law in response to widespread harms caused by the activities of corporate actors.

32. See MacPherson, 111 N.E. at 1051–53 (noting the need for a manufacturer in order to prevail on a negligence claim against that manufacturer).

33. Id. at 1053 (emphasis added).

34. Id. More specifically, Cardozo expanded the “inherent danger” exception to the privity requirement to include “thing[s, the nature of which] is such that it is reasonably certain to place life and limb in peril when negligently made,” for this characteristic makes them “thing[s] of danger.” Id. Cardozo did, however, place limits on the application of negligence law to suits by plaintiffs who were not in privity with the manufacturers of the products that caused their injuries. See id. (imposing a duty of care only on manufacturers that have “knowledge that the thing [they manufacture] will be used by persons other than the purchaser . . . without new tests”).

35. See Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 442 (Cal. 1944) (Traynor, J., concurring) (quoting MacPherson, 111 N.E. at 1053) (crediting Cardozo’s opinion in MacPherson with paving the way for courts to hold manufacturers liable for injuries caused by their products, even in the absence of negligence).
advertising techniques. By such marketing strategies, consumer product manufacturers conveyed messages that in effect became a key part of what the “product” was in the minds of consumers. In the 1944 case of Escola v. Coca Cola Bottling Co., the California Supreme Court upheld a jury verdict finding the manufacturer of Coca Cola bottles liable for the negligent manufacture of a bottle that exploded in the hand of a waitress, lacerating her palm and thumb. Traynor concurred in the judgment of the majority, but wrote separately to argue that the majority’s reasoning in justification of negligence liability was unacceptably strained. Rather, according to Traynor, the court had in effect determined that the bottling company was strictly liable for the plaintiff’s injuries—that is liable notwithstanding a failure to prove negligence on the part of the bottling company. Specifically, Traynor declared: “[I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.” That is, in cases involving injuries caused by mass-marketed products, the existence of a defect alone rendered the manufacturer responsible in tort for the injury according to Traynor.

In support of this assertion, Traynor drew heavily on Cardozo’s reasoning in MacPherson justifying the rejection of the rule that manufacturers were subject to liability for negligence in product manufacturing only to those who had purchased the products directly from the manufacturers. In particular, Traynor invoked earlier cases finding liability for injuries caused by food products and argued that they were better explained in MacPherson-type terms. That is,

36. See id. (noting consumers’ increased reliance on advertising to gauge a product’s quality).
37. See id.
38. 150 P. 2d 436 (Cal. 1944).
39. See id. at 437–38, 440 (citing Druzanich v. Criley, 122 P.2d 53, 56 (Cal. 1942); Michener v. Hutton, 265 P. 238, 240 (Cal. 1928)). The plaintiff’s injuries occurred when “[t]he bottle broke into two jagged pieces and inflicted a deep five-inch cut, severing blood vessels, nerves and muscles of the thumb and palm of the hand.” Id. at 438.
40. See id. at 441 (Traynor, J., concurring) (“It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence.”).
41. See id. (“In leaving it to the jury to decide whether the inference [of negligence by the manufacturer of a defective product] has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability.”).
42. Id. at 440.
43. See id. (citing Sheward v. Virtue, 126 P.2d 345, 345–46 (Cal. 1942); Kalash v. L.A. Ladder Co., 34 P.2d 481, 482 (Cal. 1934); MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916)). According to Traynor, “[e]ven if there is no negligence... public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.” Id.
44. See id. at 440 (citing Sheward, 126 P.2d at 345–46; Kalash, 34 P.2d at 482; MacPherson, 111 N.E. at 1053).
45. See id. at 441–43 (citations omitted). The line of “food” cases that Traynor infused with Cardozo’s MacPherson logic were cases in which negligence could not be shown by a
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tort law that accounted for the changing realities of the marketplace and the resulting new product-caused harms that were becomingly increasingly common.46

In justifying this conclusion, Traynor catalogs the changes in societal conditions that warranted this result, highlighting the significant changes that had taken place in the relationship between product manufacturers and consumers, as well as the resulting power inequities, and thus the likelihood of massive, unaddresed harms if tort law continued to be understood in terms of the drastically different world of previous centuries.47 Echoing Cardozo, Traynor stated: “As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered.”48 Traynor also pointed to changes in that relationship since MacPherson that had further altered this relationship; namely, that the manufacturer now had control over information regarding increasingly complex production processes as well as over the representation of the product on the market.49 In particular, Traynor noted:

> Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks.50

> “The manufacturer’s obligation to the consumer,” Traynor stressed, “must keep pace with th[is] changing relationship between them,”51 which required assigning tort responsibility to the manufacturer for harms caused by defective

preponderance of the evidence, and so the cause of action was contractual—specifically, for violation of the implied warranties of merchantability and safety—in which the courts essentially abolished the privity requirement for similar reasons to those advanced by Cardozo in MacPherson. See id. at 442 (citing Ketterer v. Armour & Co., 200 F. 322, 323 (S.D.N.Y. 1912); Klein v. Duchess Sandwich Co., 93 F.2d 799, 803–04 (Cal. 1939); Jacob E. Decker & Sons v. Capps, 164 S.W.2d 828, 831–32 (Tex. 1942)).

46. See id. at 443 (“The manufacturer’s obligation to the consumer must keep pace with the changing relationship between them . . . .”).
47. See id.
48. Id.
49. See id.
50. Id. (emphasis added).
51. Id.
products even if those who are injured are unable to prove negligence. In sum, Traynor recognized that, in an era of corporate national marketing campaigns that made representations of products essential to what consumers perceived the product to be, tort law had to be able to address harms that were caused not by isolated instances of individual actions, but rather from systematic and systemic activities of corporations.

Two decades after Escola, Traynor made the same arguments for tort liability based on product defects, but this time writing the court’s majority opinion. In Greenman v. Yuba Power Products, Inc., the defect-based products liability action that Traynor had advanced in his Escola concurrence became law for the state of California. It also quickly became law for much of the rest of the country, as it was recognized as the majority rule in section 402A of the Restatement (Second) of Torts, published a mere two years after Greenman and then adopted by almost every other state within a decade.

Developments in tort law such as that represented by the development of liability for defective products provide one lens for viewing changing conceptions of the boundaries of social responsibility that the public thinks should, or should not, be legally enforceable. Since tort law holds individuals

52. See id. at 442 ("[T]he logic of MacPherson] pave[d] the way for a standard of liability that would make the manufacturer guarantee the safety of his product even when there is no negligence.").

53. Cf. Gregory C. Keating, A Social Contract Conception of the Tort Law of Accidents, in PHILOSOPHY AND THE LAW OF TORTS 22, 39–40 (Gerald J. Postema ed., 2001) ("In the world of acts, risk impositions are discrete one-shot events. . . . At the opposite pole from the world of acts is the world of activities. In the world of activities risks are systemic. . . . [T]he typical injury arises not out of the diffuse and disorganized acts of unrelated individuals or small firms, but out of the organized activities of firms that are either large themselves, or small parts of relatively well-organized enterprises.").


55. 377 P.2d 897 (Cal. 1963).

56. See id. at 901 (citations omitted). Traynor confidently stated that "[the court] need not re cannas the reasons for imposing strict liability on the manufacturer." Id.

57. See ABRAHAM, supra note 29, at 145 ("[In one of the quickest transformations in the history of tort law, strict products liability swept the country. In 1965, in its influential Restatement (Second) of Torts, the American Law Institute . . . squeezed a hastily created strict products liability provision, section 402A, in between the already prepared sections 402 and 403. The courts of dozens of states then followed California and the Restatement, which had described the law as providing strict products liability for injuries caused by products that were in a 'defective condition unreasonably dangerous to the user or consumer.'") (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965)); see also JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTION TO U.S. LAW: TORTS 271 (2010) ("Within ten years of [section 402A’s] publication, almost every state had adopted some form of defect-based products liability.").

58. See, e.g., Lance Liebman, Foreword to RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM xii (2010) ("This volume [of the Restatement] explains the ideas we hold about social duty and responsibility early in the [twenty-first] century."); GOLDBERG & ZIPURSKY, supra note 57, at 1 ("To commit a tort is to do wrong to another. . . . [I]t is a legal wrong—a wrong recognized by law, as opposed to wrongs that are exclusively violations of moral
and entities liable for causing harm to another in certain circumstances, two significant drivers of this conceptual evolution are the emergence of: (1) new kinds of activities that cause harm, and (2) new kinds of harms.59 Certainly, harms may “emerge” in the sense that society now recognizes them as such, even though the experience of them has been extant for a long time.60 Harms may also actually emerge as a result of changes in types of actors, activities, and often, in both.61 It is this sort of change that has led to significant, and often

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rules.”); see also ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 1 (1995) (“[Private law] is the public repository of our most deeply embedded intuitions about justice and personal responsibility.”); Marshall S. Shapo, An Essay on Torts: States of Argument, 38 PePP. L. REV. 579, 579 (2011) (“I have believed for some time that tort law is a fairly accurate mirror of ourselves—our desires, our hopes and ambitions—and of the attitudes that grow out of those elements of ourselves . . . . Beyond that, tort law captures tensions within ourselves . . . .”).

59. See, e.g., Marc Galanter, The Dialectic of Injury and Remedy, 44 Loy. L.A. L. REV. 1, 6 (2010) (citing LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 107 (1985)) (noting that society has become concerned with “new kinds of injuries,” as well as injuries suffered by previously marginalized groups). As Professor G. Edward White artfully states: Tort law’s integrity has come from a recurrent need in American society for some legal response to the problem of responsibility for civilly inflicted injuries. In the last hundred-odd years Americans have been injured in all sorts of diverse ways; in that time secular explanations for, and responses to, the problem of injuries have predominated. Tort law has been a major explanatory and responsive device. Its integrity, and its amorphousness as well, can be linked to the place of injury in American life.

G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY xxviii (expanded ed. 2003); see also John C.P. Goldberg, Introduction: Pragmatism and Private Law, 125 HARV. L. REV. 1640, 1654 (2012) (quoting GOLDBERG & ZIPURSKY, supra note 57, at 27) (“Tort law is a ‘gallery of wrongs.’ . . . . [T]he composition of the gallery has changed, and will continue to change, over time.”); cf. David G. Owen, Why Philosophy Matters to Tort Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 1, 18 (David G. Owen ed., 1995) (“[T]he question posed [in tort disputes] is ‘What caused what?’ Causation issues are colored, however, by issues of responsibility and harm that connect to it on either side. So, matters bearing on responsibility and risk need first to be understood in order to decide or even define the issue of ‘What caused what?’”).

60. See Galanter, supra note 59, at 4 (“[W]e can visualize a moving legal frontier in which some things are newly conceived of as remediable injuries, and formerly remedied injuries are redefined as undeserving of legal remedy.”); Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 193 (1890) (“Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property . . . . Later, [however] there came a recognition of man’s spiritual nature, of his feelings and his intellect.”). Warren and Brandeis referred to this social development as “the recognition of the legal value of sensations.” Id.

61. See Galanter, supra note 59, at 4, 6 (citing FRIEDMAN, supra note 59, at 107) (“As more things are capable of being done by human institutions, the line between unavoidable misfortune and remediable injury shifts. The realm of injury is enlarged . . . . Not only does society’s concern expand to include new kinds of injuries, but it moves to the troubles of the sorts of people who were previously held of little or no account . . . .”).
quite rapid, developments in tort law since the Industrial Revolution, when the country began to experience the impacts of mass production and great concentrations of wealth and power in corporate entities.

These impacts have accelerated since the 1960s as corporate actors have acquired greater capacity for actions that can affect individuals and communities across the nation, and even the world. This has resulted, to a significant extent, from their abilities to: (1) present more serious risks to large numbers of people through the use of often quite astounding scientific and technological developments to, for example, manufacture new products and to implement new means of extracting and processing fossil fuels such as underwater drilling and hydraulic fracturing, and (2) at the same time exercise significant control over public perceptions of their products and other activities through highly sophisticated advertising and other public relations campaigns. As a result of these two developments, many private actors and entities have amassed significant power and influence over our environment and over our choices about what we consume and use on a regular basis. With such power and influence comes a great capacity to present considerable risks to human health and the environment, and thus to effect widespread harms.

The tort system has consistently been called upon to respond to these changes as litigants have brought claims based on massive environmental and public health harms that have been caused by the often complex activities of large corporate entities, including an epidemic of tobacco-related deaths and

64. See Craver, supra note 13, at 167 (citing Mitchell, supra note 13, at 584).
65. See Craver, supra note 13 and accompanying text. For example, many food, medical, cosmetic, and other personal care products now contain nanomaterials; these materials are so small that they are not visible even with the use of a regular microscope and consequently have different physical, chemical, and biological properties than the same materials have in a regular-scale state. Nanotechnology Fact Sheet, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/scienceresearch/specialtopics/nanotechnology/ucm402230.htm (last updated June 24, 2014).
67. See supra note 14.
68. See supra note 15.
69. See supra note 16.
70. See supra note 17. For a statement on the role of tort litigation in this context, see PUBLIC HEALTH LAW AND ETHICS, supra note 18, at 195. The tort system provides “attorneys general and private citizens…a powerful means of indirect regulation” that is “an effective method for reducing the burden of injury and disease” resulting from “pollution, toxic substances, unsafe pharmaceuticals or vaccines, and defective or hazardous consumer products.” Id.
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diseases; 71 deaths and debilitating injuries caused by defective drugs and medical
devices; 72 illnesses and environmental destruction resulting from oil and
chemical spills; 73 and, most recently, the devastating environmental impacts of
climate change. 74 Such uses of the tort system, in turn, have led to significant
developments in tort doctrine itself as well as advances in arguments in tort law
scholarship and in the political arena about the appropriate purposes of tort law
and its role in the U.S. legal system. 75 Importantly, these developments have
also brought into sharp relief the disruption function of tort law—namely its
ability to serve private and public functions at once by providing an opportunity,
albeit limited, to evaluate such activities and harms in a space that provides a
respite from the omnipresent corporate manipulation of societal cognition.

