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Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action

Mark R. Killenbeck

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Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action

Mark R. Killenbeck†

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† Wylie H. Davis Professor of Law, University of Arkansas School of Law. I owe an immense debt of gratitude to my wife, Ann, with whom I have discussed these matters at length. Her study of the educational impact of a diverse learning environment on first-year law students, which she is currently completing as a Ph.D. student at the University of Michigan, will add greatly to our knowledge of many of the important questions I discuss. Indeed, these pages reflect many of the insights she has developed as she completes her dissertation.
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Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action

Mark R. Killenbeck

In this Article, Professor Killenbeck examines the constitutionality of college and university affirmative action admissions programs that seek to foster and preserve a diverse learning environment. As part of this process, he explores the major assumptions informing the higher education community’s belief in the need for, and value of, diversity. He discusses what the concept of affirmative action has come to mean in our society, tracing how a system originally conceived of as a mandate for procedural fairness has been transformed into the functional equivalent of a system of substantive entitlements. He then argues that certain types of affirmative actions are constitutionally permissible given the Supreme Court’s recognition that schools may employ affirmative measures, in particular, those that are race-conscious, when they reflect the pursuit and appropriate attainment of a compelling educational interest.

Professor Killenbeck takes issue with the Fifth Circuit’s analysis in Hopwood v. Texas but not for the usual reasons. The Article does not argue that the court’s treatment of Justice Powell’s diversity rationale in Regents of the University of California v. Bakke is flawed because, for example, it assumed inappropriately that Bakke is bad law, or because it was simply hostile to policies and procedures that merit its support. Rather, it maintains that the panel failed to understand precisely what the other members of the Court said in Bakke, and why they said it. That is, it failed to see that the departures from Justice Powell’s approach came not in the other Justices’ assessment of whether diversity is a compelling interest, but in their treatment of the second strict scrutiny inquiry, the extent to which the Davis program was narrowly tailored. Accordingly, Professor Killenbeck offers an argument for the continued validity of diversity as a compelling interest in postsecondary education, at least for the important educational purpose of fashioning a diverse student body. Recognizing, however, that theory and practice have often diverged, he stresses that decisions such as Hopwood represent understandable expressions of judicial skepticism about affirmative measures that had sacrificed sound educational practices in favor of other, constitutionally indefensible objectives. Professor Killenbeck makes a case for the soundness of Justice
Powell’s approach, tied to educational theory and practice, and postulates six fundamental values as essential elements in the development and implementation of academically and constitutionally sound programs.

INTRODUCTION

What is it that makes a university great? Traditionally, we have assumed that only institutions that pursued and espoused excellence, communities of scholars that were unstinting in their dedication to hiring, admitting, and attaining the very best, were worthy of that descriptor. Those universities exemplified “meritocratic values,” and were places where factors such as “class background, religion, and ethnicity” were irrelevant. Indeed, consistent with the basic values of a People whose Declaration of Independence proclaimed that “all men are created equal,” and whose Constitution decreed that no individual is to be denied “the equal protection of the laws,” the truly great American colleges and universities were valued precisely because they “couple[d] individual advancement with ability and effort.”

What then are we to make of the quest for diversity and of its necessary accouterment, “affirmative actions,” which seem to require a different definition of excellence? Are such initiatives consistent with the notion that education “should be based on principle, formed upon rule, [and] directed to the highest ends”? Indeed, can we square the quest for excellence with a belief that we should consider group characteristics—most often race, ethnicity, and gender—when making fundamental decisions about the nature and character of an institution, frequently in ways that appear to make group identity the only thing that really matters?

The traditional arguments for diversity in higher education assume these questions should be answered in the affirmative. Proponents believe, often fervently, that group identity matters. Indeed, they insist that these characteristics matter a great deal when truly great universities decide who shall study within them. And they at least assume, and often overtly declare, that traditional understandings of academic merit, with their emphasis on grades and scores on standardized tests, are inappropriate, if not overtly discriminatory. For these individuals, race, ethnicity, gender,

4. See, e.g., Derrick Bell, Xerces and the Affirmative Action Mystique, 57 Geo. Wash. L. Rev. 1595, 1605 (1989) (“[T]he qualifications universities insist on are precisely the credentials and skills that have been long denied to people of color.”). I discuss and criticize the manner in which many critics of traditional measures of merit make their case, and fail to pose an appropriate solution. See infra text accompanying notes 483-92.
and socioeconomic status are not simply "relevant" attributes. They are essential considerations in a decision-making process that determines who shall be admitted to this nation's elite institutions. Indeed, in an eloquent paean in support of race-conscious admissions, three University of Texas School of Law faculty members predicted that a national extension of the rule articulated in *Hopwood v. Texas*, which banned race-conscious admissions, would mean that "there will eventually be no great public universities."

In his classic discourses in *The Idea of a University*, Cardinal Newman spoke admiringly of "the invaluable habit of pushing things up to their first principles." My objective in this Article is to push the argument for diversity and affirmative action to its first principles, explaining the rationales for an educational and legal regime where true institutional diversity is an academically sound goal, and where appropriate affirmative actions are an acceptable means to the attainment of a diverse student body. That is, I will discuss the educational rationales for, and policy

5. For a sampling of the arguments, see CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES (1996), particularly Chapters 3 through 5. There, Professor Edley discusses three distinctive views of affirmative action, which he labels, respectively, The Color-Blind Vision, Opportunity and Antidiscrimination, and Remediation Plus Inclusion.

6. 78 F.3d 932 (5th Cir. 1996), reh'g denied, 84 F.3d 720 (5th Cir. 1996), and cert. denied, 116 S. Ct. 2580 (1996). I discuss *Hopwood infra* at text accompanying notes 316-59. Litigation in the *Hopwood* case continues. In particular, the University is contesting the district court order on remand that it not be allowed to use any racial preferences in admissions decisions at the law school. See *Hopwood v. Texas*, 999 F. Supp. 872, 923 (W.D. Tex. 1998), appeal docketed, No. 98-50506 (5th Cir. June 1, 1998).

7. Brief of Charles Alan Wright, Douglas Laycock, and Samuel Issacharoff as Amici Curiae at 16, Board of Educ. v. Taxman, No. 96-679 (emphasis added) [hereinafter Wright et al. Brief]. The brief was filed with the Court prior to the settlement of *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (en banc), cert. granted, 521 U.S. 1117 (1997), cert. dismissed, 118 S. Ct. 595 (1997). *Taxman* arose when a school district that faced financial problems used its affirmative action plan as a predicate for discharging a white teacher and retaining a black one. The Court of Appeals found that this action was not undertaken as a response to past discrimination, and that the school board's "non-remedial affirmative action plan cannot form the basis for deviating from the antidiscrimination mandate of Title VII." *Taxman*, 91 F.3d at 1563.


9. *Id.* at 142.

10. I limit my argument to the case for affirmative actions in university admissions for a number of reasons. One important consideration is that admissions policies lie at the heart of the current legal and political dispute, and the next affirmative action case to come before the Court may well be one of four admissions challenges currently in the legal pipeline, from Texas, Washington, Michigan, or Georgia. I discuss these cases *supra* at note 6 and *infra* at notes 146-47. A more fundamental reason is that I find troubling the notion of any affirmative action involving faculty hiring that moves beyond simple procedural fairness. I take seriously the admonition that it is the responsibility of this nation's colleges and universities "to recruit and retain the best qualified faculty within its goals and means." AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, in AAUP POLICY DOCUMENTS & REPORTS 15, 17 (1995). And I am troubled by the assumption that group identity should be an element in this process, for many of the reasons outlined by the philosopher George Sher, who discusses eloquently the
attributes of, an approach to university admissions within which institutions concerned about the educational well-being of their students fashion a decision-making regime that values the individual, rather than an abstraction about that person predicated on assumptions projected from their identity as a member of one or more favored groups. My central assumption is that education is a dynamic enterprise, predicated on the belief that the “enlargement of mind” we seek entails more than simply mastering certain subjects or acquiring various skills. A high quality university education is, rather, a process within which “students come from very different places, and with widely different notions, [with] much to generalize, much to adjust, much to eliminate, [and] inter-relations to be defined.”

Accordingly, I believe that whom one studies and socializes with matters a great deal, and that this reality expresses eloquently the academic value of a diverse learning environment. These realities serve as a fundamental expression of the academic value of a diverse learning environment.

The analysis will proceed in four stages. I begin in Part I by exploring a series of questions about the values and assumptions that inform the academic enterprise in our constitutional system. I explore both the theories behind, and social science support for, the assumption that a diverse student body is a necessary component in the quest for educational excellence. In Part II, I turn my attention to the concept of affirmative action, asking first how to define that term properly and how contrasting perceptions in the public mind influence the debates about its wisdom. I then explore the origins and evolution of affirmative action in this nation, tracking how an arguably innocuous procedural innovation was

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11. **Newman, supra** note 8, at 130. In the full passage, Newman speaks in precisely these terms:

A parallel teaching is necessary for our social being, and it is secured by a large school or college; and this effect may be fairly called in its own department an enlargement of mind. It is seeing the world on a small field with little trouble; for the pupils or students come from very different places, and with widely different notions, and there is much to generalize, much to adjust, much to eliminate, there are inter-relations to be defined, and conventional rules to be established, in the process, by which the whole assemblage is moulded together, and gains one tone and one character.
transformed into the functional equivalent of a substantive entitlement. In Part III, I discuss how the quest for diversity in our colleges and universities produced programs whose rationales and details simultaneously reflect the best and worst academic impulses. That is, I will explain why the manner in which affirmative action has been practiced has fueled the contemporary revolt against both affirmative action and diversity. I will show why affirmative measures initiated by many of this nation’s premier universities have spawned a series of judicial decisions as responses to the specific programs that produced them, and why these are almost certainly correct when assessed on their own narrow terms. I also explain how these same holdings are misguided and inappropriate when approached in the light of their fidelity to basic constitutional principles and their implications for higher education as a whole. Finally, in Part IV, I set the stage for a discussion of the principles that should guide the quest for diversity by discussing three precepts that provide necessary context for them: the need to recognize that group identity is simply one characteristic in an appropriate admissions regime; the primary role of higher education in our society as an agent of social change; and the extent to which affirmative action simultaneously involves so much and yet so little. I then provide the rationales for, and details of, six principles that should guide the development and implementation of affirmative action programs in university admissions, principles that I believe reflect both the letter and spirit of our constitutional system and our commitment to educational excellence.

The modern American quest for diversity, fueled by affirmative action, is not, of course, limited to our colleges and universities, nor are individual affirmative actions within these institutions limited to admissions. Our universities, however, have played a crucial role in shaping the contemporary legal and political dialogue, and university admissions policies represent perhaps the most pervasive and contentious form of affirmative action. Indeed, while there are those who disagree, the general perception is that determinations regarding who shall be admitted to the great universities, and, in particular, to their graduate and professional programs, are perhaps the most important academic decisions made today. There may be more than a touch of hubris in Harvard’s assumption that they are “in the business of choosing leaders for the next century.” But it is quite clear that education is the key to a better life, and that the decision to deny an applicant a seat in the charmed circle of our most selective institutions has profound ramifications for the individual in question.

14. Indeed, in their recent, path-breaking study of preferential admissions at twenty of the nation’s elite universities, William G. Bowen and Derek Bok provide extensive documentation regarding the nature and scope of the advantages incurred by receiving an education at those
Ultimately, the story of affirmative action is one of a fundamentally sound policy, torn from its intellectual roots and marred by misguided and inappropriate implementation. Ironically, higher education has had both a directive and responsive role in this transformation. Indeed, many of the negative lessons of affirmative action graphically illustrate what can occur when institutions of higher education, and the individuals who manage them, substitute symbolic progress for true educational attainment. Simply put, far too many universities have crafted affirmative action initiatives whose ugly realities belie their professed noble intentions. By doing so, they have given the opponents of diversity critical leverage in their quest to dismantle these programs. Accordingly, while I assume that achieving diversity and affirmative action, properly defined and carefully undertaken, are equal elements of the higher education policy continuum, I am equally convinced that in these matters higher education has become its own worst enemy.  

This Article is a quest for the values that should inform an academic and legal world that views diversity and affirmative action as expressions of an institutional commitment to excellence and justice rather than their antithesis. It is not, in certain senses, an Article about the law, or even the institutions. See William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions 118-54 (1998) (outlining substantial employment and earnings differences between individuals who attended elite universities and those who did not). For a carefully measured account of the strengths and weaknesses of Bowen and Bok’s work, see Michael Selmi, The Facts of Affirmative Action, 85 Va. L. Rev. 697 (1999) (book review). For a sharply negative treatment, see Stephan Thernstrom & Abigail Thernstrom, Reflections on The Shape of the River, 46 UCLA L. Rev. 1583 (1999) (book review). I discuss the results and potential significance of the study infra at text accompanying notes 118-29.  

15. As my discussion of various university faculties’ policies will make clear, I disagree with Bowen and Bok, who maintain that “[t]he risk of demonstrably foolish decisions always exists, but it is surely minimal. University faculties and administrators know that they will have to live with their mistakes, and this realization acts as a restraint on hasty, ill-conceived policies.” Bowen & Bok, supra note 14, at 286. My quarrel with the accuracy of this observation does not, however, diminish my admiration for their willingness to undertake their study and the candor with which they address many fundamental concerns. Unfortunately, as Professor Sandalow ably demonstrates in his superb review of their book, Bowen and Bok’s discussion of the benefits students realize as a result of preferential admissions does not address directly or account for the costs associated with such programs. These costs are particularly high when affirmative action policies appear to compromise academic standards. See Terrance Sandalow, Minority Preferences Reconsidered, 97 Mich. L. Rev. 1874, 1902-08 (1999). Bowen and Bok’s Response to Review by Terrance Sandalow, 97 Mich. L. Rev. 1917 (1999), is notably silent on this wider point, even as they quibble about the implications of one subset of what Sandalow discusses, the possibility that grade inflation has compromised academic standards. Compare Sandalow, supra, at 1902-08, with Bowen & Bok, supra, at 1921-22.  

16. For a fascinating treatment of many of the issues raised by the realities and implications of diversity, see Arlene W. Saxonhouse, Fear of Diversity: The Birth of Political Science in Ancient Greek Thought (1992). In this insightful study, Professor Saxonhouse explores the Greek response to “the fear of diversity—a fear that differences bring on chaos and thus demands that the world be put into an orderly pattern.” Id. at x. Saxonhouse also illustrates that “[t]he political art is to understand the need for diversity within the [polity] and not to fear it, to acknowledge that it is the
constitutional theory of affirmative action, although such matters play an important role in my ultimate task and will not be ignored. Rather, my goal is to place both the legal and policy debates about the constitutionality and wisdom of affirmative admissions measures in a starkly different context from those within which they usually transpire. Just what is it that our colleges and universities are, or perhaps more appropriately, should be about when they undertake such programs? Like many Americans, I am troubled by the implicit premise in many, if not most, affirmative admissions policies that principles deemed important in so many other contexts should be redefined or cast aside when admissions decisions are made. I am especially upset when the realities of these programs are laid bare and they are seen for what they too often are: exercises in which what I had thought were core values of higher education are cast aside.

The stakes are enormous. Much of the growth and prestige of post-World War II American higher education was a direct consequence of the ability of colleges and universities to characterize themselves as institutions open to all, where individual merit and personal determination were the criteria for success or failure. The American people continuously recognized America’s great universities as such, despite the cycles of low public esteem and disenchantment that afflicted other institutions, precisely because the American people believed these academic communities were in fact enclaves of the “best and brightest.” Higher education has traditionally been suitably modest, but certain of its virtue. As the Carnegie Foundation put it, “[t]he democracy of merit on the campus, though far from perfect, is finer than that of the street.”

Affirmative measures that appear to grant an absolute preference based on group membership jeopardize higher education’s claim to a primary and trusted role as the natural leader in the identification and solution of society’s most pressing problems. If they are properly explained and properly undertaken, affirmative measures promoting academic diversity...
are within the best traditions of this nation.\textsuperscript{20} Too often, however, such programs exhibit precisely the sorts of characteristics that warrant the descriptor of “reverse discrimination [that] violates fundamental norms of justice and fair play.”\textsuperscript{21} The line between such programs and those that are simply “an attempt to enlarge opportunity for everybody” is a fine one.\textsuperscript{22} It is, nevertheless, one the academy is especially suited to discover and adhere to, and it is toward that end that I direct this Article.