III. T he C ontinuing P ower of the "D isinformation P lus Path-
D ependence" S trategy: N euromarketing and E lectronic
C igarettes

A. T he P otential M anipulation of S ocietal Cognition by N euromarketing:
"D isinformation P lus Path-Dependence" Revisited in Light of
N euroscience D evelopments

In a 1999 Harvard Law Review article on product manufacturers’
manipulation of consumers’ perceptions regarding the risks of various products,
Professors Jon Hanson and Douglas Kysar made the prescient observation that:

followed this research [indicating cigarettes were addictive and harmful] expressed concern about
how the publication and discussion of such studies might make the industry vulnerable to
litigation"); William Halton & Michael McCann, Distorting the Law: Politics, Media,
and the Litigation Crisis 233–41 (2004) (citations omitted) (discussing three distinct periods in
the history of tobacco litigation); Graham E. Kelder, Jr. & Richard A. Daynard, The Role of
Ligation in the Effective Control of the Sale and Use of Tobacco, 8 Stan. L. & Pol’y Rev. 63,
76–81 (1997) (citations omitted); see also supra note 18.

72. See David C. Vladeck, Preemption and Regulatory Failure, 33 PEPP. L. REV. 95, 101
(2005) (discussing “the discipline imposed by the tort system” and describing medical devices as “a
perfect illustration of the inadequacy of relying on regulation alone’’); see also supra note 19.

73. See David T. Peterson & Thomas P. Redick, Innovations and Considerations in Settling
Toxic Tort Litigation, nat. R esources & Env’t, Spring 1988, 9, 9; see also LeCesne, supra note
24, at 120 (noting that a “series of [negligent] decisions, acts, and omissions . . . occurred over the
course of many months” leading up to the explosion of the Deepwater Horizon oil rig).

74. See Kysar, supra note 21, at 4 (“Just as earlier periods of unprecedented injury and loss
of life contributed to significant changes in American tort doctrine and practice, an influx of climate
change claims may force a reevaluation of the existing system for compensating and deterring
harm.”).

75. See, e.g., Daniel A. Farber, Tort Law in the Era of Climate Change, Katrina, and 9/11:
the desirability of compensation for catastrophic risks, we need to think broadly about the societal
interests at stake.”).
The markets that we have described as evincing manufacturer manipulation—food products, pharmaceutical drugs, environmental pollutants, weapons, and automobiles—are all markets in which one would surmise intuitively that consumers are at least somewhat aware of the fact that health and safety issues are implicated by the product. [In such circumstances], manufacturers have incentives to manipulate risk perceptions in the manner that benefits them most.

It is our position that markets evolve to a point at which manufacturers behave as if they know and understand consumer’s [sic] biases and cognitive shortcomings and can manipulate them accordingly... The evidence of market manipulation that we offer may therefore represent only the practices that have been around long enough and are pervasive enough to be identifiable. Market manipulation may be far more prevalent and problematic than we could ever demonstrate.\(^76\)

As Edward L. Bernays well understood, insight into the mind of humans in their capacity as consumers is a highly powerful and profitable tool.\(^77\) Beginning in the 1920s, Bernays drew on the theories of human psychology developed by his uncle, Dr. Sigmund Freud, and consequently became among the first to apply the methods of public relations in the commercial sphere by, inter alia, developing marketing campaigns targeting women for the American Tobacco Company.\(^78\) Around the time that Bernays was applying Freud’s theories about the human psyche and behavior to the marketing of products, another Austrian psychologist, Ernest Dichter, was living in the United States and writing about the implications of psychoanalytic theory for manipulating consumer purchases.\(^79\) Further, large companies, including “Proctor & Gamble, Exxon, Chrysler, General Mills[,] and DuPont,” were paying Dichter millions to apply his theories to the marketing of the myriad products that they sold throughout the nation.\(^80\) Dichter’s incredibly lucrative idea was to apply Freudian theories about the power of the subconscious in decision-making to marketing strategies.\(^81\) Specifically, beginning in the late 1930s, as a result of Dichter’s advice, these and other leading national and multinational companies incorporated into their marketing the idea “that every product has an image, even

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77. See Tye, supra note 1, at 9–10.
78. See Tye, supra note 1, at 8–10, 28–31 (quoting BERNAYS, supra note 2, at 386–87); see also supra text accompanying note 2.
79. See Sex and Advertising: Retail Therapy, ECONOMIST, Dec. 17–30, 2011, 119, 119 (noting that Dichter began exploiting his insights into “irrational buying” in America in the 1930s and by the 1950s was considered “the Freud of the supermarket age”).
80. Id.
81. See id. (“[Dichter] held that marketplace decisions are driven by emotions and subconscious whims and fears . . . ”).
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a ‘soul,’ and is bought not merely for the purpose it serves but for the values it
seems to embody.82 Dichter’s psycho-marketing ideas were so pervasive that
they led Vance Packard, a sociologist, to claim in his 1957 book The Hidden
Persuaders that, as a result of advertising techniques such as those developed
by Dichter, “Americans have become the most manipulated people outside the Iron
Curtain.”83

In the 1960s, the efficacy of applying Freudian-type psychoanalytic theories
to consumer marketing began to be called into question as computers were
becoming increasingly sophisticated and the discipline of cognitive science was
emerging, which provided the opportunity for more quantitative and direct
studies of the human mind.84 Manufacturers of consumer products have never
stopped spending significant amounts on research into the human mind; however:
as Professors Hanson and Kysar pointed out in 1999, manufacturers
were spending eight billion dollars a year on cognitive science research focused
on consumer behavior.85

Although research of consumer behavior continues, and thus corporate
spending on it undoubtedly also continues to increase,86 manufacturers are
apparently now also turning toward investigating the human mind and associated
behavior through the relatively recent methods of so-called consumer
neuroscience or neuromarketing.87 In contrast to consumer behaviorism and
psychology research, neuromarketing research employs methods that aim to
directly, rather than merely theoretically, tap into the consumer’s mind—

82. Id. at 120.
83. Id. at 119 (quoting VANCE PACKARD, THE HIDDEN PERSUADERS Preface (1957))
(internal quotation marks omitted). Further, Packard targeted Dichter for exploiting the emotions
of consumers to inspire a national glut of self-indulgence. He claimed that motivational researchers
such as Dichter, with their scientific cunning and Freudian voodoo, had unleashed the “chilling
world of George Orwell and his Big Brother.” Ironically, Packard’s dramatic assessment of
Dichter’s dark powers ended up bringing him plenty of new business. Id. at 122–23 (quoting
PACKARD, supra note 83, at 5).
84. See id. at 123 (noting “the development of the cognitive sciences from the late
1950s . . . to the 1970s”).
85. See Hanson & Kysar, supra note 76, at 1429.
86. But see Eric K. Clemons, How Information Changes Consumer Behavior and How
Consumer Behavior Determines Corporate Strategy, J. MGMT. INFO. SYS., Fall 2008, 13, 14 (noting
that greater consumer access to information means many successful products are never formally
advertised or promoted). For an example of research into consumer behavior, see Echo Wen Wan et
al., To Be or Not to Be Unique? The Effect of Social Exclusion on Consumer Choice, 40 J.
CONSUMER. RES. 1109, 1109–10 (2014), where the researchers concluded, based on three
experiments, that individuals who perceive themselves to be excluded socially with little chance of
reintegration “will seek to differentiate themselves” by making “distinctive” product choices, while
socially excluded individuals who feel confident about their ultimate “reaffiliation” are “less likely
to differentiate their choices from others’ choices.”
87. See LEON ZURAWICKI, NEUROMARKETING: EXPLORING THE BRAIN OF THE CONSUMER 1
(2010) (“Neuroscience constitutes a fusion of various disciplines . . . . This relatively new field of
research has in recent years significantly contributed to a better understanding of human behavior.
In that sense, it provides insights into the consumer conduct as well.”).
particularly into the subconscious and emotions with which Freudian theory was concerned. To do so, neuromarketing researchers use complex modern techniques such as scanning various regions of the brain with magnetic resonance imaging (MRI); measuring the electrical activity of brain cells with an electroencephalogram (EEG); eye tracking; measuring physiological responses such as heart rate, blood pressure, and hormonal levels; and often some combination of these and various other techniques.

The advantage of such techniques, according to those who study and promote neuromarketing, is that its machinery-based research methods allow for an unfiltered reading of human mental reactions to stimuli. That is, the hope is that researchers and the companies that hire them have finally achieved a means of peering into what, since the days of Freud, has been considered the ultimate “black box”—the human mind and its decisionmaking processes. Whereas the science of consumer behaviorism aims to provide a scientific description of human behavior using natural or external research observation methods, and thus conceives of the mind as a black box, neuromarketing techniques allow the researcher to “directly observe internal psychological or physiological processes.”

Professor Leon Zurawicki, who specializes in business and marketing and has written one of the leading books on neuromarketing, estimates that “around the world there are approximately [ninety] private neuroscience labs contracting with businesses to perform applied studies on consumer behavior, attitudes, and related issues.” Professor Zurawicki is unable to provide an estimate of the number of companies that hire these neuromarketing firms; however, as “many client companies resorting to neuromarketing research do not publicize that fact fearing the public backlash for the ‘Frankenstein style’ experiments.”

88. See Roger Dooley, Brainfluence: 100 Ways to Persuade and Convince Consumers with Neuromarketing xii (2012). But see Sex and Advertising, supra note 79, at 123 (“[T]hese studies don’t explain why something is happening, or what its effect might be in the real world. Rather, they create a framework for new assumptions, new leaps of faith, new ways to tell stories about the irrational choices people make.”).

89. See Zurawicki, supra note 87, at 42–53 (explaining the various methods “used to investigate the anatomy and the physiological functions, to model the brain activity and analyze behavior”).

90. See id. at 212 (observing that such techniques allow advertisers to “refine[e] the way [consumers] interact with the markets”); see also Dooley, supra note 88, at xii (noting the ability of MRIs and EEGs to directly measure reactions to specific stimuli, thereby allowing marketers to optimize their ads).


92. Id. at 420 (emphasis added).

93. Zurawicki, supra note 87, at 211.

94. Id.
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Given the general nature of neuromarketing as a potential new means of developing marketing and other public relations strategies by manufacturers,95 as well as the fact that addiction is of particular interest in the neuromarketing field,96 neuromarketing could very well become an important part of both prongs of the tobacco industry’s “disinformation plus path-dependence” strategy described in a previous article: namely, “(1) the pervasive dissemination of disinformation to encourage nonrational decisionmaking . . .[,] and (2) the subsequent deprivation of free choice on the part of those who become addicted to the products, even if the disinformation problem is corrected.”97

In light of the tobacco industry’s systematic use of this strategy in various forms over time to accommodate new cultural, socio-political, and technological developments,98 it seems highly probable that the tobacco industry is involved in neuromarketing in one form or another. If that is so, their efforts surely involve the one product deemed capable of insuring a new generation of “smokers” in the developed world: electronic cigarettes.

B. The Case of Electronic Cigarettes: “Vaping” Liquid Nicotine

Within the last couple of years, the three largest tobacco product companies in this country—Altria Group (previously Philip Morris),99

95. See id. at xii–vii.
96. Cf. id. at 228–36 (citations omitted) (arguing that consumers should learn from neuroscience to better understand the ways marketers influence them).
97. Sokol, supra note 26, at 94.
98. See BRANDT, supra note 71, at 339 (noting that documents produced in litigation against the industry showed that “tobacco companies had known the addictive properties of nicotine for decades” and that “[d]espite their campaign to discredit the [Surgeon General’s report on nicotine addiction], the companies had been deeply involved in studying the scientific and behavioral effects of nicotine since at least the 1960s”); STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 61–74 (1996) (citations omitted) (describing and quoting from studies on nicotine addiction undertaken for industry giant British American Tobacco); Sokol, supra note 26, at 95 & n.48 (quoting Philip J. Hilts, Philip Morris Blocked ’83 Paper Showing Tobacco is Addictive, Panel Finds, N.Y. TIMES, Apr. 1, 1994, at A21). As further pointed out:
   “[R]esearchers working for Philip Morris were the first to successfully design a research method for assessing the addictive properties of nicotine as delivered to the body by the use of tobacco products. Their study . . ., as recognized by the editors of the scientific journal that accepted the paper on the study for publication . . . was tremendously significant, as it occurred several years before the Surgeon General issued the Report on Nicotine Addiction. However, their paper was never published; Philip Morris compelled the authors to withdraw it. The larger scientific community and the public were thus denied the benefit of this vital information. Had it been published, the Surgeon General’s report undoubtedly would have been issued much earlier.
Sokol, supra note 26, at 95–96 (footnotes omitted).
R.J. Reynolds,100 and Lorillard—bought electronic cigarette or e-cigarette companies, created subsidiaries that manufacture these products, and have been highly successful at selling them by wielding their considerable marketing power.101 Shortly before this Article went to press, R.J. Reynolds bought Lorillard, so now there are only two large U.S. tobacco companies.102 E-cigarettes are battery-powered devices designed to look similar to regular cigarettes, with an LED light at the end that lights up upon inhalation to mimic burning.103 But instead of burning, they “vape”—which is to say, a battery-powered vaporizer heats up a cocktail made up of nicotine and a mix of undisclosed chemicals that is then inhaled by the user.104

Unlike their predecessors that were imported from China in 2007,105 the versions of e-cigarettes that Altria, R.J. Reynolds, and Lorillard (until not long


Philip Morris International was also originally a subsidiary company of Philip Morris, and then of Altria. See Our History. PHILIP MORRIS INTERNATIONAL, http://www.pmi.com/eng/about_us/pages/our_history.aspx (last visited Oct. 4, 2014). However, after acquiring tobacco product companies all over the globe and capturing a global market share of 15.6%, the company spun off from Altria, “becoming the world’s leading international tobacco company and the fourth largest global consumer packaged goods company.” Id.