\section*{I}
\textbf{HIGHER EDUCATION AND EQUALITY: ADVERSARIES OR ALLIES?}

\textit{It was tragic, all right, but George and Hazel couldn’t think about it very hard. Hazel had a perfectly average intelligence, which meant she couldn’t think about anything except in short bursts. And George, while his intelligence was way above normal, had a little mental handicap radio in his ear. He was required by law to wear it at all times. It was tuned to a government transmitter. Every twenty seconds or so, the transmitter would send out some sharp noise to keep people like George from taking unfair advantage of their brains.}\textsuperscript{23}

What is it about the story of George, Hazel, and their son Harrison that is so intriguing? There is, I suspect, something simultaneously unsettling and fascinating about the notion that ours might become a society within which it is necessary to take precautions against the “unfair” use of one’s intellect. That is the world within which the Bergerons live and, in Harrison’s case, die. It is a world that reverses traditional assumptions about what it means to be free and equal, and imposes limitations on the gifted lest they put us all to shame. It is, in certain very pertinent respects, a

\begin{itemize}
  \item \textsuperscript{20} In an early, and insightful, commentary, Professor Robert M. O’Neil observed that “the admissions policies of an educational institution largely determine its mission and character—more than its structure or governance, the personality of its president, or even the interests and talents of its faculty.” Robert M. O’Neil, \textit{Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education}, 80 \textit{Yale LJ.} 699, 699 (1971).
  \item \textsuperscript{22} Roger Wilkins, \textit{Racism Has Its Privileges}, 260 Nation 409, 409 (1995).
  \item \textsuperscript{23} Kurt Vonnegut, Jr., \textit{Harrison Bergeron, in Welcome to the Monkey House} (1961), reprinted in 44 Ark. L. Rev. 927, 927 (1991). This short story is in my estimation one of the most prescient and compelling treatments of issues posed by affirmative action. In it, Vonnegut depicts the tragic consequences for one family of a system of absolute equality “before God and the law . . . [and] every which way” that is enforced through the imposition of artificial constraints on physical and intellectual skills and “through the unceasing vigilance of agents of the United States Handicapper General.” \textit{Id.} George Bergeron, for example, whose “intelligence was way above normal, had a little mental handicap radio in his ear.” He and his wife Hazel survive by accepting their restraints, both real and artificial. Their son Harrison does not survive. Rather, he dies, killed precisely because he casts off his own artificial handicaps and asks society to “watch me become what I \textit{can} become.” \textit{Id.} at 931.
world where affirmative action has reached its apogee, and each of our lives is diminished rather than enhanced.

Many will be inclined to dismiss Vonnegut's vision, assuming it is simply un-American to believe that talent and ambition should be penalized. Indeed, proponents of affirmative action will likely be outraged at the suggestion that these initiatives in any way penalize anyone, even as they craft systems within which preferences at least appear to do just that. There is, nevertheless, much to be said for Vonnegut's story, which captures simultaneously many of the promises and contradictions implicit in any system within which we assume, to paraphrase Justice Blackmun, that in order to get beyond the problems caused by active consideration of group membership, we must first take group membership into account.24

I believe it both necessary and appropriate, accordingly, to begin my quest for the principles that might best inform a system of affirmative actions with three initial questions. What is it about higher education in particular that makes affirmative action so contentious? Why is it that educators value diversity? And what, if anything, can be offered in support of their belief that a diverse learning environment in fact represents both the best of our educational traditions and a positive factor in the lives of the individuals who are admitted to this nation's colleges and universities?

A. Jeffersonian Ideals, Judicial Realities

Higher education has always been a central element of the American experience. Since the very first days of the nation, the American people have stressed the value of education and, in particular, have believed that our colleges and universities exemplify the ideals of a nation where equality and opportunity are the treasured rights of a free people. Jefferson, for example, envisioned an educational system that would create "a natural aristocracy among men" predicated on "virtue and talents," rather than an "artificial aristocracy, founded on wealth and birth, without either virtue or talents."25 Even the Jacksonian ideal of "raising the level of the average student," often characterized as articulating "contradictory commands,"26 nevertheless had at its core an assumption that privilege was the enemy, a view entirely consistent with the Jeffersonian ideal.27 Countless individuals

24. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.) ("In order to get beyond racism, we must first take account of race.").
26. GENERAL EDUCATION IN A FREE SOCIETY: REPORT OF THE HARVARD COMMITTEE 27 (1945) [hereinafter HARVARD COMMITTEE REPORT].
27. See generally FREDERICK RUDOLPH, THE AMERICAN COLLEGE & UNIVERSITY: A HISTORY 202 (University of Georgia Press 1990) (1962) ("If it was nothing else, Jacksonian democracy was a war on privilege, on artificial or accidental advantage."). As the HARVARD COMMITTEE REPORT, supra note 26, stressed, "[e]ven Jefferson's competitive, selective ideal of democratic education rests on the
have praised this vision, speaking eloquently of an educational system that would "insure equal liberty and equal opportunity to differing individuals and groups." There is little wonder, then, that the American Association of University Professors' seminal General Declaration of Principles would speak of this nation's universities as the "great and indispensable organ[s] of the higher life of a civilized community." And it is hardly surprising that in some quarters university faculty are viewed as the "high priests" of academic rites that are a key element of the American dream.

The actual situation has always been exceedingly more complex. Critics of American higher education have generally understood that its public image masked a welter of contradictory realities, and that the interests our colleges and universities actually pursued were often at odds with their avowed intentions. The author of the Declaration of Independence, for example, seemed to have meant, quite literally, that "all men are created equal." And his Notes on the State of Virginia proposed "diffus[ing] knowledge more generally through the mass of the people" by selecting the best boys for advanced instruction at public expense. Indeed, in his later years, Jefferson spoke disparagingly of any public role for women in his democracy, declaring "[w]omen, who, to prevent deprivation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men." The "natural aristocracy among men," at least at Jefferson's University of Virginia, was precisely

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30. Id. at 866.

31. See, e.g., Martin Anderson, Impostors in the Temple 9-10 (1992) ("Our universities and colleges are the home of the high priests of the American intellectual world, the men and women we look up to and listen to and sometimes follow."); Henry Rosovsky, The University: An Owner's Manual 164 (1990) ("There are three professions which are entitled to wear the gown: the judge, the priest, and the scholar."); (quoting E.K. Kantorowicz).


34. Id. at 146-47. The proposal spoke in terms of the ability of parents to "send their children three years gratis" and of "teaching all children of the state reading, writing and common arithmetic," id., a formulation that arguably included young women within its ambit. It is quite clear, however, that only "boys" were to be favored with advanced education at public expense, in a process that would identify "the best geniusses [sic] [who] will be raked from the rubbish annually." Id.

that: a conclave of leaders, shaped by their educational attainments, to which women were denied access until 1970.\textsuperscript{36}

African Americans, in turn, were even less welcome in the inner circles of a nation that practiced a form of educational apartheid well into the twentieth century. Many of Jefferson’s contemporaries believed he was too charitable when he observed that “in memory they are equal to whites; in reason much inferior,” and that “never yet could I find that a black had uttered a thought above the level of plain narration.”\textsuperscript{37} These individuals and their descendants fashioned a nation where slavery could be eliminated only through Civil War and the quest for equality would require massive and systematic intervention by Court and Congress. Indeed, the image of Governor Wallace standing in the schoolhouse door would be etched indelibly on the national consciousness as an exemplar of an educational regime within which African Americans were, at best, second-class citizens.\textsuperscript{38}

More fundamentally, the totemic symbol of educational excellence, “merit,” often assumed interesting dimensions in the university admissions process. As the President’s Commission on Higher Education observed in 1947, “[t]he old, comfortable idea that ‘any boy,’” much less, any woman or member of a minority group, “can get a college education who has it in him’ simply is not true.”\textsuperscript{39} Privilege, it seems, remained an essential attribute in an educational system within which a series of seemingly impene-trable barriers denied countless individuals access to the perspectives and skills they needed and deserved.\textsuperscript{40} Even when colleges became more numerous, and a college education more affordable, the persistence of old assumptions about each individual’s proper place in society would dominate an admissions regime that did little “to widen the horizons of ordinary students [so] that they and, still more, their children will encounter fewer of the obstacles that cramp achievement.”\textsuperscript{41}

These realities helped shape an interesting contemporary contradiction. Preferential treatment of the sons and daughters of rich alumni was seen as an appropriate institutional imperative, especially at private

\textsuperscript{36} For a discussion of the events that finally led to the admission of women, see United States v. Virginia, 518 U.S. 515, 536-38 (1996).
\textsuperscript{37} Jefferson, supra note 34, at 139, 140. Like most southern institutions, the University of Virginia opened its doors to African Americans only when the courts compelled it to do so, see Virginia Dabney, Mr. Jefferson’s University 379-80 (1981), albeit twenty years before it allowed women into the academic fold and just barely ahead of the force of the law. See Kirstein v. Rector and Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970).
\textsuperscript{38} For a discussion of the Alabama events in particular, see E. Culpepper Clark, The Schoolhouse Door: Segregation’s Last Stand at the University of Alabama (1993). For a masterful treatment of the coordinated litigation strategy that spelled the demise of “separate but equal” in the entire educational system, see Richard Kluger, Simple Justice (1976).
\textsuperscript{39} President’s Commission, supra note 28, at 977.
\textsuperscript{40} For a discussion of the various obstacles and their implications, see id. at 977-83.
\textsuperscript{41} Harvard Committee Report, supra note 26, at 11.
Affirmative actions on behalf of women, African Americans, or other minorities were, however, dismissed as risky exercises in social engineering. In *Hopwood*[^42] for example, the Fifth Circuit speaks with approval of an admissions regime where

[a] university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background.[^43]

Critics of *Hopwood* savaged the panel for suggesting that there was somehow a moral or legal equivalence between "affirmative action for the privileged" and preferences granted to "the race that was enslaved for 200 years and abused for another 100 and more."[^44] In their estimation, "[t]he plea for fairness based on 'merit' as measured by test scores appears to be confined to race—a plea that in our society should be regarded with some skepticism."[^45] Of course, the opponents of affirmative action saw things differently. For them, *Hopwood* "end[ed] the diversity charade,"[^46] laying the foundations for the demise of "hated racial quotas [that] were foisted on an unsuspecting country by unconstitutional and extralegal means."[^47]

These differences in perspective are understandable, especially when the decision-making criterion at issue is race, a characteristic that most of us believe simply should not matter when important individual decisions are made.[^48] The rhetorical touchstones are simultaneously familiar, yet controversial. There is, for example, the first Justice Harlan's eloquent

[^42]: Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
[^43]: *Id.* at 946. While it is clear that "connections" matter in university admissions, it is difficult to tell precisely how much. *Compare* Angela Browne-Miller, *Shameful Admissions: The Losing Battle to Serve Everyone in Our Universities* (1996) (exposing "behind the scenes" admissions abuses at elite institutions), with Rosovsky, *supra* note 31, at 59-74, 71 (describing the admissions process at "highly selective" institutions and maintaining that "the system is not corrupt: pull, personal influence, bribery ... are inconsequential factors").
[^48]: There are exceptions, with some scholars maintaining that there are important distinctions between and among the races. See, e.g., Richard J. Herrnstein & Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (1994).
dissent in *Plessy v. Ferguson*, where he declared that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," an argument against the Court's shameful embrace of "separate but equal" that has now become a mantra for those seeking the end of affirmative action. There is Dr. Martin Luther King, Jr., whose vision of "a nation where [people] will not be judged by the color of their skin but by content of their character" is embraced by both sides in the affirmative action debate. And there are the words of Professor Alexander Bickel, who captured what appeared to be the central tenet of centuries of invidious discrimination when he declared that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitution, inherently wrong, and destructive of democratic society."

The common denominator in these statements is the belief that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious," and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Unfortunately, matters are not quite as simple as they seem. As Justice O'Connor stressed in *Adarand Constructors, Inc. v. Pena*, suspect does not necessarily mean unconstitutional. Thus, while every affirmative action policy and program

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49. 163 U.S. 537 (1896).
50. Id. at 559 (Harlan, J., dissenting).
53. Compare Edley, supra note 5, at 85 ("The true meaning of Martin Luther King's message is that we must overcome the hope-crushing, dream-stealing power of prejudice.").
55. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).
58. See id. at 237 ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).
is measured "strictly" against the promise of individual equality before the law, the Court has recognized repeatedly that the equality guarantee is conditional, a personal right of the highest order that an entity may nevertheless modify or set aside when pursuing a sufficiently important goal. That was, tellingly, the lesson of the Japanese Exclusion Cases, the decisions that first labeled racial classifications "odious," and has been a consistent theme in the Court's jurisprudence ever since. Indeed, even Justice Scalia, who rails against "the concept of racial entitlement," concedes that there might be occasions where race can properly be taken into account. The proverbial bottom line is that there are circumstances in which affirmative measures granting some sort of preference on the basis of race will be deemed appropriate and constitutional, provided they pursue in an appropriate manner public interests and social policies of the highest order, generally by offering remedies or compensation for past, legally enforced discrimination.

The balance is a delicate one, and there is no simple, mechanical way to determine which social policies justify granting preferences based on group membership. Consider, for example, the Court's landmark decision in Regents of the University of California v. Bakke. In many respects, the core of the decision is its continued skepticism about the use of group identity—in this instance, race—as an appropriate criterion in the admissions decision. Even Justice Powell, whose opinion came to be viewed as the judgment of the Court, expressed considerable reservations about the use of such criteria, stressing that "[r]acial and ethnic distinctions of any

59. Hirabayashi, 320 U.S. at 100. Of course, perspective is everything. Compare Korematsu, 323 U.S. at 223 (stressing "the real military dangers" and alleging that "Korematsu was not excluded from the Military Area because of hostility to him or his race"), with Wartime Relocation, Pub. L. No. 100-383, § 2(a), 102 Stat. 903, 903-04 (1988) (codified at 50 U.S.C. § 1989(a) (1994)) ("[T]hese actions were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership . . . ").

60. Adarand, 515 U.S. at 239 (Scalia, J., concurring) (arguing that "[i]n the eyes of government, we are just one race here. It is American.").

61. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (observing that "only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception" to the color-blind principle); see also Adarand, 515 U.S. at 239 (Scalia, J., concurring) (concluding that "[i]t is unlikely, if not impossible, that the challenged program would survive"). Thus Justice Scalia's statement in Adarand falls short, albeit not by very much, of an absolute condemnation of racial preferences under all circumstances.

62. See, e.g., Adarand, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."); Fullilove v. Klutznick, 448 U.S. 448 (1980) (sustaining a congressionally authorized 10% set-aside for minority-owned businesses); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.) ("In order to get beyond racism, we must first take account of race.").

sort are inherently suspect and thus call for the most exacting judicial examination."

There are two principal reasons for this. The first reflects a simple reality: In general, group identity has little, if anything, to do with actual qualifications. Even Justice Brennan, whose willingness to tolerate the approach taken by the University of California, Davis Medical Center would divide the Bakke Court in unfortunate ways, stressed in his opinion that "[t]he assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated." The second reason is instrumental. Invoking group identity as a decision-making, or even decision-influencing, criterion carries definite risks, since use of a group-based preference will tend to perpetuate the stereotype that certain ethnic groups are incapable of achieving success without special race-based programs.

At the same time, preferential treatment, or simply taking group identity into account in some arguably non-preferential way, might well serve a variety of very important educational and social interests. Some of these considerations are properly denominated as compensatory or remedial, and are realized through court orders entered against individuals or entities that have engaged in deliberate, invidious discrimination. Thus, as even the Hopwood panel conceded, the Court has approved measures that "remedy[] past wrongs" in a race-conscious manner. Indeed, support for such programs is sufficiently pronounced that the Court has both approved formulaic remedies that can only be properly described as quotas, and has barred the use of arguably innocent academic mainstays when there is even a colorable risk that their use will perpetuate prior discrimination.