Interestingly, Lorillard, the first of the three tobacco product manufacturers to start selling e-cigarettes, launched its new product Blu” e-cigarettes at the same time that the Food and Drug Administration considered banning menthol flavored conventional cigarettes in addition to all other flavorings. See Mike Esterl, Got a Light—er Charger? Big Tobacco's Latest Buzz, WALL STREET J., Apr. 26, 2012, at B3. At the time, menthol cigarettes, specifically Newports, accounted for approximately ninety percent of Lorillard’s revenue. Id.


103. See Block, supra note 101.

104. See id.

105. See Esterl, supra note 101, B3 This Wall Street Journal article announcing Lorillard’s acquisition of an e-cigarette manufacturer pointed out:

[The] niche [e-cigarette] industry has grown rapidly since arriving from China five years ago. It now accounts for between $250 million and $500 million in annual sales, according to industry estimates. A government survey found 2.7% of U.S. adults had
ago—now Imperial Tobacco are now marketing look remarkably like conventional cigarettes and incorporate increasingly sophisticated battery recharging technology and software. Philip Morris’s brand, MarkTen, is white, shaped like a cigarette, and packaged in a box that looks like a conventional cigarette pack. Further, unlike many of the versions of e-cigarettes sold by companies that sell only e-cigarettes, which are larger and rather awkward-looking and are akin to “small flashlights,” Philip Morris’s MarkTens have four small lights at the end that the company calls “FourDraw technology.” Philip Morris outs its MarkTens as providing users, called “vapers,” with “a more consistent experience.” R.J. Reynolds’s Vuse e-cigarettes are even sleeker in appearance; like Philip Morris’s MarkTen, Vuse e-cigarettes look like conventional cigarettes in size and shape, but have a black and silver metallic appearance appropriate for an age of sleek-looking technology like iPhones and iPads. Lorillard’s Blu (now sold by Imperial Tobacco) e-cigarettes are similar in design to Vuse, and now come in a box that serves as a charger. The company soon plans to incorporate software into their e-cigarette boxes that will allow users to employ social media tools to connect with other users as well as to be alerted when they are near locations that sell Blu products.

Because they contain nicotine, e-cigarettes are unquestionably addictive. In fact, the U.S. Surgeon General has compared the addictiveness of nicotine to tried e-cigarettes by 2010, up from 0.6% a year earlier.

Id.

See Barbash, supra note 102 (describing the R.J. Reynolds’s purchase of Lorillard, and sale of Lorillard’s “Blu” e-cigarette brand to Imperial Tobacco).


Matt Richtel, Some E-Cigarettes Deliver a Puff of Carcinogens, N.Y. TIMES, May 4, 2014, at A1 (“Unlike disposable e-cigarettes, which tend to mimic the look and feel of conventional smokes, tank systems tend to be larger devices heated with batteries that can vary in voltage, often resembling fountain pens or small flashlights.”); see also Block, supra note 101 (quoting an e-cigarette user who referred to the product’s appearance as “ridiculous”).

See MarkTen E-Vapor, supra note 108.


See, e.g., Daniel Cressey, Regulation Stacks Up for E-Cigarettes, 501 NATURE 473, 473 (2013) (“[A]lthough [e-cigarettes] are smoke-free, nicotine itself causes high blood pressure and palpitations, and is highly addictive.”).
cigarettes were young.


117. See Block, supra note 101.


119. Id.


121. See Richtel, supra note 116, at A1, A3 (noting the significant risks associated with liquid nicotine, especially for children, but characterizing most poisonings as accidental).

122. See Block, supra note 101 (describing e-cigarette marketing as “especially seductive for young people”).

123. See Sokol, supra note 26, at 100 (“[E]fforts to maintain a positive image of cigarettes were primarily directed at children and adolescents . . . ”).


125. See Block, supra note 101.
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not surprising that a recent study by the Centers for Disease Control (CDC) found that “[t]he percentage of U.S. middle and high school students who use... e-cigarettes[] more than doubled from 2011 to 2012.”

Significantly, twenty percent of the students in the CDC study who reported using e-cigarettes also told the researchers that they had never tried a conventional “burning” cigarette. The various flavors, as well as the marketing tactics of e-cigarette manufacturers documented in a recent report on an investigation into these tactics, spearheaded by Representative Henry Waxman and other congressional Democrats, make clear that the industry is continuing to target the young in its marketing, notwithstanding its vociferous insistence to the contrary.

The findings of the CDC study indicate that e-cigarettes may not only turn out to be a gateway to nicotine addiction, but perhaps also to the use of conventional cigarettes, as many medical and public health experts have feared. Indeed, the fact that e-cigarettes look like cigarettes or modernized versions of them may lead to a renormalization of conventional cigarettes, thus undoing what was achieved by the indoor bans throughout the nation and revelations about the industry’s deceptive marketing tactics that it maintained in order to profit from a product that it knew was deadly.

A recent study published in the British Medical Journal combines these two concerns about e-cigarettes, namely, that they will provide a gateway to other tobacco products, particularly conventional cigarettes, and that many new users will be the young. Although the article acknowledges that this area of


127. See id.

128. See STAFF OF SENATOR RICHARD J. DURBIN ET AL., GATEWAY TO ADDICTION 1 (2014) (finding, inter alia, that “[e]ight e-cigarette companies promote their products through sponsored or sampling events, many of which appear to be youth-oriented;” that “[f]our e-cigarette companies use celebrity spokespeople to market their products and depict e-cigarette smoking as glamorous;” and that “[s]even-e-cigarette companies utilize social media to promote their products’); see also Sabrina Tavernise, E-Cigarettes Are Targeted at Youths, Report Says, N.Y. TIMES, Apr. 15, 2014, at A16.

129. See Cressev, supra note 114, at 73 (quoting Professor Stanton Glantz, a researcher of tobacco product use at the University of California, San Francisco, who warned that a CDC study indicates that e-cigarettes may act as a gateway to use of traditional cigarettes).

130. See Sokol, supra note 26, at 108 (“Th[e] confluence of increased public awareness of the [tobacco] industry’s deceptive business strategies... and of the numerous indoor smoking bans across the nation, appears to have been bad for cigarette business in the United States.”); Block, supra note 101 (“[E-cigarette advertising] renormalizes something that looks about [ninety-five] percent the same as smoking...”).

research is still nascent and thus information is far from comprehensive, it was able to conclude from even the small amount of data available that “youth awareness” of e-cigarettes is “high” and that use of e-cigarettes by children and adolescents is “increasing rapidly and . . . is not limited to current smokers.”\textsuperscript{132}

Many medical and public health experts are also concerned that e-cigarettes could serve as a bridge product that will allow users of conventional cigarettes to sustain nicotine addiction, in spite of the many indoor bans that still exist.\textsuperscript{133} As Dr. Vaughan Rees of the Harvard School of Public Health told a reporter for the journal Nature, “care needs to be taken to ensure that they don’t flourish alongside conventional cigarettes.”\textsuperscript{134} Importantly, none of the largest tobacco companies have stopped selling conventional cigarettes or other conventional tobacco products such as snuff and chewing tobacco.\textsuperscript{135}

Finally, although some scientific experts, such as Dr. Rees, believe that e-cigarettes could “present an opportunity to improve public health,”\textsuperscript{136} many others highlight the great need for more information before any such conclusions can be drawn.\textsuperscript{137} Alarmingly, some small studies indicate that vaping may present dangers similar to those presented by conventional cigarettes, such as

\textsuperscript{132} Id. at i45.
\textsuperscript{133} Cressey, supra note 114, at 73.
\textsuperscript{134} Id.
\textsuperscript{136} Cressey, supra note 114, at 73.
\textsuperscript{137} See, for example, id., which points out that, given the dearth of research that has been conducted about the effects of e-cigarettes, at least outside the industry, “[t]he evidence on the long-term effects of e-cigarette use is variable” and that, furthermore, it is known that “nicotine itself causes high blood pressure and palpitations.” See also Tavernise, supra note 128, at A16 (“Public health experts are deeply divided on the pros and cons of e-cigarettes. Some say they offer the first satisfying alternative to smoking in generations . . . while others contend they could become a gateway to traditional cigarette smoking for young people.”). Regardless of the risks of nicotine alone, the full extent of its long-term effects are also in question, as the studies of nicotine are largely based on human intake of it through conventional cigarettes which contain numerous chemicals, many of which are known carcinogens and significantly contribute to cardiovascular disease. See, e.g., Neal L. Benowitz & Steven G. Gourlay, Cardiovascular Toxicity of Nicotine: Implications for Nicotine Replacement Therapy, 29 J. AM. C. CARDIOLOGY 1422, 1427–29 (1997) (describing possible implications of nicotine replacement therapy). As Benowitz and Gourlay’s article states: Establishing whether the relation between [nicotine replacement therapy] and cardiovascular events is causal is difficult. Acute cardiovascular events are common in cigarette smokers, and the increased risk for such events persists beyond the time when they stop smoking. Therefore, it is impossible to ascertain from retrospective reports whether acute cardiovascular events reflect the risk of underlying disease, cigarette smoking, concurrent cigarette smoking or nicotine medications, alone or in combination. Id. at 1427–28.
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cancer. Further, as one of the researchers who was involved in one of these studies stated, “There is a lot that we don’t know about e-cigarettes, and one concern is that some of the substances within e-cigarettes could contribute to negative health effects.”

Other than the handful of indoor bans and age restrictions in some localities, e-cigarettes are currently completely unregulated. The companies that manufacture and market them do not have to, for example, disclose their ingredients, as they now do with respect to conventional cigarettes and other products classified as “tobacco products” by the 2009 legislation giving the Food and Drug Administration (FDA) the authority to regulate tobacco products. As Representative Henry Waxman, who also led an exhaustive investigation into the industry’s tactics with respect to conventional cigarettes almost two decades ago, recently told a New York Times reporter: “We fought for decades to set strict rules for marketing of traditional cigarettes. E-cigarette manufacturers don’t have to play by the same rules. They are free to sponsor youth-oriented events and make flavors that appeal to kids, and that’s exactly what’s happening.”

Although they look like cigarettes, contain nicotine, and are thus highly addictive like cigarettes, e-cigarettes do not contain tobacco. It is for this reason, according to Joe Murillo, the president and general manager of NuMark—the Altria subsidiary that manufactures and markets MarkTen e-cigarettes—that e-cigarettes are not, and thus should not be, considered or treated by regulators as the conventional cigarettes that Altria continues to manufacture

138. See Barry Meier, E-Cigarette Study Data May Raise Concerns, N.Y. TIMES, Apr. 16, 2014, at B1 (describing a “little-noticed study” in which “nicotine-laced vapor generated by an electronic cigarette promoted the development of cancer in certain types of human cells much in the same way that tobacco smoke does”); Richtel, supra note 109, at A1 (summarizing the findings of a study to be published in the journal Nicotine and Tobacco Research which discovered “that the high-power e-cigarettes known as tank systems produce formaldehyde, a known carcinogen, along with the nicotine-laced vapor that their users inhale”).

139. Meier, supra note 138, at B1. The researchers emphasized, however, that the information currently available on e-cigarettes is limited and they are still working on the best method for studying the impact of nicotine vapor on humans. See id. (reporting that one lead researcher cautioned that “it was hard to apply the findings of test-tube studies to people”). It bears mentioning that this problem is not unlike that faced by medical and other scientific researchers outside the tobacco industry when trying to assess the impact of tobacco smoke on humans. See, e.g., Benowitz & Gourlay, supra note 137, at 1427–28 (describing the difficulty of isolating the effects of nicotine from the overall effects of smoking).

140. See Block, supra note 101.


142. Tavernise, supra note 128, at A16.

such as Marlboro. In a recent interview with a National Public Radio correspondent, Murillo emphatically stated that:

Smoking is not vaping and vaping is not smoking, and that seems obvious. [D]espite the popular name, an electronic cigarette is not a cigarette. You are not burning tobacco. There is no odor. So what I would urge everyone—including the public health and regulators, just like consumers—is to think about this for what it is not for what it’s not.

What is an e-cigarette then? Without a doubt, it is a continuation of the industry’s “disinformation plus path-dependence” strategy, designed to maintain existing addictions and form new nicotine addictions while evading any sort of governmental oversight; and so far, it has.

A few years after e-cigarettes began to proliferate in the United States, the FDA did begin the regulatory process by classifying e-cigarettes as a drug and device combination subject to the agency’s “drug and device” authority, rather than as a tobacco product subject to its “tobacco” authority. However, that attempt was derailed when an e-cigarette company successfully challenged the FDA’s assertion of regulatory authority. In 2010, a panel of the U.S. Court of Appeals for the D.C. Circuit held that because the liquid nicotine in e-cigarette juice is derived from tobacco, they are tobacco products like conventional cigarettes, chewing tobacco, and so on, rather than drugs and devices.

The FDA responded that it would not appeal the D.C. Circuit’s decision and would instead propose regulations of e-cigarettes under its tobacco product regulatory authority. However, Murillo’s statement strongly indicates that the tobacco product industry will also fight this attempt by the FDA to regulate its latest nicotine product. This is further buttressed by the industry’s concerted effort in its marketing to introduce a whole other vocabulary for e-cigarettes,

144. See Block, supra note 101.
145. Id. (emphasis added).
146. See Soterra, Inc. v. FDA, 627 F.3d 891, 894 (D.C. Cir. 2010).
147. See id. at 898 (holding that U.S. Supreme Court precedent and the “Tobacco [Control] Act establish that the FDA cannot regulate customarily marketed tobacco products under the FDCA’s drug/device provisions, that it can regulate tobacco products marketed for therapeutic purposes under those provisions, and that it can regulate customarily marketed tobacco products under the Tobacco Act.”).
148. See id.
150. See Block, supra note 101 (“what I would urge everyone—including the public health and regulators just like consumers—is to think about this for what it is not for what it’s not”).
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including not only “vapers” and “vaping” instead of “smokers” and “smoking,” but also “juice” or “e-juice” instead of liquid nicotine and other ingredients.151

As the D.C. Circuit stated in its opinion, holding that e-cigarettes were not within the FDA’s drug and device authority, the Tobacco Control Act was “written to address the regulatory gap . . . identified” by a U.S. Supreme Court case rejecting the FDA’s attempt to regulate conventional cigarettes using its drug and device authority.152 In late April 2014, the agency began the long process of attempting to fill the gap created by the introduction of e-cigarettes into the U.S. market by proposing rules that will govern e-cigarettes.153 Importantly, the proposed rules would ban the sale of e-cigarettes to minors and require that manufacturers disclose their products’ ingredients, manufacturing processes, and scientific data to the agency.154 However, unlike conventional cigarettes, the proposed rule does not regulate advertising or ban flavorings of e-cigarettes; this is problematic given the information about the industry’s aggressive marketing to youth.155

If the industry is successful in what appears to be its argument that e-cigarettes also do not fall within the FDA’s tobacco regulatory authority, the only protection against the likely harmful effects of this latest “e-manifestation” of the industry’s disinformation plus path-dependence strategy may very well be provided by tort law. This will also be the case even if the industry ultimately does not successfully challenge the proposed rules as the rulemaking process

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152. See Sottera, 627 F.3d at 897. The U.S. Supreme Court case relied on by the e-cigarette manufacturer who brought the suit against the FDA and ultimately by the D.C. Circuit is Brown v. Williamson, 529 U.S. 120, 159 (2000).

153. See Regulations on the Sale and Distribution of Tobacco Products, 79 Fed. Reg. 23, 142 (Apr. 25, 2014) (to be codified at 21 C.F.R. pt. 1100, 1140, 1143). In addition to e-cigarettes, the proposed rules would cover other “[p]roducts that meet the statutory definition of ‘tobacco products’ . . . such as certain dissolvables, gels, hookah tobacco . . . cigars, and pipe tobacco.” Id. at 23, 143.

154. See id. at 23, 148.

155. See Lawrence O. Gostin & Aliza Y. Glasner, E-Cigarettes, Vaping, and Youth, 312 J. AM. MED. ASS’N 595, 596 (2014) (applauding the FDA’s deeming of e-cigarettes as “tobacco products” within the agency’s regulatory authority, but calling on the agency to “move boldly and rapidly to prevent companies from exploiting youth . . . [b]y bolstering the proposed rules to limit advertising and prohibit flavored nicotine”); see also Richtel, supra note 101, at A17 (describing the dispute between public health experts and the top three tobacco companies regarding whether the agency should limit advertising to youth, as well as whether the companies are in fact already doing so).

In the preface to its proposed rule, the FDA expresses awareness that e-cigarettes and other “novel tobacco products” come in various flavors that are attractive to youth, but at this stage asks for comment on the matter and expresses that it needs more data before proceeding with any flavoring restrictions akin to those provided for in the Tobacco Control Act for conventional cigarettes. See Regulations on the Sale and Distribution of Tobacco Products, 79 Fed. Reg. at 23, 144.
wills invariably be a long one, particularly if the industry initiates judicial challenges to the FDA’s assertion of its tobacco product authority.\textsuperscript{156}

Thus, tort law will in all likelihood be needed to provide an essential role in consumer protection against these new, unregulated products, as it did with respect to conventional cigarettes. This may be particularly so if neuromarketing turns out to be successful and becomes a part of the disinformation plus path-dependence strategy. Tort law played a protective role in the conventional cigarette litigation through its disruption function. Thus, it is essential that the misguided tort theory dichotomy and the campaign to limit the tort system that is based on it be dispelled.

IV. THE MORAL/INSTRUMENTAL DICHOTOMY AND THE SO-CALLED TORT “CRISIS”

The relatively rapid development of a torts liability doctrine in response to harms caused by mass-marketed defective products, provided significant fuel for what was around the same time becoming a very rich scholarly debate about the purposes of tort law and, relatedly, its appropriate role within U.S. law.\textsuperscript{157} Unfortunately, however, it has also been a significant impetus for a wide-ranging, concerted, and persistent campaign by corporate interests to convince state and federal governmental officials and the general public that the tort system must be cabined.\textsuperscript{158} The scholarship has continued to grow, and this

\textsuperscript{156} See Gostin & Glasner, supra note 155, at 595. The World Health Organization recently issued a report on e-cigarettes in which it recommended, \textit{inter alia}, that countries ban the use of e-cigarettes indoors, require that manufacturers provide sufficient supporting evidence before making claims that e-cigarettes are safer alternatives to traditional cigarettes, and that marketing to youth should be restricted. \textit{See WORLD HEALTH ORGANIZATION, Electronic Nicotine Delivery Systems 1,} 11–13 (July 21, 2014), http://apps.who.int/gb/edc/PDF/cop6/FCTC_COP6_10-en.pdf?ua=1.

\textsuperscript{157} See ABRAHAM, supra note 29, at 146 (noting that the application of economic theories to law, including tort law, around the time that a separate doctrine for products liability was recognized, led to a strong focus on the deterrent effects of tort law, that is, its ability to provide incentives for greater safety measures, whereas previously it had principally been on its ability to provide compensation for injuries). As David Owen points out in the introduction to the \textit{Philosophical Foundations of Tort Law}, Oliver Wendell Holmes, Jr.’s 1881 book \textit{The Common Law} was “arguably the first ‘modern’ effort to unravel fundamental problems of the common law, including tort law, in basic philosophical terms.” David G Owen, \textit{Why Philosophy Matters to Tort Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 1,} 1 (David G. Owen ed., 1995). However, Owen says, “the bridge between tort law and philosophy remained thereafter lightly traveled for many decades”—until the 1960s and early 1970s, when scholars such as Guido Calabresi and Richard Posner began putting forth “important economic efficiency theories of tort liability.” \textit{Id.} at 1–3. (citations omitted). According to Owen, “[t]ort law scholarship of this type, which viewed the law of torts through the consequentialist lens of economic analysis, spurred a sharp response in the 1970s from those in the academy who thought that the foundations of tort law rested more firmly on moral ground.” \textit{Id.} at 2.

corporate campaign has strengthened in response to the increasing use of the tort system to address systemic corporate activities and the resulting widespread harms.  

A. The Moral/Instrumental (or Individual/Public) Dichotomy of Tort Law Functions

Many of the most prominent and influential scholars of tort law have framed their inquiry as one seeking a unifying theory of tort law, that is, they start with the question of how people can make sense of the entire tort system, or most of it, with a single, or at least primary, theory of the functions that it serves. The answers have largely been divided into two categories: (1) moral theories that focus on effecting justice in the individual case, such as providing redress for harms and a venue for holding wrongdoers accountable for harms; and (2) instrumental theories that focus on the benefits provided to the public by tort

(2002); see also Timothy D. Lytton et al., Tort as a Litigation Lottery: A Misconceived Metaphor, 52 B.C. L. REV. 267, 268–69 (2011) (describing the views of various scholars who “[i]n over forty years . . . have disparaged the tort system as a lottery” and argued that the system should be “reformed” in various ways, including “replac[ing] the tort system with some form of no-fault accident insurance”).

159. See F. Patrick Hubbard, The Nature and Impact of the “Tort Reform” Movement, 35 Hofstra L. Rev. 437, 538 (2006) (“Perhaps the most interesting issue raised by the tort reform movement is: How will we know if the movement has succeeded in ‘reforming’ tort law?”). Products liability law continued to develop rapidly. As noted in the introduction to the Restatement (Third) of Torts: Liab. for Physical & Emotional Harm at 1 (2010), section 402A of the Restatement (Second) of Torts “launched the vast body of modern products-liability law.”

160. See, e.g., Christopher J. Robinette, Why Civil Recourse Theory is Incomplete, 431 TENN. L. REV. 431, 432 (2011) (stating that, “[f]rom the days of Oliver Wendell Holmes, Jr. to the present, many scholars have pointed to a single answer” to the question of what tort law “is for,” and critiquing “[t]he latest attempt to so unify tort law”; namely, “the rich ‘civil recourse’ theory of Professors John C.P. Goldberg and Benjamin C. Zipursky”). Tort law scholarship has increasingly drawn on other disciplines—particularly economics, moral philosophy, and political theory—to explicate the purposes of tort law. For an overview of some of the most prominent theories that scholars have advanced “to identify some unifying and rationalizing themes or aims” of tort law, see Gerald J. Postema, Introduction: Search for an Explanatory Theory of Torts, in PHILOSOPHY AND THE LAW OF TORTS, supra note 53, at 1.

161. See, e.g., Jules L. Coleman, Risks and Wrongs 198, 380–81 (1992) (“At the core of tort law is a certain practice of holding people liable for the wrongful losses their conduct has occasioned,” and not instrumental theories such as economic analysis, for they do not proffer any “principled reasons for connecting injurers and victims in the way that tort law does,” which is “a way that reflects their relationship to one another, rather than to the goals of tort law.”); John C.P. Goldberg, Tort Law for Federalists (and the Rest of Us): Private Law in Disguise, 28 HARV. J.L. & PUB. POL’Y 3, 10, 15–16 (2004) (arguing for an individual-case, “wrongs-based view of tort law,” and stating that “[i]n gain a genuinely realistic sense of what tort law actually does, what it can do, and what it ought to do, we must dispense with the notion that tort law ought to be public regulatory law because that is the only thing it can be”). See generally Scott Hershovitz, What Does Tort Law Do? What Can It Do?, 47 VAL. U. L. REV. 99 (2012) (discussing various prominent “corrective justice” theories and proffering an alternative way of framing this function).
law, such as the efficient distribution of the costs of losses and deterrence of unnecessarily risky behavior.\textsuperscript{162}

Many scholars whose primary theory of tort’s function lies on one side of this conceptual divide do not necessarily dismiss that tort law does in fact sometimes serve other functions that fall on the other side of the dichotomy.\textsuperscript{163} These scholars maintain, however, that tort law’s primary rationale, and the one that accounts for most decisions, and perhaps should account for all decisions, is either moral/individual or instrumental/public.\textsuperscript{164} A few scholars take a more evenhanded pluralist position, maintaining that tort law serves multiple purposes.\textsuperscript{165} These scholars, however, still view tort law’s purposes as being amenable to discrete characterization as either moral or instrumental.\textsuperscript{166} In sum, a dichotomy between moral/individual and instrumental/public dominates in tort

\textsuperscript{162} See generally WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 14 (1987) (discussing that fault may have an economic rationale); GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 312 (1970) (summarizing that a system other than the fault system may better reduce accident costs); Gregory C. Keating, Is Tort a Remedial Institution?, 24–25 (U.S.C. Ctr. in Law, Econ., and Org. Research Paper No. C10-11, available at http://weblaw.usc.edu/assets/docs/contribute/C10_11_paper_000.pdf (arguing that to “c[all] the repair of wrongful losses the ‘overarching aim [sic] or purpose’ of tort law misunderstands the law of torts[,]” for tort law is designed to prevent the need to address wrongs by deterring wrongful conduct, and, thus, “[i]n a social world where the law of torts was fulfilled as far as reasonably possible, tortious wrongs requiring repair would presumably be rare.”) (citing COLEMAN, supra note 161, at 395).

\textsuperscript{163} See COLEMAN, supra note 161, at 198 (“At the core of tort law is a certain practice of holding people liable for the wrongful losses their conduct has occasioned.”); LANDES & POSNER, supra note 162, at 14 (“It would be consistent with these efforts to find that the tort concept of fault has an economic rationale also.”)

\textsuperscript{164} See, e.g., Michael Rustad, Torts as Public Wrongs, 38 PEPP. L. REV. 433, 435–36 (2011) (citing DAN. B. DOBBS, THE LAW OF TORTS 12 (2000)) (“The law of torts is a multi-paradigmatic field with most scholars fitting into two competing camps. The emphasis is either on ‘morality or corrective justice’ or on ‘social utility or policy.’”).

\textsuperscript{165} See, e.g., Tony Honoré, The Morality of Tort Law—Questions and Answers, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 73, 84–85 (David G. Owen ed., 1995) (“arguing that tort law serves both the purpose of corrective justice—in other words, “correcting” the harm suffered by plaintiffs as a result of tortious conduct—and the purpose of “distributive justice”—the fair distribution of injury in society); Christopher J. Robinette, Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine, 43 BRANDEIS L.J. 369, 413 (2005) (arguing that the history of tort doctrine and scholarship demonstrate that “tort law must be based on multiple rationales”—moral/individual, such as corrective justice and compensation, as well as instrumental/public, such as deterrence).