64. Id. at 291.
65. Id. at 355 (Brennan, J., concurring in part and dissenting in part).
66. See id. at 298. I discuss Bakke in greater detail infra Part III.A, and indicate why I am skeptical about the Hopwood panel's attempt to treat as a brutum fulmen Justice Powell's discussion of the importance of diversity in his "lonely opinion in Bakke." Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996).
67. The classic example of arguably "non-preferential" use of a group characteristic, such as race, is of course the notion expressed by Justice Powell in Bakke that race could be simply "taken into account" as one factor in a comprehensive evaluation of the entire person. Critics of Bakke rail against the notion that matters can ever be quite that simple. For them, the minute race enters the equation it becomes a positive, indeed, determinative factor. Much of this is a matter of perspective. As I will stress in Part IV.A, however, it matters a great deal how we view the various diversity characteristics invoked during these discussions.
68. Hopwood, 78 F.3d at 944-45.
70. See United States v. Fordice, 505 U.S. 717 (1992) (barring public universities in Mississippi from, among other things, requiring a certain minimum composite score on a standardized test in light
The Court has also intimated that other needs and interests may well suffice, even in the absence of a finding of overt, illegal discrimination. In *United Steelworkers of America v. Weber*, 71 for example, the Court sustained a voluntary affirmative action measure, even though the entity adopting it had not itself engaged in, or been found guilty of, discriminatory hiring practices. 72 Stressing that simply ending overt discrimination would not be enough, the Court declared that it “would be ironic indeed” to read Title VII as a “legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.” 73 And, while the *Hopwood* panel disputed the significance of the observations, 74 various members of the Court have spoken of affirmative measures with approval, especially when these reflect the nature of the educational process. The most notable instance came in *Bakke*, 75 where Justice Powell stressed that “the attainment of a diverse student body . . . clearly [was] a constitutionally permissible goal for an institution of higher education.” 76 Similar sentiments are evident in *Wygant v. Jackson Board Of Education*, 77 where Justice O’Connor spoke with approval of the “goal of promoting racial diversity among the faculty,” 78 and observed that, “although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the context of higher education, to support the use of racial considerations in furthering that interest.” 79 There is little wonder then that in *Adarand*, its most recent foray into the affirmative action thicket, the Court emphasized, without saying precisely what it meant, that “[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.” 80

of the policy’s origins in an era of de jure discrimination). I discuss the significance of a rule that discounts the considered professional judgments of educators infra at text accompanying notes 173-74. 71. 443 U.S. 193 (1979). 72. The Court stressed that the plan was “designed to eliminate conspicuous racial imbalances” that were the “vestiges” of discrimination. Id. at 198, 204. 73. Id. at 204. A similar willingness to tolerate race-conscious measures, assuming the rigors of strict scrutiny are met, is evident in numerous other cases. See, e.g., Adarand Constructors, Inc, v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). 74. See *Hopwood*, 78 F.3d at 944-46. 75. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). 76. Id. at 311-12. 77. 476 U.S. 267, (1986). 78. Id. at 288 n.* (O’Connor, J., concurring). 79. Id. at 286. I am not convinced by the *Hopwood* panel’s dismissive treatment of this statement, for reasons I explain infra at text accompanying notes 375-83. 80. *Adarand*, 515 U.S. at 237. Since the lower courts had assessed the particular program at issue in *Adarand* under the less exacting “intermediate” standard of review articulated in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court remanded the case for further consideration. While the district court found that “Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a ‘compelling governmental interest,’” it concluded that the program statutes
B. Diversity and Excellence: The Theories

Proponents of diversity, of course, see the attainment of a faculty and student body that "looks like America" as a goal that fits squarely within this constitutional framework. Such programs, they believe, are in no way discriminatory. Rather, they are attempts "to open . . . doors to promising minority students who lacked educational and social opportunities," and commendable "efforts to address racial inequalities." This is especially the case in higher education, where diversity is not simply a positive educational value, but is, rather, viewed as an essential attribute of any educational institution worthy of the name, much less those that aspire to be truly "great." These claims tend, admittedly, to proceed down their own, very distinctive analytic track. Those in favor of affirmative action tend to speak largely in terms of "equal opportunity," while those opposed focus on what they assume to be a much different principle, "equal treatment." Taken at face value, these positions seem contradictory and intractable, and there is no truly meaningful debate, for the arguments advanced by one side tend to be unresponsive to those broached by the other. However, the problem here is not that the positions are inevitably irreconcilable. It is, rather, that the terms used to frame the dialogue pose a false choice.

That situation derives from the flawed initial assumption that the admissions processes about which we are speaking are simply exercises in numbers. More specifically, it assumes that "merit" is, for these purposes, objective and quantifiable. That, I believe, is simply wrong. Rather, merit in this context is a complex mixture of judgments, some objective and some subjective, that are themselves influenced greatly by the circumstances within which individual decisions are made. For example, there are certainly institutions that admit strictly by the numbers. For these colleges and universities, considerations other than grades and standardized test scores are simply irrelevant. And the diversity they attain as part of their admissions process is, in a very real sense, happenstance, rather than deliberate. The law school at which I currently teach is one such institution, at least for the purposes of the vast majority of the admissions decisions made. In an attempt to fashion an entering class of approximately 135 students, the admissions committee employs a simple mathematical formula to determine the fate of all but 20 individuals. The school admits students

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and regulations "[did] not provide a reasonable assurance that the application of racial criteria will be limited to accomplishing the remedial objectives of Congress," and failed the narrow tailoring requirement. *Adarand*, 965 F. Supp. at 1577, 1581.


with a "prediction index" over the target number in a given year.\footnote{See Admissions Policies, School of Law, University of Arkansas, Fayetteville, Arkansas, § A(3) (n.d.) (Current Policy, copy on file with author) [hereinafter Current Policy].} There are no personal essays or letters of reference. No consideration is given to the individual's undergraduate major, strength of institution attended, difficulties overcome or even, for that matter, who their parents (rich or poor, politically influential or not) might be. It is only at a second stage, when twenty individuals are selected for "special consideration" on the basis of factors other than their index score, that any conscious attempt to fashion a diverse first-year class is made.\footnote{Id. § A(5), 1. That information includes the extent to which an "applicant might contribute to... diversity within the School of Law." Id. ¶ 2. Previously, individual consideration was automatically given to any Arkansas resident "who is Black, Spanish surnamed, Oriental, American Indian, or a member of another ethnic minority recognized by the Department of Education." Admission Policies for the School of Law, University of Arkansas, Fayetteville § A(3) (n.d.) (Prior Policy, copy on file with author). The policy provided that such individuals "shall be... admitted if the [Admissions] Committee, in its discretion, believes that there is a reasonable likelihood that the applicant will succeed in law school." Id. (emphasis added). That two-track system was illegal, and has been changed. In that sense, this law school differs from that at the University of Texas only in the sense that Texas was found out, and Arkansas was not.}

In a system of that sort, equal treatment is equal opportunity. For those institutions that take diversity seriously, however, something more is afoot.\footnote{That is, a baseline determination is made that the individuals are "qualified," in the sense that faculty have established a set of criteria establishing that each individual who is accepted at least appears to possess the basic skills required to do the academic work that will be expected of them. Policies of the sort that Arkansas employs present, however, an interesting contradiction. If the assumption is that the "prediction index" provides the measure of what it means to be "qualified," then those granted special consideration fall below that threshold. Clearly, the prediction index cannot then be viewed as such a measure. That is perhaps why the current policy stresses that "[n]o applicants shall be admitted under [the special consideration] section unless the Admissions Committee determines that the applicant has a reasonable likelihood of graduating from law school." Current Policy, supra note 83, § A(5), ¶ 1.} Decisions as to who shall gain admission are largely contextual. Once an applicant passes a particular objective threshold,\footnote{The policy provides that any individual who does not gain automatic admission "shall be given notice that their application will be given further consideration by the Admissions Committee if they request further consideration and provide, in a timely manner, information relevant to the considerations set forth in this section." Id. § A(5), ¶ 1. That information includes the extent to which an "applicant might contribute to... diversity within the School of Law." Id. ¶ 2. Previously, individual consideration was automatically given to any Arkansas resident "who is Black, Spanish surnamed, Oriental, American Indian, or a member of another ethnic minority recognized by the Department of Education." Admission Policies for the School of Law, University of Arkansas, Fayetteville § A(3) (n.d.) (Prior Policy, copy on file with author). The policy provided that such individuals "shall be... admitted if the [Admissions] Committee, in its discretion, believes that there is a reasonable likelihood that the applicant will succeed in law school." Id. (emphasis added). That two-track system was illegal, and has been changed. In that sense, this law school differs from that at the University of Texas only in the sense that Texas was found out, and Arkansas was not.} the differences between a positive and negative decision become the product of intensive, individual consideration of the applicants in the light of their own distinctive background and characteristics, and the background and characteristics of both the other applicants and the institution itself. In this sort of a system, individual applicants must be treated fairly, but they cannot possibly be treated the same, for it is virtually impossible for them to be the "same"
in the sense that the traditional, rigorous understanding of "equal treatment" contemplates. Merit, properly understood, begins with the sort of raw academic qualifications expressed in grades and test scores, but hardly ends there.

It is within this understanding of the wider implications of what it means to be "qualified" for admission that major figures in the higher education hierarchy speak of the value and importance of diversity as part of a process of "general education." Indeed, many of the attributes these individuals associate with a "diverse" learning environment are captured in their definitions of what it is a university seeks to impart: "General education means the whole development of an individual, apart from his occupational training. It includes the civilized of his life purposes, the refining of his emotional reactions, and the maturing of his understanding about the nature of things according to the best knowledge of our time." It is for this reason that educators stress that

a college or university is responsible first and foremost to the applicants it chooses to admit, and it must attempt to create the best possible educational environment for them. One major consideration in the creation of that environment is the composition of an entering class—and entire student body. Admissions decisions are not isolated, atomistic events. They focus on individuals, but each decision is made in the context of others, where the pattern of the whole is also taken into account. This pattern contributes significantly to student diversity—and diversity...is strongly linked to the quality of learning.

The strength of these beliefs is reflected in the many recent statements made by educators defending diversity and affirmative action in the face of assaults made in the courts of law and public opinion. For example, in April 1997 a statement issued by sixty-two of North America’s most prestigious universities declared in no uncertain terms that, "as educators...we believe that our students benefit significantly from education that takes place within a diverse setting." Emphasizing that "[a] very substantial portion of our curriculum is enhanced by the discourse made possible by the heterogeneous backgrounds of our students," and fearing that recent political and legal developments spelled the end of affirmative action, these institutions asserted that "[i]f our institutional capacity to bring together a genuinely diverse group of students is removed—or severely reduced—then the quality and texture of the education we provide..."
will be significantly diminished." More recently, a vice chancellor from the University of California, Los Angeles, noted, in response to data documenting declining minority enrollments, that "[i]f this trend continues over the next five or six years, the diversity on this campus will be seriously compromised and, with it, our greatness." And the President and Provost of the University of Michigan, in a joint statement crafted in response to a lawsuit challenging undergraduate and law school admission policies at that institution, argued that any "challenge to 'affirmative action' in higher education is a challenge to our philosophy of education and to the historical purposes of our great public universities."

These individuals, and the institutions they represent, treat the use of group identity in admissions as a simple extension of principles that have defined American higher education since its inception. That is, they consider group status to be one appropriate element of the package that makes one qualified to enter the community of scholars. The process and dynamics are arguably simple, but essential if one is to fashion what educators believe to be an appropriate entering class:

A diverse educational environment challenges [students] to explore ideas and arguments at a deeper level—to see issues from various sides, to rethink their own premises, to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with other views. Such an environment also creates opportunities for people from different backgrounds, with different life experiences, to come to know one another as more than passing acquaintances, and to develop forms of tolerance and mutual respect on which the health of our civic life depends.

Proponents also argue that, at least in theory, we should not view these admissions policies as aberrations or deviations from a historical commitment to absolute equality of opportunity. Rather, they maintain that they are appropriate extensions of an educational regime within which it has always been the goal "[to assemble] their student bodies to take into account many aspects of diversity." Indeed, drawing on the writings of

93. Neil L. Rudenstine, Why a Diverse Student Body Is So Important, CHRON. HIGHER EDUC., Apr. 19, 1996, at B1; see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 n.48 ("[A] great deal of learning occurs . . . through interactions among students of . . . different races . . . who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." (quoting William Bowen, President of Princeton University)).
John Milton, John Stuart Mill, and Cardinal Newman, President Neil Rudenstine of Harvard has traced the intellectual imperatives in support of diversity back three centuries.\textsuperscript{95} He has also traced the implementation of such measures at his own institution back to the Civil War, a time when matters of race preoccupied the nation in a much more fundamental way.\textsuperscript{96}

Finally, supporters of diversity in university admissions argue that students qualifying under affirmative action have never been the only ones to benefit from admissions procedures that were not entirely merit-based. For instance, they believe it is at best disingenuous to speak favorably of a preference granted to a “legacy” while denying one to an individual whose ancestry is characterized by discrimination and denial, rather than privilege. As one proponent of affirmative action argued three years before the Bakke\textsuperscript{97} decision, “the need for ‘affirmative action’ arose only because some groups—primarily white males—for years were greatly advantaged at the expense of others.”\textsuperscript{98} Affirmative actions reflect the “responsibilities thrust upon educational institutions to transform American society from a caste to an open-class system.”\textsuperscript{99} Indeed, in a highly detailed study of the realities of affirmative action, perhaps the most compelling finding to emerge is not the extent to which affirmative action has opened the doors of legal education to African Americans and other minorities. Instead, it is the extent to which white law school applicants routinely benefit from the exceptions to the merit principle.\textsuperscript{100}

The case for affirmative action in university admissions is then predicated on a series of assumptions about the nature of the educational process and how institutions might best construct a student body that itself maximizes educational opportunities for one and all. Implicit within this

\textsuperscript{95} See Harvard University, The President’s Report, supra note 88, at 3-5.
\textsuperscript{96} See id. at 5-6. For an alternative view, maintaining that Harvard’s commitment to “diversity” was motivated in significant measure by a desire to restrict the admission of Jews, see Alan M. Dershowitz & Laura Hanft, Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?, 1 Cardozo L. Rev. 379 (1979).
\textsuperscript{97} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
\textsuperscript{98} Tom Wicker, A Misplaced Anger, N.Y. Times, June 30, 1974, § 4, at 19.
\textsuperscript{99} Wilson, supra note 2, at 163.
\textsuperscript{100} See Linda F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1, 16 tbl.2 (1997). Data in that Table indicate that 14.9% of accepted white applicants would not have been predicted as suitable for acceptance based on the combination of their undergraduate grade point average and LSAT score. That is, if the objective merit criteria embraced by opponents of affirmative action were in fact dispositive, nearly one in every six white applicants actually accepted were arguably not “qualified” in the traditional sense. For them, something more was afoot, just as something else enters the equation when someone given a preference on the basis of group identity is seemingly admitted in lieu of a white applicant with higher numbers. The Wightman study has drawn heated criticism and a defense from the author. See Stephan Thernstrom, Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman’s “The Threat to Diversity in Legal Education,” 15 Const. Commentaty 11 (1998); Linda F. Wightman, Through a Different Lens: A Reply to Stephan Thernstrom, 15 Const. Commentaty 45 (1998).
framework is a conception of academic "merit" in which a wide range of background characteristics, including group identity, are essential ingredients in the learning process. This approach is, of course, arguably at odds with traditional understandings of the term, especially at "elite" institutions which normally exhibit an almost obsessive fixation on objective measures of intellect and academic attainment. However, if the academics who speak in support of a diverse learning environment are correct, a conception of merit that takes group identity into account is hardly inappropriate. For if, as the leaders of higher education vigorously assert, the quality of one's educational experience is inextricably linked with the diversity of the environment within which that education is received, then group identity and group perspective are properly understood to be aspects of merit.