\textsuperscript{166} See, e.g., Izhak Englard, The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 183, 187 (David G. Owen ed., 1995) (“My primary argument is that positive tort law is based upon polyvalent justifications that are often mutually inconsistent . . . . [o]ne for the purposes of my endeavor, it suffices to classify the pluralistic reasoning under the two headings of instrumentalism and non-instrumentalism and non-instrumentalism . . . .”); Robinette, supra note 160, at 433 (“In each successive reform, instrumentalism made increasing inroads into tort. Civil recourse theory, in failing to acknowledge this instrumentalism, omits a substantial component of tort law.”); see also id., at 471–75 (citations omitted) (characterizing the development of modern products liability tort doctrine as driven largely by the “instrumentalist” rationales of deterrence and loss-spreading).
law theory. This dichotomy, in turn, underlies the prevailing assumption that tort law generally, or particular doctrines or decisions, are driven largely by moral or individual purposes of addressing wrongful conduct and resulting harms that have already taken place in the individual case, or by the instrumental or public purposes of distributing losses across society, or protecting the public against ongoing and future wrongful conduct and harms.

B. The So-Called Tort “Crisis” and the Call for Tort “Reform”

Because many of the business ventures that present significant risks to populations and the environment involve activities that are highly complex, scientifically and technologically, and because of the widespread and often complex nature of the harms that such activities cause, many policymakers, political commentators, and business interests have argued that the tort system is an inappropriate mechanism for making judgments about responsibility in such cases.\(^\text{167}\) Rather, they argue that tort law should be confined to its proper, long-standing function of redressing unique individual harms caused by relatively uncomplicated activities and processes. That is, although these cases may involve wrongful conduct and harm, either or both are not of the sort that should be recognized as such in the tort system as properly understood. Rather, if these sorts of activities and harm are dealt with by the legal system at all, it should be

\(^{167}\) See, e.g., Haltom & McCann, supra note 71, at 36 (2004); Michael L. Rustad, The Endless Campaign: How the Tort Reformers Successfully and Incessantly Market Their Groupthink to Rest of Us 5 (Suffolk Univ. Legal Studies Research Paper No. 10-32, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614983 (“The tort reform movement is often portrayed as a grass roots movement by ordinary Americans calling for changes in the tort system. In reality, tort reform is an astroturf movement by public relations professionals representing America’s most powerful corporations and insurance companies.”); id. at 6–7 (observing that those associated with the tort reform movement “often employ the theme of personal responsibility to marginalize plaintiffs seeking compensation for mass torts. For example, the tort reformers ‘attacked the plaintiff in a landmark tobacco product liability action by arguing that the plaintiff should have taken personal responsibility for the cancer caused by her smoking rather than blame the tobacco industry.’”) (quoting Rustad & Koenig, supra note 62, at 3–4); Daniel Fisher, Filmmaker Takes on Lawyers – With Chamber’s Help, FORBES (July 11, 2011, 10:07 AM), available at http://www.forbes.com/sites/danielfisher/2011/07/11/filmmaker-takes-on-lawyers-with-chambers-help (discussing a documentary financed by the U.S. Chamber of Commerce portraying the tort system as a venue for abuse in litigation arising out of asbestos exposure.); cf. Victor E. Schwartz, Taking a Stand Against Lawlessness in American Courts: How Trial Court Judges and Appellate Judges can Protect Their Courts from Becoming Judicial Hellholes, 27 AM. J. TRIAL ADVOC. 215, 224–25 (quoting Holmes Cnty. Bk. & Trust Co. v. Staple Cotton Cooper. Ass’n, 495 So. 2d 447, 451 (Miss. 1986)) (using Mississippi litigation involving tort claims against a pharmaceutical manufacturer as a case example to argue that appellate courts should take proactive measures to curtail what the authors argue are unfair jury verdicts against corporate defendants including, for example, reigning in noneconomic pain and suffering damages and consolidation of claims).
through the public law system of statutes and administrative rules for governmental regulation of private business activities. 168

It is in part on the basis of such an individual/public dichotomy or moral/instrumental dichotomy that corporate interests have argued that there is a tort crisis that must be addressed by limitations on tort law.169 Many of their arguments for so-called tort reform are variants of the claim that the use of tort law to address large-scale, systematic corporate activities involving complex technology that cause widespread harms—such as harms caused by dangerous products like conventional cigarettes, defective automobiles, and possibly e-cigarettes, as well as those caused by anthropogenic climate change and toxic spills—is not an appropriate function of the civil justice system.170 Rather, corporate interests have repeatedly argued that such activities and harms are properly addressed only through public regulatory law, more specifically, U.S. congressional statutes and federal administrative agency rules.171

168. Cf. Benjamin Ewing & Douglas A. Kysar, Prods and Pleas: Limited Government in an Era of Unlimited Harm, 121 YALE L.J. 350, 356 (2011) (arguing that the tort system should be used to adjudicate claims involving massive harm, such as the myriad harms caused by climate change, so the tort system has “an opportunity to fulfill a crucial institutional role too often neglected both by dominant theories of tort law’s purposes and by institutional competence analyses that compare tort law with regulation ‘proper’”). Such arguments that tort law is being improperly employed for “public law” functions are often particularly directed at cases involving complex activities and harms brought by a group of plaintiffs—such as class action members or a community—and, increasingly, by state attorneys general on behalf of the residents that they are charged with protecting. See, e.g., id. at 369–70 (“many of the reasons for skepticism that climate change tort defendants could be held liable...have been similarly applicable to other environmental and toxic tort suits. Albeit with hesitation and confusion, courts have devised a number of doctrinal devices to accommodate the difficulties of proof associated with those cases.”).

169. See HALTOM & MCCANN, supra note 71, at 34.

170. See Ewing & Kysar, supra note 168, at 369–71; HALTOM & MCCANN, supra note 71, at 36; Rustad, supra note 167, at 5–6 (citing Rustad & Koenig, supra note 62, at 4; FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS xxx (3d. ed. 2006)).

171. See Ewing & Kysar, supra note 168, at 418 (citing to Tribe et al., Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine 21 (Wash. L. Found., Working Paper No. 169, 2010), available at http://www.wlf.org/upload/legals/workingpaper/012910Tribe_WP.pdf). That does not mean, however, that the same corporate interests do not spend significant resources fighting legislative and administrative regulation. In Massachusetts v. EPA, 549 U.S. 497 (2007), for example, trade associations of the automotive industry filed amicus briefs in support of then-President George W. Bush administration’s argument that the U.S. Environmental Protection Agency (EPA) did not have authority to regulate carbon dioxide and other greenhouse gas emissions. See Massachusetts, 549 U.S. at 505, n.6 and accompanying text. The Supreme Court rejected this argument and further held that the states were correct that the EPA was required by the Clean Air Act to regulate carbon dioxide emissions as a “pollutant” harmful to human health. See id. at 534–35 (citing 42 U.S.C. §7607(d)(9)(A) (2012)). It bears mention that, in arguing that the EPA did not have authority to regulate greenhouse gas emissions, the administration relied heavily on FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), in which tobacco companies successfully challenged the FDA’s assertion of its “drug/device” authority to regulate tobacco products. See Massachusetts, 549 U.S. at 512 (citing Brown & Williamson, 529 U.S. at 159).
TORT AS A DISRUPTER OF CULTURAL MANIPULATION

The tort reform campaign has multiple fronts, including state and federal, and legislative and constitutional. A significant part of the campaign is a dual push for statutory and constitutional limits on damage awards on the one hand, and for statutory and constitutional immunity from tort claims on the other.\(^\text{172}\) To demonstrate how the tort reform campaign relies on the moral/instrumental and individual/public dichotomy in this Article, this Article focuses on the push for constitutional immunity from state tort claims, which are potentially the most troubling means of limiting the tort system. The most efficient way to limit the system is at the national level, but those seeking to do so have much less success in convincing Congress to enact legislation than they have state legislatures.\(^\text{173}\) What has been successful at the national level, however, is a federal constitutional argument that may prove to be even more effective than national legislation, namely, preemption of state tort claims.\(^\text{174}\)

\(^{172}\) See, e.g., Rustad, supra note 167, at 5 (citing Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 MD. L. REV. 1093, 1095 (1996)) (noting that tort reformers portray the tort system as plagued by unscrupulous plaintiffs’ attorneys, as well as confused and “irresponsible” juries, and thus argue that “we need to adopt various ‘tort reform’ proposals to inhibit claims (e.g., loser pays) and limit awards (e.g., eliminating joint and several liability, capping damages, etc.).”); John Gramlich, Republicans Reward Business with Lawsuit Limitations, The PEW CHARITABLE TR. (June 22, 2011), available at http://www.pewstates.org/projects/stateline/headlines/republicans-reward-business-with-lawsuit-limitations-85899375030 (last visited Oct. 8, 2014) (discussing Ohio’s passage of eight bills limiting tort suits and damages, including, for example, a $350,000 cap on pain and suffering damages in many suits, and noting that Ohio is not alone as “[a]t least 18 states have passed legislation in 2011 changing the rules of the civil justice system to favor businesses,” and that “[t]he new laws run the gamut, from changes in the way class-action suits can be filed to new rules” immunizing defendants from tort liability for certain claims).

\(^{173}\) See CONG. BUDGET OFFICE, U.S. CONG., THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES ix, tbl. 1, 3–4 (June 2004), available at http://www.cbo.gov/fpdocs/55xx/doc5549/Report.pdf (last visited Sept. 12, 2014) (providing a summary of various state statutes which evidence that, since the mid-1980s, “[t]ort reform has been a national trend”); Gramlich, supra note 172 (quoting a Tulsa businessman as stating that, although he strongly supported Ohio’s new sweeping legislation limiting tort claims and damages, he ultimately believed that, “[t]he states can deal with it, but until it’s done nationally, we’re not going to get rid of the problem”).

The gun industry, however, succeeded at the federal level in securing sweeping blanket statutory immunity from many tort claims. In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act, which immunizes gun manufacturers and sellers, and their trade associations, from liability for most civil actions based on the “criminal or unlawful misuse” of firearms. See 15 U.S.C. §§ 7901–03 (2012).

\(^\text{174}\) See THOMAS O. MCGARTY, THE PREEMPTION WAR 209–10 (2008) (noting that the preemption push is to some extent a part of the broader “tort reform” movement); Kessler & Vladec, supra note 23, at 463–64, 474–75 (quoting Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3935–36 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601)) (describing the “seismic shift in FDA policy” regarding preemption under the administration of President George W. Bush, and pointing out that the agency’s position that failure to warn claims are preempted by its approval of a label represented a complete reversal of its long-standing “view that its regulatory efforts could comfortably coexist with state-law damage claims by consumers injured by drugs”); Vladec, supra note 72, at 100–101 (“The current Bush Administration has taken unprecedented steps to persuade courts to adopt its pro-preemption position . . . [B]y working hand-in-glove with industry to change
Similar in respect to many of the other means of limiting tort law, the tobacco product industry has been a leading industry proponent of the argument for preemption of tort law.  

Indeed, the argument appears to have been crafted by tobacco industry lawyers before the early 1990s when the tobacco companies asserted before the Supreme Court in *Cipollone ex rel. v. Liggett, Inc.* that the plaintiffs’ state tort claims were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA).  

The Supreme Court had largely recognized the possibility of federal preemption only of state positive law—that is, statutes and administrative regulations—as arguments for preemption of state tort law were “a rarity.” However, a majority of the Court agreed with the companies’ preemption argument in *Cipollone*, concluding that several of the plaintiffs’ claims were expressly preempted by the FCLAA’s provision governing the preemptive effect of the Act’s requirements on state laws.  

Unsurprisingly, given that preemption is virtually a grant of federal constitutional immunity from state tort claims, product manufacturers and other corporate interests have frequently made preemption arguments in the wake of *Cipollone*, often with great

the law on preemption, the Administration has given the public legitimate reason to question whether the FDA is serving the interests of the public or the industry it regulates.”


177. *Id. at 520 (citing Federal Cigarette Labeling & Advertising Act, 15 U.S.C. §§ 1331 et seq. (2012)). In Cipollone, the Court was addressing earlier versions of the FCLAA, and it was the amendments to the preemption provision of the Act enacted in 1969 that the Court found to have preemptive effect on many of the plaintiffs’ tort claims. See id. at 520; see also Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87-88 (1969).*


179. *Cipollone*, 505 U.S. at 524–25 (citing 15 U.S.C. § 1334(b) (2012); Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8356 (July 2, 1964); 21 C.F.R. § 191.102 (1965)) (holding that the petitioner’s tort claims for failure to warn and fraudulent misrepresentation were preempted by the 1969 amendments to the FCLAA’s preemption provision).

180. *Cf. Ewing & Kysar, supra* note 168, at 401–02 (“Technically, preemption is not a barrier to merits adjudication, but rather an implied revision of the substantive law governing the merits; a preempted cause of action is one that the common law can no longer cognize.”). This Article argues a “virtual grant of constitutional immunity” because Congress could amend the statute to provide explicitly that it does not preempt state common law claims in response to U.S. Supreme Court decisions holding that state tort claims are preempted. That is highly unlikely, however, given the tendency of the U.S. Congress toward inertia, particularly when it comes to highly charged political issues, as tort law has been for at least the past three decades.