That interest is, moreover, not simply institutional, as some critics of diversity initiatives have maintained. It is, rather, a reflection of the university's interest in offering an individual the best possible education, within which each student benefits from interactions with individuals whose distinctive identities, values, and perspectives add immeasurably to the educational experience. There is an obvious problem with taking this argument too far, for it seems to imply that students who are educated in an institution that lacks an "appropriate" level of diversity inevitably receive, at best, a "second-rate" education. That may be true in the limited sense that they may not have the benefit of the perspectives and interactions that occur in a diverse environment. But that does not mean that the education they receive is simply not worth having and cannot be excellent in its own right.

This belief in the value of diversity is perhaps best expressed as a set of assumptions about what each individual student brings to his or her own education, that of his or her fellow students, and to the college and university itself. Viewed in this manner, institutional admissions policies reflect something more than a simple, objective assessment of the sort of purely academic credentials normally expressed through grade point averages and scores on standardized tests. Rather, as William Bowen has observed,

the task of an admissions office is not simply to decide which applicants offer the strongest credentials as separate candidates for college; the task, rather, is to assemble a total class of students, all of whom will possess the basic qualifications, but who will also represent, in their totality, an interesting and diverse amalgam of

101. See, e.g., Dershowitz & Hanft, supra note 96, at 384 n.15 ("Indeed, the Harvard Law School in particular has prided itself over the years—and has been praised—for its almost single-minded commitment to a meritocratic admissions policy.").

102. See, e.g., Michael Greve, The Vanity of Diversity, WKLY. STANDARD, July 20, 1998, at 26 ("Now, two decades later, institutional concerns have come to be viewed as ends in themselves.").
individuals who will contribute through their diversity to the quality and vitality of the overall educational environment.\textsuperscript{103}

The extent to which these admissions offices succeed or fail has, accordingly, implications far beyond the specific decisions made about each individual applicant. This means, as a practical matter, that it is imperative to recognize that candidates for admission do not enter that process with any vested interests. Neither institutions, nor individuals, should “start from the premise that any applicant has a ‘right’ to a place in a college or university.”\textsuperscript{104} That is an especially difficult perspective for many, given a mind-set in our society that insists that virtually everything of importance can be measured objectively. Nevertheless, recognition of this reality, and of the institutional imperatives that attach to it, lies at the heart of the debate about affirmative action and diversity.

Individuals unwilling to believe that anything matters other than a perfect grade point average will likely never be convinced of the importance of taking factors other than grade point average into account. Indeed, there are sound reasons for believing that their position lies at the heart of the “American dream,” assuming we are willing to accept that dream as reality for the purposes of shaping social and educational policy.\textsuperscript{105} Nevertheless, what is clear is that the commitment to some form of diversity in fashioning the student body is a long-standing American academic tradition. Indeed, statements in support of that precept are the rule, rather than the exception in the literature of higher education. What remains to be seen is whether the abstract belief that diversity enhances learning tracks the realities of actual student outcomes. I now turn to that critical inquiry.

\section*{C. Diversity and Excellence: The Evidence}

There is at least some evidence that the individuals who promote the positive values of a diverse learning environment are correct.\textsuperscript{106} Various

\textsuperscript{103} Expert Report of William Bowen, in \textit{The Compelling Need for Diversity in Higher Education} 235, 237 (John A. Payton ed., 1999). This document is a compilation of the expert witness reports commissioned by the attorneys for the University of Michigan in connection with the lawsuits challenging that institution’s undergraduate and law school admissions policies, \textit{Gratz v. Bollinger}, No. 97-75231 (E.D. Mich. filed Oct. 14, 1997), and \textit{Grutter v. Bollinger}, No. 97-75928 (E.D. Mich. filed Dec. 3, 1997). These materials are notable for a number of reasons, not the least of which is that Michigan appears to be the first institution to commit itself to the development and use of such evidence as part of its defense of its affirmative admissions policies. For a discussion of the Michigan strategy, see Steven A. Holmes, \textit{A Most Diverse University’s New Legal Tack}, N.Y. Times, May 11, 1999, at A1 (noting that “what distinguishes the Michigan case is the university’s full-throated counteroffensive: the marshaling of statistical evidence of the benefits of racial diversity”).

\textsuperscript{104} Expert Report of William Bowen, supra note 103, at 236.

\textsuperscript{105} As Professor Sandalow notes, while that “ideal has very often been honored only in the breach ... the importance of the ideal cannot be doubted.” Sandalow, supra note 15, at 1913.

\textsuperscript{106} Readers interested in many of the issues posed by this part of the Article will find a wealth of helpful information and perspectives in the Ohio State law journal’s recent symposium issue on \textit{Bakke}. 
social scientists have explored a variety of diversity considerations, finding, for example, that “emphasizing diversity appears to have uniformly positive effects, not only on those outcomes that are relevant to the goals of general education—heightened cultural awareness and satisfaction and reduced materialism—but also on the students’ commitment to promoting racial understanding.”\textsuperscript{107} The studies are few, and many are subject to limitations that make it appropriate to approach them with caution. There is, for example, a fundamental difference between simply creating a diverse learning environment and creating institutional initiatives that, in Alexander Astin’s formulation, “emphasize” diversity in proactive ways.\textsuperscript{108} The form of the studies also matters. For example, by expressly focusing on the value and importance of diversity, many of these studies may inadvertently skew their results. There are a number of reasons for this. One is the simple fact that this is a highly controversial area, within which many of the essential constructs are politically and emotionally charged. That reality, by itself, counsels caution.\textsuperscript{109} These are also issues where context matters a great deal. There is, for example, little real agreement


\textsuperscript{108} See generally Astin, supra note 107. Astin’s work is perhaps the most important and most influential in this field. Both the database on which he draws and the methodologies he employs have been embraced by others attempting to document the effects of diversity. See, e.g., infra note 132. For an example of a study examining the effect of “structured contact,” see Donna M. Desforges et al., Effects of Structured Cooperative Contact on Changing Negative Attitudes Toward Stigmatized Social Groups, 60 J. PERSONALITY & SOC. PSYCHOL. 531 (1991). This study reveals a great deal about efforts to influence attitudes, but contributes only marginally to our understanding of how a diverse environment itself influences learning in the classroom.

\textsuperscript{109} Educational researchers stress, for example, that survey research in particular suggests the possibility of “social desirability bias,” a tendency on the part of individuals “to be and to appear to be good people.” Seymouf Sudman & Norman M. Bradburn, Asking Questions: A Practical Guide to Questionnaire Design 6 (1982). Given the nature of much of the dialogue about affirmative action and diversity, it strikes me as especially important to carefully consider the extent to which a desire to avoid, for example, being characterized as a racist influences study outcomes.
about exactly what is meant when one speaks of affirmative action. That same problem infects discussions of "diversity." I, for example, use that term as a shorthand expression for the variety of experiences and viewpoints that substantially different individuals bring to the educational process. Others arguably limit their understanding of diversity to racial or ethnic distinctions, assuming that group identity is, by itself, dispositive. Studies that simply ask questions about diversity, without more, pose both definitional and contextual problems that must be taken into account when assessing their true value.

These and related considerations make it very important that studies probing the value and effects of a diverse learning environment provide context for the questions posed and responses elicited. They also counsel that care should be taken to separate the study from extrinsic considerations that might skew the result. For example, there are reasons to be cautious about studies conducted by institutions in direct response to litigation challenging the very policies whose efficacy they are attempting to establish. Care should also be exercised when studies do not compare the results achieved within one environment with those that obtain within another. Nevertheless, social science studies seem to provide the sort of support necessary to make a belief in the value of diversity something more than a simple exercise in blind faith. This is a matter of no small importance in an area where, far too often, institutions of higher education have acted in ways that seem, at best, legally and morally bereft.

110. See infra text accompanying notes 185-88.

111. Concerns about exactly what is meant by the term "diversity" have been forcefully expressed by various courts. See Wessman v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998) (stating that the meaning of diversity "depends not only on time and place, but also upon the person uttering it"); Tracy v. Board of Regents Univ. System Ga., 1999 WL 557691, at *7 (S.D. Ga. July 6, 1999) ("[T]he very concept of 'diversity' has become so malleable that it can be instantly conscripted to march in any ideologue's army . . . .").

112. I am not arguing here that the studies are intentionally biased, in the sense, for example, that they use leading questions. My concern is more fundamental, given the emotionally charged nature of the diversity debate. For a brief discussion of the research issues posed, see WALTER R. BORG & MEREDITH DAMIEN GALL, EDUCATIONAL RESEARCH: AN INTRODUCTION 318 (3d ed. 1979).


114. Researchers characterize this as a problem of "history," and identify it as "[o]ne of the major threats to internal validity," EDWARD L. VOCKELL & J. WILLIAM ASHER, EDUCATIONAL RESEARCH 221 (2d ed. 1995). They also stress that "[t]he more transparent or obvious the purpose of a questionnaire, the more likely respondents are to provide the answers they want others to hear about themselves rather than the ones that may be true." TUCKMAN, supra note 113, at 235.

115. As Tuckman observes, "[c]omparisons need to be made between students who experience different types of education. The term comparison should be stressed because survey research done on a single group often leads to invalid conclusions about cause-and-effect relationships." TUCKMAN, supra note 113, at 11.

116. I allude here to situations such as those that arose in Hopwood, where a law school faculty implemented a program that they could not possibly have believed to be legal. For a discussion of why I believe this to be the case, see infra text accompanying notes 338-51. The University of Texas is not
Three recent studies illustrate the strengths and weaknesses of what can be accomplished.\textsuperscript{117} The first to appear was the massive account of the experiences of thousands of individuals who attended some of this nation's most prestigious institutions, compiled by William Bowen and Derek Bok. They set out to provide "empirical evidence as to the effects of [race-sensitive admissions] policies and their consequences for the students involved."\textsuperscript{118} The study examined a series of questions about the educational experiences and post-baccalaureate accomplishments of the three groups of individuals who attended twenty-eight highly selective colleges and universities.\textsuperscript{119} It describes, in considerable detail, processes that admit qualified individuals who benefit in specific ways from being educated on a diverse campus,\textsuperscript{120} go on to achieve substantial success in life,\textsuperscript{121} have rich and fulfilling family and social lives,\textsuperscript{122} and look back on their undergraduate years with considerable satisfaction.\textsuperscript{123} It concludes that "academically selective colleges and universities have been highly successful in using race-sensitive admissions policies to advance educational goals important to them and societal goals important to everyone."\textsuperscript{124}

This necessarily terse summary barely scratches the surface of the complex and detailed findings Bowen and Bok offer, which have been characterized, with considerable justification, as "provid[ing] striking confirmation of the success of affirmative action in opening opportunities and creating a whole generation of black professionals who are now alone. As I note infra at text accompanying notes 361-69, both the University of California, Berkeley, School of Law (Boalt Hall), Stanford Law School, and the University of Michigan Law School crafted arguably similar programs, and there are undoubtedly numerous other institutions that have done the same, including the University of Arkansas. See supra note 82.

\textsuperscript{117} Many of these studies are the by-products of current litigation. Some are an integral part of an institution's defense strategy. See, e.g., \textit{The Compelling Need for Diversity in Higher Education}, supra note 103. Others reflect a more general attempt by research professionals to bolster the case for diversity through a variety of descriptive articles and applied studies. See, e.g., \textit{Compelling Interest: Examining the Evidence on Racial Dynamics in Higher Education} (Mitchell Chang et al. eds., 1999). One critic has castigated these efforts, asking "[i]f patriotism is the last refuge of a scoundrel, is social science the last resort of a losing cause?" Peter Schrag, \textit{The Diversity Defense}, \textit{The Am. Prospect}, Sept.-Oct. 1999, at 57.

\textsuperscript{118} BOWEN & BOK, supra note 14, at xxiv.

\textsuperscript{119} Bowen and Bok's findings are drawn from the College and Beyond Database, compiled by the Mellon Foundation, which contains information on more than eighty thousand individuals who matriculated in the fall of 1951, 1976, and 1989. The database and survey instruments are described in Appendix A of the study. See id. at 297-335.

\textsuperscript{120} See id. at 15-52 (describing the academic credentials of both black and white applicants), 53-90 (detailing academic outcomes, including both high graduation rates and positive experiences of and reactions to being part of a racially diverse student body).

\textsuperscript{121} See id. at 91-117 (documenting the comparatively high rate at which black graduates of the C&B institutions enrolled in graduate and professional programs), 118-54 (establishing that the C&B graduates achieved meaningful employment, high earnings, and considerable job satisfaction).

\textsuperscript{122} See id. at 155-92 (noting high levels of civic participation and satisfaction with life).

\textsuperscript{123} See id. at 193-217 (documenting for both black and white students high levels of satisfaction with their undergraduate and diversity experiences).

\textsuperscript{124} \textit{Id.} at 299.
leaders in their fields and their communities." However, some of the findings are limited, in that they derive from a smaller subset of the overall sample. Some are also disturbing. For example, the credentials of black applicants admitted through preferences were substantially lower than those of the white matriculants, and both academic achievement and graduation rates appeared to suffer as a result. Both the grade point averages and class ranks of black students in the study were substantially below those of their counterparts, and while the overall graduation rate for the black matriculants "was very high by any standard," it was substantially below that for individuals from other ethnic groups.

A second major study was conducted by Professor Patricia Gurin of the University of Michigan as part of the University's defense strategy in the litigation it currently faces. Building on her own prior work and that of others, Professor Gurin conducted what she characterizes as a "broad and extensive series of empirical analyses," with a special emphasis on "outcomes." That is, she attempted to establish the extent to which there is an empirically significant correlation between the nature of the academic

126. See Bowen & Bok, supra note 14, at 17 (noting that the detailed study of actual admissions processes and its results was confined to "five colleges and universities within the College and Beyond universe that were able to provide the full range of data used to admit and enroll their 1989 entering cohorts").
127. See id. at 18-23.
128. See id. at 72 (noting a 2.61 cumulative grade point average for black students, versus a 3.15 average for white, and that the average class rank of black students was at the 23d percentile, that is, the bottom quarter of their classes).
129. Id. at 55-56.
130. As indicated, see supra note 103, one element of that strategy is a substantial commitment to the use of social science data through the development and use of studies such as the one Professor Gurin conducted. It has also involved a public relations effort that includes a remarkable op-ed piece written by former President Gerald R. Ford, within which he criticizes the lawsuits brought against Michigan and characterizes the university's current admissions program as an "eminently reasonable approach, as thoughtful as it is fair, [that] has produced a student body with a significant minority component whose record of academic success is outstanding." Gerald R. Ford, Inclusive America, Under Attack, N.Y. TIMES, Aug. 8, 1999, § 4, at 15, 15. This is part of a strategy the University's President, Lee Bollinger, has characterized as an attempt "to recapture the moral high ground." Jack E. White, Affirmative Action's Alamo; Gerald Ford Returns to Fight Once More for Michigan, TIME, Aug. 23, 1999, at 48.
132. Professor Gurin used two bodies of data, the Cooperative Institutional Research Program (CIRP) data set created and maintained by Professor Astin and his colleagues at UCLA, and a second data set compiled at the University of Michigan itself, the Michigan Student Study. The CIRP project is a national, independent, and ongoing empirical study. See Gurin Report, supra note 131, at 172. The Michigan Student Survey is more narrow and was undertaken for the specific purpose of "increasing understanding of the impact of racial/ethnic diversity at the University of Michigan on all groups of Michigan undergraduates." Id. at 174. The data sets and Professor Gurin's methodologies are detailed in Appendix C of her report. See id. at 171-87.
community within which students find themselves and actual changes in
their knowledge, attitudes, and perspectives that could reasonably be asso-
ciated with that environment.

The University characterized Professor Gurin’s findings as
"conclusive proof that a racially and ethnically diverse student body has
far-ranging and significant benefits for all students, non-minorities and
minorities alike."

The attorneys representing the plaintiffs in these
actions were unimpressed, maintaining that “[n]either this report nor
anything else the university has said... refutes our contention that race
plays a predominant... role in the admissions process.”

The critical
question is not, however, whether or not race, or any other arguably
“suspect” group characteristic, plays a “predominant role” in the admis-
sions process. It is, rather, whether there is a compelling educational justi-
fication for allowing that characteristic to enter the decision-making mix,
and it is in that specific context that the Gurin study makes a contribution.

Gurin begins her analysis with a brief summary of the social science
evidence documenting the critical role a college or university education
can play in individual development. Drawing on the work of a number of
psychologists and sociologists, Gurin emphasizes that for the typical stu-
dent, “[i]n late adolescent and early adult experiences, when they are
discontinuous enough from the home environment and complex enough
to offer new ideas and possibilities, can be critical sources of
development.”

Gurin then theorizes that two specific dimensions of indi-
vidual development, learning outcomes and democracy
outcomes, are
important measures of personal growth. She further argues that three
aspects of a diverse learning environment—structural diversity, classroom
diversity, and informal interactional diversity—provide the operational
dimensions through which these outcomes are attained. Gurin then tests
each of these assumptions in an attempt “to provide scientific insight

133. The Compelling Need for Diversity in Higher Education, supra note 103, at 5.
134. Terrence J. Pell, Senior Counsel, Center for Individual Rights, quoted in Chron. of Higher
135. This approach tracks closely the assumptions about the value and importance of higher
education that permeate my discussion in Part I.A of this Article.
137. Gurin defines “learning outcomes” as a “mode of thought,” and postulates that diversity
produces “deeper and more complex thinking.” Id. at 104. Democracy outcomes are aspects of the
educational process that make students “better able to participate in our democratic process.” Id. at 106.
For an interesting discussion of both the importance of these social dimensions and the social science
evidence underlying them, see Linda Hamilton Krieger, Civil Rights Perestroika: Intergroup Relations
138. These are defined as, respectively, “the racial and ethnic composition of the student body,”
“the incorporation of knowledge about diverse groups into the curriculum,” and “the opportunity to
interact with students from diverse backgrounds in the broad, campus environment.” Gurin Report,
supra note 131, at 108.
into the processes by which students are changed by their college experiences.\textsuperscript{139}

Gurin found “strong evidence” that diversity matters in both areas of concern. In the area of “learning outcomes” she found that “[s]tudents who had experienced the most diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.”\textsuperscript{140} Positive “democracy outcomes” were also evident,

strongly support[ing] the central role of higher education in helping students to become active citizens and participants in a pluralistic democracy. Students who experienced diversity in classroom settings and in informal interactions showed the most engagement in various forms of citizenship, and the most engagement with people from different races/cultures. They were also most likely to acknowledge that group differences are compatible with the interests of the broader community.\textsuperscript{141}

Gurin’s findings are potentially important for a number of reasons. They closely track many of the results of previous, more limited analyses.\textsuperscript{142} Moreover, her approach is both longitudinal and highly comparative. She does not, for example, simply ask at a single point in time if students believe a diverse learning environment is important. Rather, she tries to determine both whether such an environment exists and whether it has had an actual impact on student learning and development over time. She also examines how such results differ when students attend a less diverse institution.

These realities help place in context another recent study, which focuses on a narrower and potentially more significant question, the effect of a diverse learning environment on students enrolled in what the study aptly characterizes as “leading law schools.”\textsuperscript{143} The survey is unique in one sense, for it is the first published account to examine the role and impact of diversity in the specific contexts of a professional school, a portion of the educational spectrum that has played a significant role in the development of the body of law that currently shapes the dialogue about the legality of

\begin{itemize}
\item[139.] \textit{Id.} at 109.
\item[140.] \textit{Id.} at 118.
\item[141.] \textit{Id.} at 126.
\item[142.] Gurin’s work echoes many of the findings set forth in the studies listed \textit{supra} in note 107. That is not surprising. A careful reading of Gurin’s makes it quite clear that those studies, particularly those of Astin, influenced her work in important respects.
\item[143.] Gary Orfield & Dean Whita, \textit{Diversity and Legal Education: Student Experiences in Leading Law Schools} (Aug. 1999) <http:llwww.law.harvard.edu/civilrights/publications/lawsurvey.html>. The two law schools were those at Harvard and Michigan, which the study correctly characterizes as two of the most competitive and highly rated law schools in the country. See \textit{id.} at n.18. The study was conducted under the auspices of The Civil Rights Project at Harvard.
\end{itemize}
affirmative action. The two leading cases in the field, for example, *Bakke*\(^{144}\) and *Hopwood*,\(^{145}\) involved affirmative admissions programs at colleges of medicine and law. And two of the cases currently in the legal pipeline, at the Universities of Washington\(^{146}\) and Michigan,\(^{147}\) also involve legal education.\(^{148}\)

Affirmative action is an important issue for graduate and professional education for two reasons. As a practical matter, those schools and colleges are much more likely to oversee the sort of competitive admissions processes within which decisions as to who shall be admitted matter a very great deal.\(^{149}\) Unlike undergraduate education, graduate and professional programs offer a limited number of seats. Competition for admission is therefore intense, and the impact of granting a preference more pronounced.

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145. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *reh'g* denied, 84 F.3d 720 (5th Cir. 1996), and *cert. denied*, 116 S. Ct. 2380 (1996).
146. See *Smith v. University of Wash. Law School*, 2 F. Supp. 2d 1324, 1328-29 (W.D. Wash. 1998) (describing the three plaintiffs and their challenge to the law school’s admissions policies and procedures). In a subsequent, unreported decision, the Court held that “[t]he opinion of Justice Powell [in *Bakke*], which calls for strict scrutiny of racial classifications and permits race to be used in university admissions only to achieve educational diversity” should, given its reading of governing Supreme Court precedent, “be viewed as the holding of the Court.” *Smith v. University of Wash. Law School*, No. C97-335Z, slip op. 6 (W.D. Wash. Feb. 12, 1999). It also held, in a separate unpublished order, that certain aspects of the plaintiff’s claims survived the passage of Initiative 200, a ballot initiative that amended state law to bar any “preferential treatment to, any individual or group on the bases of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting.” *Smith v. University Wash. Law School*, No. C97-335Z (E.D. Wash. Feb. 10, 1999) (quoting Initiative 200). I discuss Initiative 200 briefly *infra* at text accompanying notes 200-01.
147. See *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich. Dec. 3, 1997). As indicated, see supra note 103, the University is mounting a vigorous defense in this and a companion case involving undergraduate admissions, see *Gratz v. Bollinger*, No. 97-75231 (E.D. Mich. Oct. 14, 1997). This includes a substantial commitment to employing social science studies to demonstrate that a diverse learning environment in fact constitutes a compelling educational interest. Recently, the Court of Appeals for the Sixth Circuit held that various students and interest groups who favored affirmative action could intervene in these lawsuits given the potential for inadequate representation of their perspectives. See *Grutter v. Bollinger*, 1999 WL 6072000 (6th Cir. Aug. 10, 1999).
148. The other two cases focus on undergraduate admissions. One case challenges the admissions policies employed by the University of Michigan. See supra note 147. The other involves the University of Georgia and has produced two decisions finding that admissions policies focused “solely” on ethnic diversity violated *Bakke*. See *Wooden v. Board of Regents Univ. System of Ga.*, 32 F. Supp. 1370, 1381-84 (S.D. Ga. 1999); *Tracy v. Board of Regents Univ. System of Ga.*, No. CV 497-45, 1999 WL 557691 (S.D. Ga. July 6, 1999). In the second of these the court held that the plaintiff lacked standing, but that given the likelihood that the policy “will be re-challenged in the near future,” went on to “note what the record evidence now compels: UGA cannot constitutionally justify the affirmative use of race in its admission decisions.” *Tracy*, 1999 WL 557691, at *5.
149. See, e.g., BOWEN & BOK, supra note 14, at 15 (estimating that only 20 to 30% of the colleges and universities in the nation “pick and choose” their entering classes), 282 (“In law and medicine, all schools are selective.”). I discuss one important implication of these realities *infra* at text accompanying notes 404-08.
A more important consideration lies in the nature of the educational process itself, and counsels caution when addressing questions about the value of diversity. As I noted earlier, much of the force of the analysis undertaken by Astin and Gurin lies in the fact that they draw on a rich and extensive literature documenting the importance of diversity during late adolescence and early adulthood. In particular, they identify the importance of the undergraduate years as "a psycho-social moratorium—a time and place in which [students] can experiment with different social roles before making permanent commitments to an occupation, to intimate relationships, to social groups and communities, and to a philosophy of life." Individuals entering a law school are generally not, however, impressionable youth undertaking their first foray outside the home. At a minimum, they are graduates of a four-year degree program that has, presumably, already afforded them many of the developmental opportunities that the social development literature describes. Many are, presumably, graduates of the sorts of diverse institutions that would already have provided the sort of enriched learning environment Gurin describes. And many are older individuals who are returning to postsecondary education after a variety of post-baccalaureate social and work experiences.

These realities must be accounted for when considering the results of the Orfield and Whitla study, which involved administering a Gallup Poll of the students enrolled during the 1998-99 academic year in the law schools at Harvard and Michigan. Students were asked a series of questions about their background and prior educational experiences and, in particular, their perceptions of the value and importance of a diverse learning environment as an element in their own legal education. The authors of the study characterize it as showing that "large majorities [of both black and white students] have experienced powerful educational experiences from interaction with students of other races." These included increased interracial contacts and experiences, more positive classroom experiences, and positive changes in individual views and values. Viewed in isolation, these findings are important. They reflect actual student experiences, and show at least that students themselves appear to value the opportunities presented by studying in a more diverse

150. See supra text accompanying notes 135-36.
151. Gurin Report, supra note 131, at 103.
152. See Orfield & Whitla, supra note 143, at 9 (describing the survey process). The authors note and discuss earlier survey efforts involving a request that students at seven law schools respond to an email questionnaire. See id. at 7-9. As the authors stress, given the problems inherent in that sort of survey, there is "no way... to reach any scientifically valid conclusion that the views [expressed] were representative of the overall law school population." Id. at 8.
153. Id. at 29.
154. See id. at 11-14.
155. See id. at 14-17.
156. See id. at 17-24.
environment. The approach employed was, however, neither comparative nor longitudinal. It also focused expressly on diversity in environments within which that construct was a pronounced institutional value and, in the case of Michigan, under legal attack. These factors counsel caution, for reasons I have already discussed.57

These studies are nevertheless valuable. They are not, as was so often the case in the past, simple affirmations of individual or organizational beliefs in the value of diversity. Instead they attempt to describe, in a concrete manner, both the learning process and the perceived impact of a diverse learning environment on student outcomes.58

That is a matter of considerable importance given the Court's record of turning to the social sciences when it wishes to "develop or to justify its norms pursuant to human behavior," a process within which "the findings of professional social scientists become especially important and deserving of careful examination."59 Clearly, the Court's understanding of basic constitutional principles will shape its eventual resolution of the dispute about the permissibility and value of diversity initiatives. But it would be a mistake to treat the debate about affirmative action and diversity as one that the Court will, or even should, resolve solely through the application of constitutional principles to the facts of the case before it. Indeed, this is an area where Judge Posner's recent observations about the limitations of constitutional theory and the "need for empirical knowledge" are especially apt, for "[t]he big problem" surrounding the debate about diversity "is not lack of theory, but lack of knowledge—lack of the very knowledge that academic research, rather than the litigation process, is best designed to produce."60


158. The distinction between perceived and actual outcomes is important. Both Astin and Gurin have offered substantial and potentially convincing evidence that a diverse learning environment has an actual, measurable impact on important student outcomes at the undergraduate level. Their work indicates, however, that how the environment is structured matters a great deal, and it would be a mistake to simply assume that racial and ethnic diversity, without more, is sufficient. It is also important to remember that affirmative admissions policies are the exception rather than the rule in undergraduate admissions. See supra note 149. Such policies are pervasive, however, at the graduate and professional level, and none of the studies conducted to date measure actual outcomes in those environments, much less offer comparative or longitudinal perspectives.


160. Richard A. Posner, Against Constitutional Theory, 73 N.Y.U. L. Rev. 1, 3 (1998). For an incisive critique of Judge Posner's methodology, albeit not his fundamental point about the value of social science evidence in this debate, see Deborah Jones Merritt, Constitutional Fact and Theory: A Response to Chief Judge Posner, 97 Mich. L. Rev. 1287 (1999). Professor Merritt comes to this debate with sterling credentials, as both a thoughtful student of the importance of the social sciences in the overall dialogue, see Deborah Jones Merritt, The Future of Bakke: Will Social Sciences Matter?, 59 Ohio St. L.J. 1055 (1999), and as an active practitioner of the sort of reality-based, interdisciplinary studies that offer important insights, See, e.g., Deborah Jones Merritt & Barbara F. Reskin, Sex, Race,
As Hopwood demonstrates, judges have indeed become skeptical about unsupported claims regarding the value of diversity, and institutions now must provide something more than "simple . . . assurances of good intention." Rather, they must develop and provide the "strong basis in evidence," information that demonstrates the positive educational value of diversity. This is precisely the sort of evidence that the social sciences have supplied in so many cases in the past. In Brown v. Board of Education, for example, the Court observed that "[w]hatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson," the conclusion that "segregation of white and colored children in public schools has a detrimental effect upon the colored children" is now "amply supported by modern authority." Critics of Brown spoke out against a decision that was "based neither on the history of the [Fourteenth Amendment] nor on precise textual analysis but on" the "highly evanescent grounds" of "psychological knowledge." It is clear, however, that the Court believed then, and continues to believe, that social science materials can and should play an important role in its decision-making process. Indeed, the Court in some instances has appeared to invite such studies, a process that produced materials instrumental in fashioning the rules that now govern discussions of the appropriate size for a jury and the extent to which the views of potential jurors regarding the death penalty should or should not be used to preclude their inclusion within the group ultimately impaneled.

Social science evidence will not likely convince a Justice or judge for whom the principle of absolute equality before the law invariably trumps any consideration of the positive effects of a diverse learning environment achieved through modest and appropriate considerations of group identity. It is difficult to believe, for example, that either Justice Scalia or Justice

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164. Id. at 494 n.11.
166. The Court has invoked social science in numerous decisions. For cases assessing the nature and impact of obscene material, see New York v. Ferber, 458 U.S. 747 (1982), and Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); on the deterrent effect of the death penalty, see Gregg v. Georgia, 428 U.S. 153 (1976); and Furman v. Georgia, 408 U.S. 238 (1972); and on the extent to which a "good faith" exception would undermine the deterrent effect of the exclusionary rule, see United States v. Leon, 468 U.S. 897 (1984).
Thomas would be inclined to retreat from their hostility toward race-based classifications on the basis of such materials, or that such information would have made a difference in *Hopwood*.\(^{170}\) Indeed, in one important decision in which Justice Thomas played a crucial, albeit controversial, role,\(^ {171}\) the uses to which social science studies were put illustrated many of the problems with such information. There, both sides found, in the same materials, snippets providing support for the conclusions they wished to reach.\(^ {172}\)

Nevertheless, courts generally follow a rule and tradition of deference: Judges respect the “professional judgment” of a “person competent, whether by education, training or experience, to make the particular decision at issue.”\(^ {173}\) Indeed, in cases involving higher education, a combination of constitutional command and respect for the realities of academic life yields a general rule:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.\(^ {174}\)

Cases raising the specter of race provide an exception to this general rule that has in the past, and will in the future, continue to test the limits of these doctrines. Nevertheless, institutions of higher education that defend

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\(^{170}\) It is possible that the parties tried to present such evidence in that case. There is, however, nothing in any of the reported decisions to indicate that they did so. The district court opinion refers simply to the opinion testimony of law deans and faculty. See *Hopwood*, 861 F. Supp. at 571. The briefs filed before the Fifth Circuit by the University of Texas in both the original appeal and the one currently pending are also noticeably silent in this regard, offering either cross-references to this prior testimony, or a simple description of the assumed benefits of a diverse learning environment. See Brief of Appellees at 24, *Hopwood* v. *Texas*, 861 F. Supp. 551 (W.D. Tex. 1994) (No. 94-50664); Brief of the State of Texas et al. at 36-37, 42-44, *Hopwood* v. *Texas*, 999 F. Supp. 872 (W.D. Tex. 1998) (No. 98-50506).