181. *See, Vladeck, supra* note 72, at 106. As Professor Vladeck points out: “Prior to *Cipollone*, preemption defenses were a rarity; post-*Cipollone*, they were routine.” *Id.* Indeed, as Vladeck further states, “*Cipollone* unleashed a torrent of preemption litigation, including . . . litigation over medical devices,” as well as other products such as automobiles and pharmaceutical drugs. *Id.; see David C. Vladeck, Deconstructing Wyeth v. Levine: The New Limits on Conflict Preemption, 59 CASE W. RES. L. REV. 883, 887–88 (2009) (citing Geier v. Am. Honda Motor Co., 529 U.S. 861, 865, 886 (2000); see also Ewing & Kysar, supra* note 168, at 401–09 (citations omitted) (arguing the tort system should be used for claims which involve massive harm).
success.\textsuperscript{182} The arguments for preemption of tort law are essentially based on the premise that when tort claims are based on harms that are widespread and caused by the activities of industries, those asserting the claims are attempting to use tort law in ways that are sufficiently similar to the ways in which statutes and regulations function, which will interfere with the function of those statutes and regulations.\textsuperscript{183} That is, tort law cannot serve a private/public hybrid function, but rather must fall either on the moral/individual side or on the instrumental/public side of the traditional tort function dichotomy.\textsuperscript{184} Based on this argument, if tort claims based on national business activities are subject to federal regulation, it may be argued that those claims are serving as something akin to a federal statute or an administrative regulation, and are thus preempted by that statute or regulation.

As noted, this misguided reasoning based on the moral/instrumental or individual/public dichotomy was the basis of the Court’s decision in \textit{Cipollone} and its progeny.\textsuperscript{185} More specifically, in \textit{Cipollone}, the Court held that several of the plaintiffs’ tort claims against cigarette manufacturers were “expressly” preempted\textsuperscript{186} by the provision of the FCLAA providing that “any State

\textsuperscript{182} See, e.g., Pliva, Inc. v. Mensing, 131 S. Ct. 2567, 2575–76, 2584 (2011) (citing U.S. DEPT HEALTH & HUMAN SERVS., ASPE ISSUE BRIEF: EXPANDING THE USE OF GENERIC DRUGS 3–4 (2010), available at http://aspe.hhs.gov/sp/reports/2010/genericdrugs/ib.pdf) (holding that manufacturers of generic drugs—which, as the dissent points out, the vast majority of patients are taking—are immune from tort claims for failure to warn because the FDA’s labeling approval process for generic drug manufacturers under amendments to the Food, Drug, and Cosmetic Act (FDCA) and the FDA’s implementing regulations preempt such claims); Wyeth v. Levine, 555 U.S. 555, 559–60, 580–81 (2009) (citing \textit{Geier}, 529 U.S. at 883) (holding that the plaintiff’s tort claim based on failure to warn of the dangers associated with the administration of a brand name drug manufactured by the defendant was not preempted by the FDCA and the FDA labeling regulations promulgated pursuant thereto); Riegel \textit{ex rel. Riegel v. Medtronic, Inc.}, 552 U.S. 312, 327–28 (2007) (citing 21 U.S.C. § 360k(a) (2012)) (holding that the plaintiffs’ claims against the defendant manufacturer for defective and negligent design and labeling of catheters and for breach of the implied warranty of merchantability were expressly preempted by the Medical Device Amendments to the FDCA); Geier, 529 U.S. at 864–65, 874 (holding that the plaintiff’s tort claim alleging defective design of an automobile without an airbag was preempted by a Department of Transportation regulation allowing car manufacturers to choose among passive restraints, with airbags being one option). \textit{But see} Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1134, 1139–40 (2011) (citing Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 434–35, 444 (2005); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (holding that most of the plaintiff farmers’ tort claims for damage to their peanut crops against a herbicide manufacturer, including those claims based on defective design, negligent design and manufacture, and breach of express warranty, were not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act).


\textsuperscript{184} See \textit{id.} (“There is certainly little regard in these remarks for tort law’s historic place in contributing to public safety or for its ‘catalyzing’ effect to increase access to risk information as discussed in \textit{Bates}.”)


\textsuperscript{186} See \textit{id.} at 515, 520 (quoting Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1340 (2012)). The U.S. Supreme Court’s preemption jurisprudence is based on the Supremacy
requirement or prohibition relating to cigarette advertising or health is preempted.”\textsuperscript{187} The provision does not mention state tort claims, and as Professor David Vladeck has pointed out, in interpreting “requirement or prohibition” as including state common law tort claims, “[t]he Court took a wrong turn in \textit{Cipollone}.”\textsuperscript{188} As Vladeck further explains:

There is not a hint in either the language of the FCLAA or its legislative history that Congress understood that the preemption provision would nullify state common law claims—\textit{even failure to warn claims that might arguably be in tension with the Act’s dictates}. To the contrary, the provision was included in the Act to ‘avoid the chaos created by a multiplicity of conflicting [state and local] regulations,’ not to deprive injured smokers of their state damages action remedies.\textsuperscript{189}

In subsequent cases in which a majority of the Court has held that tort claims are preempted, the Court has similarly made a “wrong turn” based on a misreading of congressional intent, which, in turn, is to a significant extent based on a misunderstanding of tort law. That is, when the Court finds preemption of state tort law claims, it is largely based on the misguided notion that the claim is

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\textsuperscript{187} See \textit{Cipollone}, 505 U.S. at 515 (quoting 15 U.S.C. § 1334(b) (2012)).

\textsuperscript{188} Vladeck, \textit{supra} note 72, at 110.

based on an instrumental or public duty.\textsuperscript{10} That is, the Court concludes that tort law serves the instrumental function of requiring manufacturers to design or label their products to promote human safety.\textsuperscript{11} However, such an analysis completely misses the unique disruption function of tort law, which is based on a general duty that manifests itself in a way that serves both moral and instrumental functions in a given case. This duty is by no means sufficiently akin to those imposed by statutory provisions and regulations to justify preemption of tort claims.

Of course, the reputational impact of an adverse judgment or the prospect of future verdicts in favor of injured plaintiffs may influence a product manufacturer’s decisionmaking about the nature of the product that it puts in the marketplace—whether regarding that product’s informational nature, that is, the labeling, advertising, and promotion of it, its design, or perhaps both. The manufacturer may choose, for example, to make changes in its products because of a concern that an adverse judgment or judgments, and the information that is revealed through the civil discovery process, are not worth the reputational harm that would likely result. The manufacturer may also, as Blackmun put it in his \textit{Cipollone} dissent, “decide to accept damages awards as a cost of doing business and not alter its behavior in any way.”\textsuperscript{12} Either way, as Blackmun puts it, any “effect of tort law on a manufacturer’s behavior is necessarily indirect.”\textsuperscript{13}

Thus, \textit{Cipollone} evinces a failure on the part of the Court to understand that tort law’s inherent, limited, and case-based nature merely provides a space for the litigants, and perhaps ultimately the public, to consider carefully a given product, a way of doing business, or, relatedly, an entire company or industry. Any effect of this opportunity that the disruption function of tort law provides for litigants and the public on defendants’ future behavior is, in the words of Justice Blackmun, “necessarily indirect.”\textsuperscript{14} Further, this wrongheaded tendency to gloss over the complexity of tort law and its potential to disrupt corporate manipulation of societal cognition is not confined to express preemption cases such as \textit{Cipollone}.\textsuperscript{15} Rather, the Court has continued to render decisions that

\textsuperscript{10} \textit{Cf. Cipollone}, 505 U.S. at 536–37 (Blackmun, J., dissenting) (“Tort law has an entirely separate function—compensating victims—that sets it apart from direct forms of regulation”).

\textsuperscript{11} \textit{Id.} at 536 (arguing that all that a tort judgment in favor of a plaintiff requires of the defendant is payment of monetary damages).

\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{Id.} Blackmun further notes that: “The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations.” \textit{Id.} at 536–37.

\textsuperscript{14} \textit{See id.} at 536.

ignore this third disruption function of tort law in implied preemption cases as well.\textsuperscript{196}

That is, the Court has, to a significant extent, continued down the path of the wrong turn of which Professor Vladeck warned.\textsuperscript{197} The Court has done so not only in cases involving implied preemption in the form of the obstacle or frustration of purpose,\textsuperscript{198} which involves an analysis that Justice Thomas has repeatedly condemned as a “freewheeling judicial inquiry” that is “vague and ‘potentially borderless.’”\textsuperscript{199} The Court has also veered in the wrong direction, rather incredulously, in the 2011 case of PLIVA, Inc. v. Mensing,\textsuperscript{200} a case that involved “impossibility” preemption.\textsuperscript{201} In Mensing, the Court appears to have morphed a doctrine that the Court had stressed was a “demanding defense”\textsuperscript{202} a mere two years earlier in Wyeth v. Levine, into a doctrine involving the same sort of “freewheeling judicial analysis” that Justice Thomas maintains is what the

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\textsuperscript{196} For an explanation of the categories of “express” and “implied” preemption that the Supreme Court has developed over the years in its case law based on the Supremacy Clause of the U.S. Constitution, see supra note 180.
\textsuperscript{197} See Vladeck, supra note 72, at 110.
\textsuperscript{198} See Geier, at 885–86. (2000).
\textsuperscript{199} Wyeth v. Levine, 555 U.S. 555, 587 (2009) (Thomas, J., concurring) (quoting Geier, 529 U.S. at 907–08 (Stevens, J., dissenting)).
\textsuperscript{200} 131 S. Ct. 2567 (2011).
\textsuperscript{201} See id. at 2577 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).
\textsuperscript{202} Wyeth, 555 U.S. at 573.
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Court undertakes when it evaluates a state law under “frustration of purpose” implied preemption doctrine. 203

The plaintiff-respondents in PLIVA—Gladys Mensing and Julie Demahy—sued the manufacturers of the generic drug metoclopramide, which both women were prescribed to treat their digestive disorders. 204 After taking the drug for several years, both women developed a neurological disorder called tardive dyskinesia, which causes those that suffer from it to make involuntary movements, is irreversible in many cases, and is caused by long-term use of certain drugs such as metoclopramide. 205 Both women brought tort claims against the generic drug manufacturers, which produced the metoclopramide they took, for failing to provide adequate warnings of the risk of tardive dyskinesia. 206 The manufacturers asserted preemption in defense to both plaintiffs’ claims. 207 Rather unsurprisingly, given that the Supreme Court had recently held the provisions of the Federal Food, Drug, and Cosmetic Act (FDCA) 208 and relevant FDA regulations governing the labeling of brand name

203. See supra note 134 and accompanying text. Interestingly, Justice Thomas wrote the opinion for the majority of the Court in PLIVA holding that the plaintiffs’ tort claims based on the defendant generic drug manufacturer’s failure to warn were preempted because it was “impossible” for the manufacturer to comply with the tort duty of adequate labeling and the FDA rules promulgated pursuant to 1984 amendments to the FDCA creating a “fast-track” labeling approval process for generic drugs. See PLIVA, 131 S. Ct. at 2577. In her dissent, Justice Sotomayor points out this anomaly and resulting diminishment of the exacting nature of impossibility preemption. See id. at 2591 (Sotomayor, J., dissenting) (quoting Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 716 (1985); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). However, Justice Thomas effectively ignores Sotomayor’s important point in his opinion for the majority, relegating his response to a footnote in which he simplifies her argument so much that he mischaracterizes it. See PLIVA, 131 S. Ct. at 2577, n.5.

204. See PLIVA, 131 S. Ct. at 2572, 2573. The women’s physicians prescribed the brand name drug Reglan, but both of their prescriptions were filled with metoclopramide. Id. As Justice Sotomayor points out in her dissent, most patients end up taking the generic version of brand name drugs because federal law, many state laws, and many insurance plans are designed to promote such use as generic versions are less costly than their brand name counterparts. See id. at 2583–84 & n.2 (citing U.S. DEP’T HEALTH & HUMAN SERVS., ASPE ISSUE BRIEF: EXPANDING THE USE OF GENERIC DRUGS 7 (2010), available at http://aspe.hhs.gov/sp/reports/2010/genericdrugs/ib.pdf)).

205. See PLIVA, 131 S. Ct. at 2572; see also Tardive Dyskinesia, NAT’L ASSOC. OF MENTAL ILLNESS http://www.nami.org/Content/ContentGroups/Helpline/Tardive_Dyskinesia.htm (last visited Sept. 1, 2014) (explaining that tardive dyskinesia (TD) “is primarily characterized by random movements of different muscles within the body and can occur in the tongue, lips or jaw—such as facial grimacing—or consist of purposeless movements of arms, legs, fingers and toes. In some severe cases, TD can include swaying movements of the trunk or hips or affect the muscles associated with breathing. TD can be quite embarrassing and—depending on its severity—can be disabling as well.”).

206. See PLIVA, 131 S. Ct. at 2573. More specifically, both women claimed that, “despite mounting evidence that long term metoclopramide use carries a risk of tardive dyskinesia far greater than indicated on the label,” none of the Manufacturers had changed their labels to adequately warn of that danger.” Id. (quoting Mensing v. Wyeth, Inc., 588 F.3d 603, 605 (8th Cir. 2009)).

207. See id. at 2573.

drugs did not preempt tort claims based on failure to warn,\(^{209}\) both federal appellate courts rejected the generic manufacturers’ preemption claims.\(^{210}\) A five Justice majority of the Supreme Court, however, reversed on the ground that the different labeling approval process for generic manufacturers introduced by amendments to the FDCA in 1984\(^{211}\) rendered it impossible for the generic drug manufacturers to comply with federal law and the state tort law duty to provide adequate warnings on their products.\(^{212}\)

As the Mensing majority points out, the amendments to the FDCA regarding approval of generic drug labels requires much less of generic drug manufacturers than of brand name drug manufacturers.\(^{213}\) Specifically, in order to get approval to put its drug on the market, the manufacturer must show only that its label “is the same as the labeling approved for the [brand-name] drug.”\(^{214}\) Most importantly, according to the majority, unlike the brand name manufacturer, once the drug is approved and on the market, the generic manufacturer cannot strengthen the warnings on its label unilaterally or without pre-approval from the FDA.\(^{215}\) Rather, the generic manufacturer cannot change its label unless the brand name manufacturer changes its label.\(^{216}\) And, because the Court understands tort law duties in terms of the moral/instrumental function dichotomy,\(^{217}\) the Court frames the plaintiffs’ failure to warn claims as requiring that the generic manufacturers change their labels to include stronger warnings about the risk of tardive dyskinesia, rather than what they were in fact required to do, namely, to pay the damages awards.\(^{218}\) Thus, since “[f]ederal drug regulations, as interpreted by the FDA, prevented the manufacturers from independently changing their generic drugs’ safety labels,”\(^{219}\) the majority deems the plaintiffs’ tort claims preempted on grounds of impossibility of compliance with both state and federal law.\(^{220}\) This ruling has tremendous implications for

\(^{209}\) See Wyeth, 555 U.S. at 580–81 (2008) (citing Geier v. Am. Honda Motor Co., 529 U.S. 861, 861, 883 (2000)) (holding that the plaintiff’s tort claim based on failure to warn of the dangers associated with the administration of the brand-name drug (Phenergan) manufactured by the defendant was not impliedly preempted by the FDCA and the FDA labeling regulations promulgated pursuant thereto).

\(^{210}\) See PLIVA, 131 S. Ct. at 2573.


\(^{212}\) See PLIVA, 131 S. Ct. at 2570–71.

\(^{213}\) Id. (citing 21 U.S.C. § 355(j)(2)(A)(v)(2012)).


\(^{215}\) See PLIVA, 131 S. Ct. at 2575–76 (quoting Aner v. Robbins, 519 U.S. 452, 461 (1997)).

\(^{216}\) See id.

\(^{217}\) See supra note 184 and accompanying text.

\(^{218}\) See PLIVA, 131 S. Ct. at 2577.

\(^{219}\) See id. However, as Justice Sotomayor emphasizes in her dissent, such a change by the brand-name manufacturer is still subject to the FDA’s subsequent approval. See id. at 2588–89 (quoting Wyeth v. Levine, 555 U.S. 555, 571 (2009)) (noting that a brand-name manufacturer’s “label change [i]s contingent on FDA acceptance, as the FDA retained “authority to reject labeling changes made pursuant to the CBE ["changes-being-effected"] regulation”).

\(^{220}\) See id. at 2578.
patients throughout the United States, most of whom are taking generic versions of any drugs they are prescribed. Indeed, as Justice Sotomayor points out in her dissent, the generic drug manufacturing industry is huge:

Today’s decision affects [seventy-five] percent of all prescription drugs dispensed in this country . . . Ninety percent of drugs for which a generic version is available are now filled with generics. In many cases, once generic versions of a drug enter the market, the brand-name manufacturer stops selling the brand-name drug altogether . . . . Reflecting the success of their products, many generic manufacturers, including the Manufacturers [that are defendants in this case] are huge, multinational companies. In total, generic drug manufacturers sold an estimated [sixty-six] billion [dollars] of drugs in this country in 2009.

Leaving so many patients without the protection provided by tort law is unnecessary. It is based on a misunderstanding of tort law that assumes the validity of the false moral/instrumental dichotomy, and, further, that tort claims based on widespread corporate activities and the harms that they cause generally fall on the instrumental side. For the most part, Justice Sotomayor does not disagree with this characterization of the tort duty by the majority. Rather, she principally disagrees with the majority’s conclusion that the regulatory regime does not allow the generic manufacturers to take measures to strengthen their label, and thus renders it impossible for them to comply with both federal labeling laws and the state tort law duty to warn. Justice Sotomayor is right in this respect.

However, a better way of understanding the tort duty, and thus a better preemption analysis, is the one that Justice Sotomayor suggests in a footnote and is one that echoes Justice Blackmun’s Cipollone dissent: “Respondents’ state-law claim is not that the Manufacturers were required to ask the FDA for assistance in changing the labels; the role of the FDA arises only as a result of the Manufacturers’ pre-emption defense.” As Justice Blackmun might have further stated, the drug manufacturers’ tort duties were satisfied by the payment

221. Id. at 2583–84 (citing U.S. DEP’T HEALTH & HUMAN SERVS., supra note 211, at 3–4). For graphs depicting the steady rise from 2006 to 2010 in both generic and brand name manufacturers’ share of the prescription-drug market, and, relatedly, in the market available for generic drug substitutions, see Leonard H. Glantz & George J. Annas, Impossible? Outlawing State Safety Laws for Generic Drugs, 8 NEW. ENG. J. MED. 681, 682 (2011).

222. See PLIVA, 131 S. Ct. at 2588–89.

223. See id. at 2588. Specifically, Justice Sotomayor points out that: “Just like the brand-name manufacturer in Wyeth, the Manufacturers had available to them a mechanism for attempting to comply with their state-law duty to warn. Federal law thus “accommodated” the Manufacturers’ state-law duties.” Id.

224. Id. at 2588 n.11.
of money damages. Whatever effect that duty may have had on drug manufacturers’ behavior otherwise—for example, requesting that the FDA strengthen the warning label regarding the risk of tardive dyskinesia on metoclopramide’s warning label—would necessarily have been indirect. The possibility of that effect is, in turn, simply an example of the disruption function of tort at work.

Thus, the either/or structure of constitutional preemption doctrine is quite amenable to the assumption that there is a single, or at least primary, justificatory theory of the function of tort law and that there are two primary, discrete, and virtually hermetic theories—one moral/individual and the other instrumental/public. Under such an account of tort law, when tort claims are based on industry activity that is subject to federal regulation by widespread harms, it may forcefully be argued, and indeed has been successfully argued, that tort law is improperly functioning as public regulatory law and thus is preempted thereby. In the wake of PLIVA v. Mensing, preemption resulting from taking the wrong turn down the tort law dichotomy appears now to be available in every type of preemption except so-called field preemption. That being said, PLIVA’s extension of preemption to impossibility preemption presents the risk that it will infect the entire body of the Court’s preemption jurisprudence, including that of field preemption.

Like the arguments for preemption, other calls for tort reform are to a significant extent based on the misguided moral/individual and instrumental/public dichotomy, and the assumption that tort law falls on the instrumental/public side in cases involving widespread harms. For example, claims alleging that the tort system is in crisis, out of control, and so on, often largely rely on the premise that tort is being improperly used to achieve public purposes. Also like preemption, such arguments are based on a failure to understand the civil justice system’s unique role in the legal system—one that belies the dichotomy with the hybrid individual/public disruption function and in many other ways.


227. See supra note 162 and accompanying text.
V. THE THIRD HYBRID DISRUPTION FUNCTION OF TORT LAW AND WHY IT IS MORE VITAL THAN EVER IN LIGHT OF ELECTRONIC CIGARETTES AND BEYOND

A. The Disruption Function of Tort Law

The moral/instrumental or individual/public dichotomy misses an important function of tort law that defies the dichotomy, namely, what this Article calls the disruption function. Naturally, so do the arguments based on the dichotomy, such as those made by advocating limits on the tort system and the majority of the United States Supreme Court in many of its preemption decisions involving state tort law. Particularly, in the current era of corporate activities that affect many lives and that are capable of causing widespread harms, the dichotomy and the concomitant tendency to ignore the vital disruption function are simply not tenable. Even if such a dichotomy was arguably fairly accurate at one very nascent time in the development of tort law, it is no longer acceptable to characterize the tort system as properly falling on one side or the other of the moral/individual or instrumental/public dichotomy.

Indeed, the tort system in many ways serves the individuals in the given case and the public at once, in ways which will be overlooked if one views the potential goals of the system through the lens of the dichotomy. One of the principal ways that the tort system serves a hybrid individual/public function is by providing a space relatively insulated from disinformation—a disruption of the assumptions, cognitive biases, unquestioned beliefs, and so on, created by myriad corporate communications pervading society and culture. Such a relatively undisrupted space permits the individuals involved in the case, and many times eventually the larger public as well, to look back in time to examine the present and future implications of the issues that arise as a result of the case.

That is, by focusing on an individual case or a number of similar individual cases at once or over time, the tort system has long served the disruption function by its unique ability to bring into sharp relief the devastating impacts of various actions and activities in society and to respond in a relatively direct, but limited, private law way through individual judgments in cases between private parties. As a result, the tort system allows society—as litigants, judicial

228. The moral/individual and instrumental/public dichotomy claims to be false and place tort law in a “catch-22” is distinct from the “private/public” dichotomy fundamental to the reigning conceptual framework of U.S. law. See, e.g., Goldberg, Pragmatism and Private Law, supra note 59, at 1640 (“Private law defines the rights and duties of individuals and private entities as they relate to one another. It stands in contrast to public law, which establishes the powers and responsibilities of governments, defines the rights and duties of individuals in relation to governments, and governs relations between and among nations.”).

This Article assumes that the categories of private and public law remain salient within a descriptive account of the current landscape of U.S. law, and that the cases brought by state attorneys general alleging tort claims based on harm to state residents are consistent with that account.
officials, jurors, and the public at large—to express its evolving ideas about the nature of conduct and harms that are deemed unacceptable, and get vital information about both in the process.

This opportunity for careful consideration provided by the disruption function of tort law is a key part of its ability to provide redress in the individual case, as the plaintiffs may be vindicated in their assertion that they have been wrongfully harmed.\(^\text{229}\) Additionally, the disruption function at the same time often provides the public with vital information to process and perhaps, consequently, question pervasive disinformation.\(^\text{230}\) Importantly, the tort system accomplishes both of these things without requiring society to decide immediately whether to address those harms through legislative or administrative regulatory mechanisms and, if so, how.

Thus, that the tort system has increasingly been called upon by those seeking relief from individual experiences of harms that are in fact experienced widely is simply an instance of this long-standing disruption function at work, which is perfectly natural and indeed essential in the face of increasing widespread and ongoing harms in an inextricably intertwined and complex nation and world. State common law tort claims do not, and of course cannot, address widespread harms caused by complex business activities in the same way that legislation and administrative rules can address them.\(^\text{231}\) However, to maintain that that fact justifies confining the tort system to redressing unique individual injuries on the ground that it cannot function in the way that legislation does is simply wrong.

After all, the tort system need not function in a positive law way in order to serve a much needed role in the legal system for protecting public health, safety, and the environment.\(^\text{232}\) Nor does the fact that the tort system can, and does, serve this protective role in any way diminish its ability to provide redress to

\(^{229}\) See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette, 88 Ind. L.J. 569, 570–71 (2013) ("[W]e argue that the concept of a tort fits very naturally with the idea of having a court system that is open to hearing complaints that are filed at the discretion of a putative victim of injurious wrongdoing and that seek relief as against a wrongdoer.").

\(^{230}\) See, e.g., LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 216 (2d ed. 2008) ("Perhaps the most important effect of tobacco litigation was to transform public and political perceptions about risk and responsibility in smoking, making clear what manufacturers knew, how they concealed this knowledge, and how they manipulated consumers . . . Here we have a case where tort law reframed the debate from personal to corporate responsibility"); see also Kessler & Vladeck, supra note 23, at 492 n.150 ("The information-gathering tools lawyers have in litigation are, by any measure, more extensive than the FDA’s," as the agency does not have "the most important tool trial lawyers have—the right to subpoena relevant information from any source," including the companies’ own safety assessments and other internal documentation that companies are not obligated to provide to the FDA).

\(^{231}\) See GOSTIN, supra note 19, at 196.

\(^{232}\) Cf. id. at 195 ("The levers of public health regulation are often viewed as being in the hands of legislatures and executive agencies. However, attorneys general and private citizens possess a powerful means of indirect regulation through the tort system.")
individuals for harms that they have suffered as individuals.\textsuperscript{233} In fact, it is because tort law focuses on an individual case that it is capable of complementing statutory and administrative regulatory systems. The moral/individual and instrumental/public dichotomy is thus a catch-22 for the tort system that threatens to diminish its power in the legal and political system in the increasingly important cases in which an individual or group seeks redress for a harm that is widespread and caused by technologically and scientifically complex business ventures.

Thus, contrary to the claim that tort law has been improperly morphed into regulatory law as a result of its use to address these sorts of public harms, tort law is still being tort law. Tort law is simply doing so in a world in which corporate activities are becoming increasingly expansive as marketing has become more pervasive,\textsuperscript{234} and as unprecedented technological and scientific manipulation of cognition, environment, and the products used and consumed has become possible.\textsuperscript{235} Consequently, massive public health and environmental harms have become more frequent and will only continue to become more so.\textsuperscript{236} Tort law accomplishes this through a combination of its focus on the individual case and its ability to reveal public, and previously undisclosed, information about the nature of how the harm experienced by the given individual or individuals came about.

Importantly, tort cases involve the whole civil justice system and not just the individual plaintiff or plaintiffs against the individual defendant or defendants and their respective attorneys, but also the jury and judge, all of whom use the system’s powerful discovery procedures and apply long-standing, but adaptable, general principles of social responsibility to deem conduct legally wrongful and the harms caused thereby unacceptable.\textsuperscript{237} The tort system, therefore, provides a forum for meaningful inquiry into the question whether wrongful conduct and resulting harms rise to a level deserving of legal recognition.