\(^{171}\) See *Lamprecht* v. *F.C.C.*, 958 F.2d 382 (D.C. Cir. 1992) (invalidating an FCC policy granting a preference to women in awarding radio station construction and operating licenses). Justice Thomas “returned” to the circuit from the Court to issue an opinion many claimed was completed prior to the hearings on his nomination to the Court and suppressed by him in an attempt to protect him from the wrath of the women’s groups who would have been offended by the decision. See DAVID BROCK, THE REAL ANITA HILL: THE UNTOLD STORY 102-04 (1993). Judge Buckley, a member of the panel, verified and deplored in his concurring opinion the fact that a draft had been completed and leaked. See *Lamprecht*, 958 F.2d at 403-04 (Buckley, J., concurring).

\(^{172}\) Compare *Lamprecht*, 958 F.2d at 395-98 (arguing that a Congressional Research Service Report shows that female ownership does not lead to increased “women’s programming”), with *id.* at 412-14 (Mikva, J., dissenting) (arguing that the same report does establish the correlation).


diversity initiatives on the basis of their documented educational value stand a far better chance of succeeding than those that simply ask the court to accept the program as a matter of faith. The ultimate difficulty is, of course, reaching agreement on just what it is a college or university had in mind when it undertook the affirmative action in question. Was "the person or committee responsible . . . actually exercisin[ing] professional judgment," consistent with the threshold requirement for an exercise in judicial deference to a principled decision? Or is the program itself, or at least the particular decision being challenged, simply an expedient undertaken for other reasons and divorced from sound educational considerations? That issue is, as I will make clear in Part III of this Article, a matter of considerable importance. Before dealing with that question, however, I turn to what I mean by an "affirmative action" and how the evolution of that concept has shaped the current debate.

II
AFFIRMATIVE ACTION: ORIGINS AND TRANSFORMATIONS

The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else . . . . Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General.\(^{176}\)

There are no "affirmative action" provisions in our Constitution. Instead, we are confronted with a text that appears to require equality of treatment, even as we fret about the realities imposed by a world in which no two of us are exactly the same.

One of the many things about which we disagree is just what we mean when we speak of "affirmative action." As initially conceived and implemented, affirmative action was at most a mandate for procedural fairness, predicated on the assumption that each of us should be free to succeed or fail on the basis of our own strengths and limitations. It quickly became apparent, however, that there was a sharp divide between treatment and attainment. What was originally a matter of breaking down artificial barriers became a system of actual preferences, within which institutions that had once been the exclusive preserve of white males now actively courted, and advanced, individuals from a variety of groups previously excluded. This was especially true in higher education, where traditional notions of "merit" were questioned and it at least seemed that scarce places in the inner circle were increasingly allocated on the basis of group membership.

175. Id.
176. VONNEGUT, supra note 23, at 927.
rather than individual attainment. I now turn to these aspects of the debate about affirmative action and diversity.

A. Initial Questions: Definitions and Perceptions

Affirmative action is simultaneously one of the most controversial and least understood facets of contemporary American life. Proponents of affirmative action speak eloquently of programs that are "morally justified as a corrective for discriminatory employment practices." Critics, in turn, argue affirmative action efforts run counter to the "broad antidiscrimination principle [that] lies at the core of American political and intellectual understandings of a just and proper society." The debate is long-standing. It is also described as "intractable," "stalled," and "sterile." Indeed, at least one observer maintains further dialogue is futile: "All the relevant material is known to people of good will on both sides; continued discussion of it has very little practical effect beyond educating successive generations of adversaries."

Perhaps the most important reason for this state of affairs is that there is little, if any, consensus as to what the phrase "affirmative action" means. This problem arguably has a simple solution: agreement as to what we mean when we speak of "affirmative" action. But definitions of affirmative action are as varied as the agendas of the individuals who articulate them. Some individuals, for example, claim that "[a]ffirmative action

179. Arguably, the practice began with the nation, see Stephen A. Siegel, The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry, 92 Nw. U. L. Rev. 477 (1998) (tracing the origin of race-conscious laws back to the Founding Era), and flourished throughout our history, see Rabenfeld, supra note 17, at 429-32 (documenting post-Civil War Era enactments); Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753 (1985) (same). While I suspect these fascinating arguments that affirmative action comports with "originalism" will not sway Justices Scalia and Thomas, they are nevertheless powerful indications that deviations from the ideal of equality are not recent innovations.
181. Lawrence C. Becker, Affirmative Action and Faculty Appointments, in AFFIRMATIVE ACTION AND THE UNIVERSITY: A PHILOSOPHICAL INQUIRY, supra note 177, at 93, 93.
183. Becker, supra note 181, at 93. As I stress in Part I.C of this Article, I disagree with Becker on one critical point: educators in the past did not in fact "know" the most critical thing about a diverse learning environment, whether it actually influences, for the better, student attitudes and educational outcomes. This may be changing with research of the sort being conducted by individuals such as Professor Gurin. See Gurin Report, supra note 131. The results of such studies are certainly promising and, if they withstand critical scrutiny, will go a long way toward supplying the essential evidentiary link.
184. A good example is the arguably contradictory belief reflected in the polls that the general public opposes both discrimination and preferences. See infra text accompanying notes 196-206.
properly pursued seeks not the obviously unqualified[,] but the *qualified and unobvious* applicants,”[^185] a formulation that turns on the need to establish simple but fair procedures. Others recognize that such measures have a more active dimension and treat affirmative action as a concept that “entails positive steps, rather than just passive nondiscrimination, to advance equality in education and employment.”[^186] Still others take a very directive approach, speaking of “a conscious effort to increase the representation of women and other designated groups in particular organizations, occupations, programs, and a wide range of activities.”[^187] Others deny that such matters even involve anything that can properly be characterized as differential treatment, maintaining that “[a]ffirmative action is not a preference; it is a modest effort to recognize the ways that standardized tests don’t measure the potential of entire groups of people, particularly those who were not represented when these tests were developed.”[^188]

Perhaps this ebb and flow of “expert” opinion regarding just what affirmative action means is beside the point, especially when the focus is on affirmative action as a matter of law, rather than simply an expression of policy. The realities and rigors of the Court’s current strict scrutiny approach means that each diversity measure, and, by implication, the vision of affirmative action it expresses, will be assessed on its own terms. But it is important to recognize that a sense that affirmative measures require lowering the threshold, reducing in some way the qualifications otherwise required, dominates the popular understanding of affirmative action. And that this is understandable, since many of the affirmative action “horror stories” that shape public discourse appear to verify that such is the case.

Most affirmative action policies attempt to define their ambitions in appropriately soothing ways, stressing that they seek simply to make it possible to choose “among thousands of applicants who are not only ‘admissible’ academically but have other strong qualities.”[^189] These same policies stress, however, that while “numerical indicators are not dispositive . . . subjective information alone is seldom sufficient as a substitute for strong objective credential[s].”[^190] Thus, while the policies appear to emphasize the need to draw distinctions between applicants

“with similarly strong objective credentials,”191 too often it appears to the general public that the objective thresholds are in fact lowered, often substantially, when minority applicants are admitted.

This contradiction fuels the general belief that preferences discriminate against individuals with “superior” qualifications. If, for example, the Law School Admissions Test is touted as a reliable predictor of grades in the first year of law school, and if those grades are in fact an appropriate measure of individual “merit,” on what basis can an institution justify admitting applicants with lower LSAT scores? Individuals who support affirmative admissions measures answer these questions by trying to put the various standardized tests in context. They point out, for example,

that one’s performance on these tests can be influenced by one’s experience, by one’s cultural background, by one’s access to schooling and the cultural perspectives, attitudes, and know-hows that might favor test performance, by the extent to which one’s peers value school achievement, by the nature of one’s dinner table conversation, and so on.192

In many instances, however, these and similar arguments fall on deaf ears. As Steele goes on to note, standardized tests are “popularly assumed to measure such a singularly important component of academic merit as to mandate its centrality in the admissions process.”193 It is important to recognize, however, that merit in the specific context of college and university admissions should not be so narrowly understood. The philosopher George Sher, for example, has noted that there are both moral and nonmoral dimensions of merit,194 and that within each grouping there are variations on theme such that “the relevant desert-claims may seem to have no single justification.”195 Viewed in this light, the argument for admission predicated solely on objective criteria reflects a nonmoral claim, asking that we divorce individual attainments from the circumstances within which they were achieved. The argument for diversity, however, is premised on the assumption that context matters very much, both in terms of assessing individual worth and assembling a group of individuals who will reflect in an appropriate manner the full range of institutional objectives, goals that

191. Id.
192. Expert Report of Claude M. Steele, in THE COMPPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION, supra note 103, at 243, 244. Steele’s acknowledgment of the importance of “the extent to which one’s peers value school achievement” is of special interest, given Professor Lino Graglia’s unfortunate experiences when he made essentially the same point. See infra text accompanying notes 506-16.
194. See generally SHER, supra note 10, at 109-11.
195. Id. at 109. Sher notes the importance of the desert construct, stressing that it “is central to our pre-reflective thought” and that “[m]ost people find it simply obvious that persons who work hard deserve to succeed, that persons of outstanding merit deserve recognition and reward, and that persons harmed by wrongdoers deserve to be compensated.” Id. at ix.
recognize the crucial role that the community itself plays in the learning process.

There are a variety of reasons to believe that the American public understands many of these distinctions. Unfortunately, the debate about affirmative action and diversity has become polarized. In most instances, each side seems to be talking past the other. Moreover, as I will make clear in Part III of this Article, it is difficult to ask for support in any court, judicial or that of public opinion, when an admissions regime sets different admissions standards for two groups of applicants based on group identity.

Public opinion polls have consistently indicated that the general public opposes both discrimination and preferences,196 and even individuals firmly dedicated to the elimination of racism shy instinctively away from any measure that appears to grant group preferences.197 The significance and implications of this distinction between fair treatment and preferences become especially clear when one considers the disparate results of popular referenda in California, Washington state, and Houston. California’s Proposition 209 was approved by fifty-four percent of the individuals voting,198 a substantial popular endorsement of a measure that declared "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."199 The voters in Washington, in turn, approved Initiative Measure No. 200 by a similar margin,200 and by that action placed on their statute books a prohibition that used precisely the same language to ban "discrimination" and "preferential treatment."201

As originally drafted, the Houston measure reflected the letter and spirit of Proposition 209 and Initiative 200, stating that "[t]he city of Houston shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of any identity or

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199. CAL. CONST. art. I, § 31(a) (1996). The measure was immediately challenged on its face, invalidated, and eventually sustained. See Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), vacated, 110 F.3d 1431 (9th Cir.), amended and superseded by 122 F.3d 692 (9th Cir.), stay denied, 122 F.3d 718 (9th Cir.), cert. denied, 521 U.S. 1141 (1997).
200. See Sam Howe Verhovek & B. Drummond Ayres, Jr., The 1998 Elections: The Nation—Referendums; Voters Back End to State Preferences, N.Y. TIMES, Nov. 4, 1998, at B2 (noting that the measure was "running ahead, 60 percent to 40 percent").
201. WASH. REV. CODE ANN. § 49.60.1 (West 1999) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group . . . .").
national origin in the operation of public employment and public contracting."\textsuperscript{202} As submitted to the voters, however, the ballot measure read quite differently: "Shall the charter of the City of Houston be amended to end the use of affirmative action for women and minorities in the operation of City of Houston employment and contracting, including the current program and any similar programs in the future?"\textsuperscript{203} Many individuals have identified the shift in emphasis from "discrimination" to "affirmative action" as the critical factor in a vote that "put a surprising brake on a national movement that has often seemed to have the momentum of an unstoppable freight train."\textsuperscript{204} In this debate, form and substance matter. In California and Washington, the opponents of affirmative action dictated the terms of the discussion, raising the specter of discrimination as the natural corollary of any affirmative measure. In Houston, however, the measure presented was softer, asking simply if unspecified "affirmative" actions should be continued.

It remains to be seen whether, in Houston or elsewhere, "it is all in the wording."\textsuperscript{205} It does seem clear that there is a significant difference between measures intended to be simple mandates for fair treatment and those that "challenge[] the sacred American myth that landing a job, or a seat in the freshman class, is a prize one deserves thanks solely to one's own efforts."\textsuperscript{206} And, as the history of affirmative action verifies, this was not at all what those who created the construct had in mind.

\textbf{B. Origins and Evolution: From Procedural Guideline to Substantive Entitlement}

Modern "affirmative action" came into being in 1961,\textsuperscript{207} when President Kennedy issued Executive Order 10925, a measure that

\begin{itemize}
  \item 203. \textit{Id.} (quoting Proposition A as approved by the Houston City Council).
  \item 206. Sandel, \textit{supra} note 205, at 13.
  \item 207. The term surfaced much earlier, in the National Labor Relations Act, which contained a provision authorizing the National Labor Relations Board to order an employer who committed an unfair labor practice "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act. National Labor Relations Act, Pub. L. No. 74-198, § 10(c), 49 Stat. 449, 454 (1935) (codified at 29 U.S.C. § 160(c) (1994)). "Affirmative action" first became an important factor for the Court in decisions probing whether, for example, the Board had the authority to order reinstatement of individuals who had engaged in illegal conduct, \textit{see NLRB v. Fansteel Metallurgical Corp.}, 306 U.S. 240, 260-61 (1939), or possessed "unlimited" authority to impose "punitive" measures, \textit{see} Republic Steel Corp. v. NLRB, 311 U.S. 7, 11 (1940), both of which questions it answered in the negative.
\end{itemize}
VALUES OF AFFIRMATIVE ACTION

contained what one scholar justifiably described as a “vague and almost casual reference to ‘affirmative action.’” Most observers understood that the Order was intended to be a modest, largely symbolic first step in the new administration’s efforts to eventually outlaw discrimination. To the extent they thought of it at all, they sensed that the phrase “affirmative action” was a shorthand expression for a requirement of individual procedural fairness, a simple obligation to treat individuals appropriately by taking “affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.” As the person who introduced the phrase into modern race relations observed, “I put the word ‘affirmative’ in there” because “I was searching for something that would give a sense of positiveness to performance under that executive order.”

At the time, affirmative actions were thought to be procedural measures designed to insure that individual merit would be recognized. The term “affirmative action” itself was never defined in the Executive Order mandating its adoption, and thoughtful contemporary observers speculated that it “[p]resumably . . . meant such things as advertising the fact, seeking out qualified applicants from sources where they might be found, and the like.” Indeed, the major legislative and regulatory initiatives undertaken in the wake of the original Executive Order seemed to verify that this was the intent. Thus, as one contemporary commentator stressed, “[r]ead together” the various measures “indicate that the overarching policy . . . is to insure the neutrality of the hiring process—to insure that hiring decisions are made on merit, with neither positive nor negative reference to minority determinative characteristics.” A university or college might, for example, undertake “aggressive” recruitment efforts as part of the process of documenting a good faith end to prior discriminatory practices. The actual selection of students, however, and their subsequent treatment by the institution, would be governed by the traditional assumption that individual merit was dispositive. Indeed, during the early years of affirmative action many of its proponents maintained, vigorously, that “[a]ny

211. NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 46 (1975).
institution that gives preference . . . on the basis of sex, race, or ethnic origin is violating the law.”

The phrase affirmative action, then, was a shorthand expression for the quest for procedural fairness. President Kennedy’s mandate was narrow, specific, and characteristic of what one scholar characterized as “classical liberalism’s command not to discriminate.” The assumption was that positive legislative commands not to discriminate could be paired with fair and open procedures to produce a society with “equal opportunity for all qualified persons.” Accordingly, organizations acted “affirmatively” when they took specific steps to broaden the pool from which they still selected the “best qualified” candidate regardless of gender or race. The basic decision was nondiscriminatory, and the “affirmative” matrix simply reflected a willingness to discard discredited assumptions about group characteristics while aggressively seeking the most qualified applicants from a pool that would now include individuals previously excluded.

Compelling reasons supported embracing affirmative action as a matter of positive public policy. At the time that Executive Order 10925 was issued, legally enforced discrimination against women and minorities was the rule rather than the exception, and individuals from those groups were at much greater risk of being relegated to the margins of society. For example, data from 1959, 1969, and 1975 indicate that minority and female-headed households had only half the per capita income of majority households. Minority families were twice as likely to be in poverty as majority families, and minority female-headed families were five times as likely to be in poverty as majority-headed families.