Thus understood, the notion that tort law primarily does or should serve a moral/individual function, instrumental/public function, or multiple functions—some moral/individual and some instrumental/public—obscure the unique and increasingly essential disruption function of tort law in the United States legal system. Due to the disruption function, tort law can bring into sharper relief significant human harms caused by corporate activities that may have previously been diminished or unrecognized as a result of lack of information and pervasive disinformation.\textsuperscript{238} Because the tort system is case-based, the individual or

\textsuperscript{233} See Goldberg & Zipursky, supra note 158, at 1919.
\textsuperscript{234} See supra note 4.
\textsuperscript{235} See supra notes 64–70 and accompanying text.
\textsuperscript{237} See Escola v. Coca Cola Bottling Co., 150 P.2d 436, 443 (Cal. 1944).
\textsuperscript{238} One might compare this ability of the tort system to John Rawls’s extremely influential theory that basic principles of justice would be unanimously agreed upon if everyone assumed a so-
individuals seeking redress for injuries have the opportunity to tell the judge, jury, and part of the legal system their story or stories, which have a special power to reveal harms or a degree of the severity of harm previously overlooked. 239 This individual, case-based nature, coupled with powerful discovery procedures, provides the clarity needed for a close and thoughtful examination of the plaintiffs’ individual experiences of injury, including insights into the role that manipulation of societal cognition may have played in the plaintiffs’ stories. Tort law thus provides society with vital tools for determining how and whether to respond to those experiences in the particular case, as well as in the future.

B. E-Cigarettes as a Potential Future Example of the Vital Role of the Disruption Function of Tort Law

Because of the tort system’s ability to serve this disruption function over time, society now knows that the tobacco industry used a strategy of disinformation plus path-dependence for decades to maintain high demand for a deadly product even in the face of mounting evidence of its devastating health and mortality consequences. 240 Similarly, before federal legislation was passed immunizing gun manufacturers and sellers from tort suits based on harms caused called “veil of ignorance” regarding their socioeconomic status. See JOHN RAWLS, A THEORY OF JUSTICE 136–37 (1971) (describing “the veil of ignorance” as a thought experiment permitting “pure” theoretical inquiry into justice by “assum[ing] that the parties . . . do not know how the various alternatives will affect their own particular case” because they are unaware of their “place in society,” of their “class position or social status,” and of what they will possess in terms of “natural assets and abilities,” such as “intelligence, strength, and the like”); id. at 140 (arguing that under these “veil” conditions, “each is forced to choose for everyone,” and thus “[t]he veil of ignorance makes possible a unanimous choice of a particular conception of justice”).

Many have questioned whether Rowl’s theory provides a useful, or even plausible, thought experiment for ascertaining the nature of “justice.” This Article’s use of Rawls’s theory, however, is at a very general level for the purpose of describing what this Article argues is an essential function of the tort system—that is, providing the space and resources for meaningful inquiry into the wrongful conduct and the harm that the plaintiffs have brought to public attention in seeking redress.

239. Cf. Anne Bloom, Zen and the Art of Tort Litigation, 44 Loy. L.A. L. REV. 11, 31 (2010) (citing DANIEL GILBERT, STUMBLING ON HAPPINESS, 165–88 (2006)) (“Although we live in a world of uncertainty, we know that our best capacity to predict the future comes from listening to those who have already been there.”).

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by third parties, the suits being brought by cities against gun industry actors had begun to unveil what could also be framed as a disinformation plus path-dependence strategy on the part of the gun industry. Finally, while our current dependence on a carbon-based economy is certainly more complex than dependence on nicotine or weapons, the fossil fuel industries have employed a similar disinformation plus path-dependence strategy.

Tort law’s disruption function of bringing wrongful conduct and resulting harms to light, as well as allowing litigants, judges, juries, and society to undertake a close examination of such conduct and resulting harms, is becoming ever more essential in an era of uncertainty and potentially unlimited harm. The disruption function is particularly vital given that legislative and administrative officials are often without the resources or political will to address such harms. Judges such as Cardozo, Traynor, and those assigned to the


It bears mention that, across industries, the tort reform campaign has become part of the disinformation prong of their strategies. See HALTOM & MCCANN, supra note 71, at 52 (noting that the tort reform campaign has “shaped common sense less by rigorous arguments and systematic measurements than by skillful rhetoric, alluring narratives, and consistent convictions,” and that “remarkable encapsulations of ideological and moral critiques of the modern tort regime persist in ‘tort tales,’ anecdotes and horror stories about civil litigation in the United States”).

244. See Ewing & Kysar, supra note 168 at 352, 378 (“Society today faces realistic threats of unlimited harm.”).

245. Constitutional law largely leaves harms caused by corporate conduct unaddressed because of the highly limiting “state action” requirement. See Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974) (citing Shelley v. Kraemer, 334 U.S. 1 (1948)) (“In 1883 this Court... affirmed the essential dichotomy set forth in the Fourteenth Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, however discriminatory or wrongful, against which the Fourteenth Amendment offers no shield.”). Cf.
tobacco and gun industry cases were faced with new types of misconduct and harms as a result of the post-industrial era of market manipulation and mass production. Similarly, society is currently faced with new types of misconduct and harms as a result of manipulation of societal cognition and rapid scientific and technological developments.246

Importantly, these developments present risks that are foreseeable at a general level, but often not foreseen in their particular manifestation.247 After all, the specific long-term effects of technological manipulations of our environment are often uncertain.248 Furthermore, in many cases—including that of e-cigarettes and their nicotine delivery product predecessors—governmental authorities neither investigate nor prepare for risks to human health and the environment in time to avert disastrous consequences.249 As Professor David Owen has powerfully stated:

Mankind now has crossed the Rubicon into a brand new world, by altering the rudiments of matter and life—smashing and tearing apart atoms, the building blocks of the universe; re-engineering the foundations of plant and animal life; remaking (through cloning, cell manipulation, synthetic biology, etc.) animals and, increasingly, humans themselves. In such a world, where humans bend nature so far and fundamentally that they may be said to be ‘playing God,’ such conduct undoubtedly will sometimes accidentally produce harmful consequences impossible to predict. Such consequences might be labeled foreseeably unforeseeable—the inevitable yet unknowable consequences of monkeying with nature in fundamental ways.250

This path-breaking technology and science applied in the commercial context by private actors certainly may yield benefits.251 This technology is also often quite remarkable as an indication of what human intelligence and ingenuity


246. See supra notes 64–70 and accompanying text.
248. Id. at 578–79.
250. See Owen, supra note 247, at 580 (citing Hannah Devlin, Chinese Researchers Clone Tiny the Mouse from Skin Cells, TIMES ONLINE (July 24, 2009, 12:00 AM), available at http://www.timesonline.co.uk/tto/science/genetics/article1967409.ece).
251. See id. at 570.
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can achieve. However, this type of path-breaking technology and science is often coupled with a massive marketing campaign that manipulates societal cognition by highlighting the perceived benefits, while failing to disclose the potential risks, and even sometimes questioning or directly countering evidence of threats.

The tort system has allowed society to examine this complex balance in a limited way, by focusing on the individual or individuals harmed and addressing their case or cases, but in the process also considering carefully, in a relatively quiet space, the legal limits on activities and resulting harm that society may want to impose. Doing so as a matter of tort law does not mean it will go beyond that—tort law may serve only to express societal outrage and provide redress in the particular individual case, or it may also serve to communicate the need for action by the non-judicial branches of state or federal government.

Because tort law comprises general principles of social responsibility and is state-based, multiple judges, litigants, and citizens serving as jurors are able to consider and perhaps disagree about whether and the extent to which these long-standing principles apply to actors, activities, and harms in society. This unique feature of tort law brings to it a dynamism that has made it a vital tool for securing redress for new sorts of harms, a necessary part of which, in this era of widespread harms, is calling the public’s attention to certain private conduct and the resulting harms. Although calling the public’s attention to certain conduct and its resulting harms is, of course, not sufficient to address public health and environmental crises; it is nevertheless essential. Tort law may lead to needed further public health and safety protections by deterring similar conduct in the future, by acting as a prod to legislators or administrative agencies to more comprehensively regulate a given industry or business activity, or some combination thereof.

However, though tort law may, and often does, provide these much needed further protections, this Article’s argument is that it need not do so in order to be legitimate, justifiable, and essential. Rather, tort law must be permitted to continue to do at least this much in order to address the complaint of the individual or individuals in a given case. To achieve this in the current era of expansive corporate activity, power, and resulting widespread harms, tort law

252. See Escola v. Coca Cola Bottling Co., 150 P.2d 436, at 443 (Cal. 1944); see also supra notes 64–70 and accompanying text.
253. See, e.g., Ewing & Kysar, supra note 168 at 375, 378 (discussing how the judiciary should explore the problem of climate change litigation within the existing tort framework).
254. See Ewing & Kysar, supra note 168, at 356 (“Entertaining the substance of boundary-pushing causes of action also gives tort an opportunity to fulfill a crucial institutional role too often neglected both by dominant theories of tort law’s purposes and by institutional competence analyses that compare tort law with regulation ‘proper.’ In entertaining and adjudicating tort disputes, courts can, do, and should interact with the other branches of government.”).
256. See id.
257. See id.
necessarily requires dispensing with the moral/individual and instrumental/public dichotomy and making room for the hybrid disruption function. If limits on tort law, such as preemption, prevent it from serving the disruption, and perhaps other individual/public hybrid functions, tort law will be rendered virtually powerless as a result of being placed in the catch-22 created by this false dichotomy.

For example, tort litigation, in significant part, led Congress to enact legislation giving the FDA authority to regulate tobacco products.\(^{258}\) However, as noted above, recently, in response to declining cigarette sales, the three largest tobacco product companies in this country introduced their own brands of e-cigarettes.\(^{259}\) Undoubtedly, these tobacco product companies will maintain that this manifestation of their disinformation plus path-dependence strategy is not currently subject to governmental regulatory authority, as they did in the case of conventional cigarettes.\(^{260}\)

Although some medical and public health experts may be right in stating that e-cigarettes are less harmful because they do not contain tobacco, it is impossible to know this until at least two very significant inquiries are explored.\(^{261}\) First, it is essential that the companies disclose all of the ingredients in the vapor being inhaled and exhaled by e-cigarettes. Secondly, independent medical and public health experts must inquire into the impact of vaping e-cigarettes on users, particularly young users. For example, do e-cigarettes provide a way to use nicotine in public places without giving up tobacco products? Do e-cigarettes normalize cigarette smoking in the eyes of young children and adolescents who might otherwise have seen such activity as marginalized as a result of the indoor bans that are now commonplace throughout the nation?\(^{262}\)

If the FDA’s authority to regulate e-cigarettes is successfully challenged, the tort system will in all likelihood provide an essential role in disrupting the industry’s ongoing manipulation of societal cognition regarding e-cigarettes by helping to answer these and other questions, as well as unearthing new questions and further vital information.

VI. CONCLUSION

Calls for limiting the tort system in response to its increased use to address harms caused by corporate activities, both of which—the harms and the activities—are often widespread, are largely based on the moral/individual and

\(^{258}\) See, e.g., Sokol, supra note 26, at 93 (“Largely as a result of documents uncovered in state tort litigation . . . it became clear that the tobacco industry had been implementing . . . a ‘disinformation plus path dependence’ strategy.”).

\(^{259}\) See supra note 99–111 and accompanying text.

\(^{260}\) See supra notes 101–154 and accompanying text.

\(^{261}\) See supra notes 135–136, 141 and accompanying text; see also supra note 101.

\(^{262}\) See supra Section II.B.
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instrumental/public dichotomy that places tort law in a catch-22. This catch-22 threatens to disempower tort law in the current era of systemic corporate activities and resulting widespread harms by confining tort law to the moral/individual side of this dichotomy. This is highly problematic because the dichotomy is sorely misguided. Tort law is not amenable to two poles, as it recognizes individual harms—whether unique or experienced broadly—as public harms, but in a single case.

The disruption function of tort law provides plaintiffs with a unique legal venue to publicly voice their claims that they have been wrongfully harmed and that the defendants should be held accountable. The tort system accomplishes this by providing not only the plaintiffs, but also the general public, with the opportunity to examine closely the activities of the defendants, the harms suffered by the plaintiffs, and the connection between the two. The public then has the opportunity to determine whether the defendants should be held responsible for those harms in that case. In the process, it provides the public both with much needed information through the powerful civil discovery system, and with the space necessary to reflect on whether the alleged wrongful conduct and resulting harms should be addressed by the tort system and perhaps also more broadly by other branches or levels of government.

Accordingly, the two sides of the dichotomy dominating tort law theory and policy need not, and should not, be understood as competing. In fact, public health and environmental tort litigation is a natural development of the traditional common law of torts in response to new risks and the harms resulting from their realization. Consequently, there is no call for uncertainty about the capacity of the tort system to play a vital role in addressing these harms. Since the Industrial Revolution, individuals are increasingly subjected to injuries caused by highly complex business activities that are often not well understood outside the industry, and cause public health and environmental disasters from which entire communities suffer at the local, national, and global levels. The nature of the harms complained of, and for which redress is sought, does not change the individual case-based nature of the tort system. However, this nature does reflect the fact that the harms that are now most pressing and devastating are experienced by many individuals, and are often caused by powerful corporate actors with significant control over the information about their activities and, relatedly, with great influence on our policy and culture. It is already clear that there is a very rich potential of tort litigation based on widespread harms, and it should be allowed to continue playing itself out. The hybrid disruption function of tort law, which reveals the tort function dichotomy as fallacious, should thus be embraced.

263. See supra notes 79–80.
264. See supra notes 64–70 and accompanying text.
265. See supra notes 12–13, 64–70 and accompanying text.