These realities made it quite clear that procedural fairness was necessary. At a minimum, such reforms would provide one important means to “smoke out” inappropriate decision-making criteria and force institutions to articulate what they sought in the individuals they wished to admit and hire. In the specific context of higher education, for example, they would insure that the academic community was both perceived as, and in actuality would be, open to all.

However, actual results were mixed, particularly in higher education. As one observer noted, “[w]hile there were gains in employment opportunities for minorities and women in academia during the seventies,

218. See id. at 65-66.
startling inequalities [persisted]."\textsuperscript{219} These realities provided the foundations for a competing theory of affirmative action that emerged during the late 1960s, one that, not coincidentally, remains a mantra for those who argue that affirmative action remains necessary in the late 1990s. This alternate vision postulates that decades of discrimination make it necessary to seek both equal treatment \textit{and} equal achievement. That is, that the persistent failure of equal opportunity to translate into equal actual participation means something more is needed.

Statements to that effect found an especially receptive audience during the halcyon days of the Great Society. In a commencement address delivered at Howard University in 1965, for example, President Johnson declared that "[w]e seek not just freedom but opportunity[,] ... not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result."\textsuperscript{220} This pledge, to frame a society within which "equal opportunity is essential, but not enough, not enough,"\textsuperscript{221} eventually became a regulatory reality with the promulgation of what became known as Revised Order No. 4.\textsuperscript{222} In theory, this measure spoke simply of the need for "good faith efforts" to achieve "equal employment opportunity."\textsuperscript{223} In reality it placed substantial pressures on employers to do more than ensure equal opportunity. An "affirmative action program" was "a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort."\textsuperscript{224} Such programs must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of its work force where deficiencies exist.\textsuperscript{225}

As a result, more and more programs began to concentrate on the bottom line. Instead of serving simply as aspirations, the goals became

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  \item \textsuperscript{220} Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), \textit{reprinted in II Public Papers of the Presidents of the United States, 1965}, at 635, 636 (1966).
  \item \textsuperscript{221} \textit{Id.}
  \item \textsuperscript{222} Affirmative Action Programs, 36 Fed. Reg. 23,152 (1971). This was a Nixon administration document and reflected the strange mixture of enlightened civil rights instincts and cynical political calculation that characterized Nixon's record in these matters. For a thorough and even-handed discussion of the events, see \textit{Graham, supra note 208}. The Order remains in effect today. See Affirmative Action Programs, 41 C.F.R. \S 60-2 (1998).
  \item \textsuperscript{223} \textit{Id.} \S 60-2.10 (1998).
  \item \textsuperscript{224} \textit{Id.}
  \item \textsuperscript{225} \textit{Id.}
\end{itemize}
The transformation of affirmative action from procedural mandate to substantive goal was the product of two complementary yet contradictory motives. One was the need to insure that both the reality and effects of deliberate discrimination would end. An affirmative action mandate that did not in fact produce, or at least was not in some sense required to produce measurable results invited the accusation that it was a "sham effort[]."

A second, less commendable impulse was the need for organizations subject to the affirmative action mandate to demonstrate progress to both their government overseers and a skeptical public. The theory was quite simple:

Neutrality on the part of [an employer], even open espousal of equal opportunity, will not overcome the years of job discrimination to which minorities have been subjected. Where no affirmative action is taken by employers, as was the prevailing situation prior to 1969, recruitment and upgrading of minority individuals proceeds at an extremely slow pace.

Simply put, numerical objectives that were initially embraced as appropriate goals became very specific performance criteria against which progress was measured. The goals themselves were not, in any meaningful legal sense, quotas. They tended, nevertheless, to operate inexorably in that manner when managers mistook statistical progress for appropriate accomplishment. As Laurence Silberman, Undersecretary of Labor from 1970 to 1973, explained, "[w]e wished to create a generalized, firm, but gentle pressure to balance the residue of discrimination," but instead "[o]ur use of numerical standards in pursuit of equal opportunity . . . led ineluctably to the very quotas, guaranteeing equal results, that we initially wished to avoid."

C. Affirmative Action and Higher Education: From Process to Outcome in the Halls of Academe

The transition from procedure to substance was especially evident in higher education. Indeed affirmative action seemed to be nothing more

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227. UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 189 (1970).

228. Indeed, the regulations arguably forbid the adoption of quotas. See 41 C.F.R. § 60-2.12(e) (1998) ("Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable . . . .").

than a simple description of the manner in which higher education had always operated. In an early statement on affirmative action, for example, the American Association of University Professors stressed that the “first test of equal opportunity” is that there be “standards of competence and qualification . . . set independently of the actual choices made.” At least in theory, any “affirmative” action that involved anything more than, for example, simply broadening the pool of candidates, would have been dismissed as fundamentally at odds with both the academic ethic and higher education’s understandings of its legal obligations. The goal was the elimination of overt discrimination, and the assumption was that, to the extent positive actions were called for, higher education would “correct” its past wrongs by simply “stimulating the hiring of minorities and women.”

Of course, most parties to the educational compact had at least a basic understanding that the realities of hiring and admissions were infinitely more complex. Some of the distinctions traditionally drawn were benign, others indefensible by any possible standard. The preference for legacies, for example, may deny opportunity to someone with arguably superior credentials, but is an understandable institutional imperative, especially for private universities that depend greatly on the generosity of their alumni. The desire to exclude women and African Americans, on the other hand, often on the basis of “scientific” evidence, reflected the worst impulses of the American people.

Recognizing the need for changes, many influential actors in the academy argued for a different approach to hiring and admissions. In 1975, for example, the Carnegie Council on Policy Studies in Higher Education defined affirmative action as

actions to eliminate discrimination: creation of more adequate pools of talent, active searches for talent wherever it exists, revision of policies and practices that permitted or abetted discrimination, development of expectations for a staff whose composition does not reflect the impacts of discrimination, provision of judicial processes to hear complaints, and the making of decisions without improper regard for sex, race, or ethnic origin.

232. For an insightful, rigorous, and highly readable account of the uses and misuses of testing, see STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981). As I state infra at notes 436-43 and accompanying text, the debate continues and is, if anything, even more intense than ever.
233. CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION, MAKING AFFIRMATIVE ACTION WORK IN HIGHER EDUCATION: AN ANALYSIS OF INSTITUTIONAL AND FEDERAL POLICIES WITH RECOMMENDATIONS 2 (1975).
The Council's approach arguably was purely procedural. It spoke largely of how one treated individuals, and the operational theory remained eliminating discrimination. However, the Council condemned only the "improper" consideration of group identity, a formulation that left open ample channels for a programmatic approach within which group identity would become a positive factor in the decision-making process.

In a similar vein, the American Association of University Professors "commended" plans "which are entirely affirmative, i.e., plans in which 'preference' and 'compensation' are words of positive connotation rather than words of condescension or noblesse oblige—preference for the more highly valued candidate and compensation for past failures to reach the actual market of intellectual resources available to higher education." 234 But the position the Association embraced took matters to a new level, aiming directly at the notion that there were any defined, or even definable, dimensions to "merit":

We cannot assume uncritically that present criteria of merit and procedures for their application have yielded the excellence intended; to the extent that the use of certain standards has resulted in the exclusion of women and minorities from professional positions in higher education, or their inclusion only in token proportions to their availability, the academy has denied itself access to the critical mass of intellectual vitality represented by these groups. We believe that such criteria must thus be considered deficient on the very grounds of excellence itself. 235

It seemed the "enemy" was not simply the assumption that certain groups had no proper place in the halls of academe. Rather, it was the very belief that traditional conceptions of proper academic policy or procedure should be maintained.

To their credit, many colleges and universities recognized and accounted for the dilemma posed by conceptions of affirmative action that granted preferences. They recognized that, under this approach, in order to "get beyond" race or gender, institutions otherwise dedicated to decisions purely "on the merits" needed to expressly take race or gender into account. As one individual observed:

Affirmative action can only have the effect that is hoped for (the effect that would justify it) if employers, boards of admissions, and the like are compelled (or compel themselves) to accept a significant proportion of applicants from minority groups—even if, after giving consideration to what would traditionally be regarded

234. AAUP, supra note 230, at 155.
235. Id. at 156.
as their credentials, they must accept many whom they would otherwise have passed over.\textsuperscript{236}

It is, nevertheless, quite clear that a substantial number of institutions turned a blind eye to these realities. Rather than accepting that the affirmative measures they were undertaking effected a fundamental shift in the normal calculus, these universities pretended that this simply was not the case. One pointed example occurred at the Georgetown University Law Center in 1991, when a student with access to admissions files published an article in the student newspaper asserting that the average test scores and grade point averages of black and white students differed dramatically.\textsuperscript{237} The Dean of the Law Center sharply criticized the story, maintaining that it contained a "misleading mix of opinion and data"\textsuperscript{238} and stressing that "in deciding who is qualified, we consider not only LSAT scores and grades, but also activities and work experience, recommendations and personal statements."\textsuperscript{239} That may well have been the case. But as the controversy unfolded, it became apparent that key aspects of the student's assertions were correct, and that the Law Center's commitment to diversity and affirmative action had resulted in the admission of a substantial number of individuals whose credentials, absent the intervention of a positive preference, simply would not have qualified them for admission.\textsuperscript{240}

The difficulty with such an example is that lower does not necessarily mean inferior, at least in the sense that the individuals admitted are unqualified or otherwise unable to successfully complete their education. The Law Center insisted, vigorously, that the individuals were "qualified" for admission to a school of law, and there is no reason to doubt this. Nevertheless, the perception remained that exceptions to the rule were necessary for many of these individuals to gain admission to Georgetown, an arguably inevitable consequence in an admissions regime that strives simultaneously to maintain the veneer of elitism while pursuing an admissions strategy whose details require often substantial deviations from the


\textsuperscript{238} Saundra Torry, \textit{Black Law Students Assail Author of Article on GU Law Admissions}, \textit{WASH. POST}, Apr. 16, 1991, at C1 (quoting Dean Judith Areen).


\textsuperscript{240} See, e.g., Timothy Maguire, \textit{My Bout With Affirmative Action}, \textit{COMMENTARY}, Apr. 1992, at 50, 51 (noting that a member of the Georgetown faculty discussed in class, prior to Maguire's article in the student newspaper, the "'significant differences' in the grades and test scores of whites and minorities"); Torry, \textit{supra} note 239, at C7 (discussing university memorandum documenting a substantial difference in the median LSAT score for entering black students).
norm. That perception was reinforced by the actions of an institution unwilling to concede the obvious even, as one observer noted, when it "was news to precisely no one—especially no one at Georgetown."241

Asserting that an institutional initiative is designed to simply "level the playing field" so that all individuals may apply and be considered on an equal, nondiscriminatory basis is quite different from maintaining that active consideration of race in the admissions process is consistent with accepted norms designed to "distinguish between applicants with similarly strong objective credential[s]."242 This distinction arises, however, when affirmative measures are transformed from a mandate for procedural fairness into some variation on what might properly be characterized as a substantive entitlement. All institutions and virtually all proponents of affirmative action deny vigorously that diversity initiatives do, or even should, create such absolute preferences.243 The difficulty with these protestations is that actual practices often reveal that such is precisely the case, especially when tested in the unforgiving light of litigation. It is in these examples, which shape both the public perception and judicial response to diversity initiatives, that the fate of affirmative action lies.

III
FROM PRINCIPLE TO PRACTICE:
AFFIRMATIVE ACTION AND HIGHER EDUCATION IN THE COURTS

"If I tried to get away with it," said George, "then other people'd get away with it—and pretty soon we'd be right back to the dark ages again, with everybody competing against everybody else. You wouldn't like that, would you?"

"I'd hate it," said Hazel.

"There you are," said George. "The minute people start cheating on laws, what do you think happens to society?"244

Who is "cheating" in the affirmative action debate? Those who oppose the sort of preferences routinely associated with an affirmative action program believe they are the ones espousing the quintessential American value, equal treatment of equal individuals. Those who believe deeply that diversity matters, in turn, argue with equal vehemence that our society is in fact immeasurably better when positive steps are taken to fashion colleges and universities that "look like America." And both sides insist that the law is on their side.

242. Georgetown Law Center, supra note 190.
244. VONNEGUT, supra note 23, at 929.
Unfortunately, the law of affirmative action is an infinitely malleable beast. As I have already indicated, each individual citizen is entitled to the equal protection of the laws, and any program invoking a "suspect" decision-making criterion must establish that it is pursuing interests of the highest order in the least discriminatory manner possible. In particular, affirmative measures taking race into account are subject to "strict scrutiny," a judicial balancing act that courts use to assess the relative importance of the interest at issue and the precision with which the institution pursues that objective. The process has been characterized as one in which a court looks for an interest that is "so strong, so important, that a threat to it not only suggests, but actually compels" action. It also requires that there be both "a strong basis in evidence" for selecting the approach chosen, and that the institution articulate and embrace a policy stance "before" it embarks on an affirmative action program.

The formulation is admittedly imprecise. The Supreme Court has never offered a workable definition of the term "compelling interest" and is unlikely ever to do so, preferring to approach matters on a case-by-case basis. Even without a definition, the compelling interest inquiry is exacting and while its basic structure offers the opportunity to achieve important social goals, it also affords decision makers a sufficient degree of latitude to make mistakes. Ironically, higher education has generally led the way. Nowhere is this more apparent than in the various affirmative action cases that have originated from the nation's professional schools, within which one routinely finds institutions defending initiatives they almost certainly knew were inappropriate from their inception. Indeed, as I will now explain, many of these decisions make it clear that one factor in particular has had a profound influence on the evolution of affirmative action: the tendency on the part of individuals in positions of authority within higher education to embrace the easiest possible, and almost always totally inappropriate, means to an otherwise laudable end.

248. I make this claim knowing that responsible and honorable individuals at these institutions maintained that their programs were in full compliance with the Court's decisions. It is difficult, however, to understand the bases for these beliefs when so many of these programs include elements that so clearly violate both the letter and spirit of Bakke. Perhaps I read that decision too narrowly. But it seems that one clear aspect of it is that an institution cannot establish two-track admissions systems, which is precisely what Texas, see infra text accompanying notes 324-26, Boalt Hall, see infra text accompanying notes 361-64, Stanford, see infra text accompanying note 365, Michigan, see infra text accompanying notes 366-67, and Arkansas, see supra text accompanying note 84, have done in the past.
A. Setting the Stage: Bakke and the Diversity Rationale

In Regents of the University of California v. Bakke,\(^{249}\) for example, the Court assessed a program developed by the medical school at the University of California at Davis to identify and admit ""economically and/or educationally disadvantaged" applicants."\(^{250}\) These terms were never formally defined. Rather, after first allowing students to self-select for consideration under the policy, ""the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation."\(^{251}\) The committee then evaluated those who met this criterion ""in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants."\(^{252}\)

Allan Bakke applied for admission twice, and was rejected both times.\(^{253}\) Suspecting that the special admissions program played a role, he challenged the decision to deny him a place in the entering class. When the case went to trial the record indicated that the only individuals admitted under this program were minorities. While the medical school characterized the admission of such students as a ""goal,"" the program appeared to have reserved, apparently absolutely, sixteen of the one hundred available seats in the entering class for such ""disadvantaged"" students.\(^{254}\) Each of these individuals was, arguably, fully qualified for admission. Indeed, the University insisted that this was the case.\(^{255}\) Nevertheless, the credentials of the students admitted under the program were generally substantially below those of students who entered through the regular admissions process, and Allan Bakke's grade point average and test scores were considerably higher than the average for the special admittees in each of the ""objective"" categories employed by the medical school.\(^{256}\) Admittedly,

\(^{250}\) Id. at 274.
\(^{251}\) Id. at 275.
\(^{252}\) Id.
\(^{253}\) For this and other factual details related in this paragraph, see id. at 276-79. For a brief and highly readable account of the case, see Michael Selmi, The Life of Bakke: An Affirmative Action Retrospective, 87 Geo. L.J. 981 (1999).
\(^{254}\) There is now some dispute as to whether all 16 ""slots"" were reserved absolutely for minorities. See, e.g., Joel Dreyfuss & Charles Lawrence III, The Bakke Case: The Politics of Inequality 183 (1979) (indicating that in 1974 one special admissions slot was ""returned"" to the regular admissions pool). It also appears that the dean reserved the right to intervene in the admissions process ""on the side of fairness"" and each year controlled up to five seats that went to ""well-connected applicants."" Id. at 24, 42-43. This fact called the University's use of benchmark scores into question and actually reduced Bakke's chances of admission still further. On the basis of the record before the Court, however, Justice Powell's conclusion that only 84 of the 100 available seats were open to regular admission candidates was clearly correct. Bakke, 438 U.S. at 289.
\(^{255}\) See Brief for Petitioner at 6, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) (""All students admitted are fully qualified to meet the requirements of a medical education at Davis.").
\(^{256}\) See Bakke, 438 U.S. at 277 n.7.
and as the University stressed, these numerical indicators were not the only criteria employed. Each applicant also underwent a personal interview, submitted a personal statement and letters of recommendation, and was assigned a composite score reflecting both the basic credentials and the judgments of an admissions committee that screened all available materials. But the University's use of the principle objective measures and its own propensity for ranking candidates on a numerical basis reinforced the impression that the admissions process was largely an objective inquiry, and that the departure from that regime in Bakke's case had to be motivated by concerns other than a desire to identify the "best" candidates for admission.

The University committed multiple sins. It did not define at all, much less with precision, what it sought to achieve. To the extent it did articulate a goal for the special admissions program, that objective was not tied, in any convincing way, to the realities that arguably impelled its creation. The program created a two-track system, within which the records and credentials of individuals under consideration for special admissions status were never compared with those of the individuals in the "regular" admissions track. It also lowered the admissions threshold for the special admissions applicants in a system which, while ostensibly dedicated to the welfare of all, yielded at the end only minority admittees. As a result, the inference that the medical school had created a quota for less qualified, albeit arguably not necessarily unqualified minority students was virtually inescapable.

The Court found the Davis program unconstitutional. Unfortunately, as Justice Powell conceded when announcing the decision, it did so "with a notable lack of unanimity." Five members of the Court, speaking through five written opinions, found that a public university could in fact have "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." A different group of five, in turn, found that the University had failed to establish that the particular approach adopted by Davis was "necessary to promote a substantial state interest."

257. Bernard Schwartz, Behind Bakke: Affirmative Action and the Supreme Court 143 (1988) (quoting Justice Powell). The degree of fragmentation may have been unique for the time but has unfortunately become a hallmark of many of the Court's most recent decisions dealing with the volatile issue of race in America. See, e.g., Bush v. Vera, 517 U.S. 952 (1996) (including six written opinions, of which one was Justice O'Connor's separate concurrence with the plurality opinion she herself wrote).

258. Bakke, 438 U.S. at 320 (opinion of Powell, J.). The five were Justice Powell, who announced the "judgment" of the Court, and Justices Brennan, White, Marshall, and Blackmun, who each joined portions of the Powell opinion and each wrote separately. As I note infra note 302-03 and accompanying text, however, Justices Brennan, White, Marshall, and Blackmun would have found the Davis program constitutional.

259. Id. This group of five included Justice Powell, joined by Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist, who expressed themselves through the Powell opinion and a single
The common link was the opinion of Justice Powell, which came to be regarded as the opinion of the Court. That characterization, as the Fifth Circuit emphasized in Hopwood, is technically inaccurate: No other member of the Court agreed with Justice Powell in all respects. The failure of any other opinion to expressly praise "diversity" per se, however, hardly means, as the Hopwood panel maintained, that Justice Powell's "lonely" opinion was the only one that "concluded that race could be used solely for the reason of obtaining a heterogeneous student body." Indeed, for reasons I will now explain, the other Bakke opinions are notable, not for their express rejection of the Powell position, but rather either for accepting its central premise regarding the importance of a diverse learning environment, or for expressly rejecting the need to consider the question at all in the light of the improper manner in which Davis proceeded.

The essential consideration for Justice Powell was his belief that universities had a compelling interest in pursuing "genuine diversity." Davis's "dual admission program," however, effected a racial classification that disregarded Allan Bakke's individual rights. This, Justice Powell believed, ran counter to the very premise that should sustain such programs. In a key passage, Justice Powell declared:

> It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Justice Powell's opinion reflected his considered judgment that the pursuit of a diverse student body was an appropriate and respected academic goal. Drawing on both the academic literature and the Court's own opinions, he declared that "our tradition and experience lend support to the view that the

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additional opinion written by Justice Stevens, who objected to the decision of the case on constitutional grounds when it could have been dealt with on statutory grounds. See id. at 411-12.

260. See, e.g., Antonin Scalia, The Disease as Cure: "In order to get beyond racism, we must first take account of race," 1979 WASH. U. L.Q. 147, 148 (describing "Justice Powell's opinion, which we must work with as the law of the land"). Admittedly, Justice Scalia then spoke as Professor Scalia, and criticized the Powell opinion as "thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution," id., and he might well disavow the statement today. But his characterization of the Powell opinion as "the law of the land" was a common theme until Hopwood burst on the scene.

262. Id. at 944-45.
263. Bakke, 438 U.S. at 315.
264. Id.
contribution of diversity is substantial.” The linchpin in his analysis was an expectation that institutions opting to pursue diversity would in fact do so by simply “pay[ing] some attention to distribution among many types and categories of students.”

Critics castigate this suggestion that race can somehow be treated simply as a “plus” in the admissions process, stressing that, “as a practical matter, [it] seem[s] difficult to allow race to be used as one factor in admissions without that factor eventually becoming the determining factor.” In their estimation, the Powell formulation was, at best, disingenuous. Indeed, in an otherwise highly favorable biography of Justice Powell, Professor Jeffries characterizes the attempt to distinguish the Davis and Harvard approaches as “a transparent failure” and “pure sophistry.”

Justice Powell’s opinion, however, did reflect the considered judgment of a wide spectrum of the higher education community on what universities should seek through their admissions programs. Unfortunately, Davis failed to implement that judgment in an appropriate manner. Rather, it appeared to act in a mechanical way, leading one ineluctably to the conclusion that the program reflected a “facial intent to discriminate,” not through its antipathy toward Bakke as an individual, but rather through its clumsy elevation of race per se as a selection criterion. Ultimately then, the manner in which the University acted tipped the balance against it. By creating an admissions regime in which race appeared to be the dominant consideration, and by allowing Allan Bakke to set himself up as an individual with “superior” qualifications who would have been admitted but for the special admissions program, the University set the stage for failure.

This was certainly the essence of Justice Stevens’s comparatively terse opinion finding that the University program was a clear violation of Title VI of the Civil Rights Act of 1964. That opinion, which provided the

265. Id. at 313.
266. Id. at 316-17 (quoting Harvard College Admissions Program statement).
267. Id. at 316-317 (quoting Arnold Foster, General Counsel, Anti-Defamation League of B’Nai B’rith).
268. See, e.g., William J. Bennett & Terry Eastland, Why Bakke Won’t End Reverse Discrimination: 1, COMMENTARY, Sept. 1978, at 29, 32 (“[T]here is an admissions program at Harvard College that is not called a special-admissions program but is a special-admissions program nonetheless.”).
270. See supra Part I.B.
272. The interplay is perhaps best reflected in the majority opinion of the California Supreme Court which states, “the question we must decide is whether the rejection of better qualified applicants on racial grounds is constitutional.” Bakke v. Regents of the Univ. of Cal., 553 P.2d 1152, 1162 (1976). The dissent rejoined that this was “simply not the case,” and that “[t]he record establishes that all the students accepted by the medical school are fully qualified for the study of medicine,” id. at 1173 (Tobriner, J., dissenting), a contention that, while arguably true, refuses to join battle on the grounds selected by Bakke and the judges who agreed with him.
margin against the University, emphasized that “[t]he University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race.”

The focus was narrow and specific: Did this program discriminate against this particular individual? The issue was not “whether race can ever be used as a factor in an admissions decision,” a consideration Justice Stevens maintained pointedly “is not an issue in this case.” It was, rather, the “natural meaning” of Title VI, which provides that “[n]o person . . . shall, on the ground of race . . . be excluded from participation in . . . any program or activity receiving Federal financial assistance.” Neither theory nor policy mattered, but only whether the University treated this individual in an illegal manner.

The notion that Justice Powell stood alone in his tolerance of race as a criterion is then not as self-evident as the Hopwood panel maintains. The Stevens opinion arguably reflects nothing more than disagreement with the manner in which the program was crafted and operated. Justice Stevens did not discuss the mechanics of the program, or even Allan Bakke’s qualifications. But he did emphasize that method mattered, stressing that the Davis program presented the precise scenario that opponents of Title VI “feared,” one within which “the [measure] would be read as mandating racial quotas and ‘racially balanced’ colleges and universities.” The Stevens opinion hardly represents an express repudiation of race as a decision-influencing characteristic. Rather, it highlights an important distinction regarding the manner in which an institution may proceed. A program that operates as a quota, inflexibly denying an individual an opportunity to compete differs fundamentally from one that, as Justice Stevens himself subsequently stressed, identifies precisely “the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment” and specifies how the “race-based decisions . . . may produce tangible and fully justified future benefits.”

Justice Brennan, in turn, stated explicitly that he and the three Justices who joined his opinion “agree with Mr. Justice Powell that a plan like the

274. Id. at 411.
275. Id. at 418.
277. Bakke, 438 U.S. at 414-15. Justice Stevens has himself stressed continuously that he does not agree “that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.” City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (Stevens, J., concurring); cf. Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (“[T]he Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs.”).
278. Croson, 488 U.S. at 514 (Stevens, J., concurring).
279. Id. at 511-12 n.1. Significantly, it is the portion of Justice Powell’s Bakke opinion discussing the value of a “diverse student body,” 438 U.S. at 311-19, that Justice Stevens cites to illustrate this proposition.
‘Harvard’ plan . . . is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.” The *Hopwood* panel characterized the concluding phrase of Brennan’s observation as “implicitly reject[ing] Justice Powell’s position,” but it is hardly clear that such was the case. The court does not explain its reasoning, but it must have believed Justice Brennan’s language to be consistent with the rule that only a remedial purpose suffices when an entity acts in a race-conscious manner and the entity itself must be the “guilty” party.

This may well be the rule today assuming, as the *Hopwood* panel did, that *Bakke* itself is no longer good law for the very limited purpose of assessing the validity of race-sensitive decisions in university admissions. Of course, the burden for the court was not to predict where the Court might stand on that issue today. Indeed, the Court itself has recently reminded one and all that

> [w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that ‘[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’

The proper course for the *Hopwood* panel was, accordingly, to explain why it assumed that Justice Brennan and his colleagues had in fact refused to accept the Powell formulation, not why it believed it had been “implicitly rejected.”

This is a difficult, if not impossible, task given that Justice Brennan’s opinion expressly joined the portion of the Powell opinion asserting “that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” Indeed, while Justice Brennan went to great lengths to stress his agreement that “the failure of minorities to qualify for admission at Davis under regular procedures was due

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281.  *Hopwood*, 78 F.3d at 944.
282.  *Hopwood*, 78 F.3d at 944.
283.  See id. at 949 (“The Supreme Court has ‘insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.’” (quoting *Wygant* v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (Powell, J., plurality opinion)).
285.  *Hopwood*, 78 F.3d at 944.
286.  *Bakke*, 438 U.S. at 320. This statement is found in Part V.C of the Powell opinion which, as the Reporter’s Syllabus notes, Justices Brennan, Marshall, White and Blackmun joined. See id. at 267.
principally to the effects of past discrimination," he made it equally clear that he was not speaking of discrimination on the part of Davis, an entity that was, within the letter and spirit of the Court’s decisions, undertaking “voluntary efforts to further the objectives of the law.” Justice Brennan also stressed at the close of his opinion that the sole distinction he found between the Harvard and Davis approaches was that “the Harvard approach does not also make public the extent of the preference and the precise workings of the system.” Institutions were, accordingly, free to embrace the Harvard approach if they wished, a position that most assuredly does not reject the diversity rationale, as the Hopwood panel maintained.

There is one important difference between the Powell and Brennan opinions, for Justice Brennan believed that affirmative measures of this sort should be subjected to a form of “intermediate” review. It was largely on that basis that he parted company with Justice Powell. It is important to recognize, however, that the Hopwood panel treated the strength of the University’s interest in taking race into account as the critical consideration. The Hopwood panel proceeds as though Bakke’s contribution to affirmative action law is the conclusion that diversity is not a compelling constitutional interest. However, it is difficult to find any distinctions between the Brennan and Powell approaches on this specific question. Justice Brennan devoted a substantial portion of his opinion to a detailed recitation of the reasons why both the Constitution and Title VI allowed the University to consider race as part of its admissions process. Both the level of detail, and the nature of the analysis, make this portion of the Brennan opinion virtually indistinguishable from the approach routinely taken in strict scrutiny cases. That is presumably why Justice Brennan felt compelled to stress that his approach in Bakke, while “not ‘strict’ in theory and fatal in fact, because it is stigma that causes fatality,” is “strict and searching nonetheless.” Indeed, the focus on “stigma” is telling, for it was that consideration that Justice Brennan believed distinguished what

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286. *Id.* at 365 (Brennan, J., concurring in part and dissenting in part).
287. *Id.* at 364.
288. *Id.* at 379. For Justice Brennan, this was a distinction without a difference, “which does not condemn the [Davis] plan for purposes of the Fourteenth Amendment.” *Id.*
289. The level of scrutiny to which Justice Brennan subjects the Davis program, for example, is virtually indistinguishable from Justice O’Connor’s discussion of the details and mechanics of the Richmond set-aside program in *Croson.* See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989).
290. *Id.* at 362 (quoting Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)). Professor Tushnet highlights the importance of the language chosen when he notes that “Brennan waffled over the right doctrinal formulation. He toyed with the idea of accepting strict scrutiny as the standard but watered it down so that it would not be ‘strict’ in theory and fatal in fact,” in *Gerald Gunther’s famous phrase.* MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991, at 132 (1997).
Davis did from impermissible measures, those that "are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" and "are invalid without more."  

Simply put, the "interest" analysis in Brennan's Bakke opinion cannot be distinguished from the analysis routinely conducted by the Court when it tests the strength of a government action within the traditional strict scrutiny formulation. The distinction between a "compelling" interest and one that is simply "important" may be ephemeral, both as an absolute matter and in the analysis required. Indeed, various members of the Court have said as much. In Wygant v. Jackson Board of Education, for example, Justice O'Connor observed that "[i]n particular, as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one." Justice Stevens has consistently maintained that there is no real difference in the analysis: "[A]ll equal protection jurisprudence might be described as a form of rational basis scrutiny; we apply 'strict scrutiny' more to describe the likelihood of success than the character of the test to be applied." And Justice Scalia has complained that "[t]hese tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case."  

This means, as a practical matter, that the Hopwood panel elevated form over substance when it insisted that Justice Powell stood alone in the manner in which he treated the diversity interest. If anything, the court mistook the forest for the trees in its eagerness to discredit Justice Powell and isolate him from the other members of the Bakke Court. For example, the Hopwood panel praised Justice O'Connor's emphasis in Croson on the need to "smoke out" the "illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a

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291. Bakke, 438 U.S. at 357-58 (Brennan, J., concurring in part and dissenting in part). The same attention to the nature of the justification characterizes the opinions of Justices Marshall and Blackmun, particularly as pertains to the nation's history of discrimination against African Americans.


293. Id. at 267 (O'Connor, J., concurring in part).

294. Bush v. Vera, 517 U.S. 952, 1010 (1996) (Stevens, J., dissenting). Justice Stevens here cites his concurring opinion in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 452-53 (1985), in which he explains why certain types of distinctions, including those drawn on the basis of race, are "utterly irrational" and fail under his approach. I agree with him to the extent he argues for a more convincing definition of what it means to characterize an interest as "rational," an approach that rejects what I characterize as the "anything works if someone could have thought of it" analysis expressed in cases such as Railway Express Agency v. New York, 356 U.S. 106, 109-10 (1949). I am less willing to take the next step, which would relax the requirement that any measure tested under strict scrutiny in fact be narrowly tailored.


highly suspect tool.” But, as his emphasis on “stigmatic” harm demonstrates, Justice Brennan’s approach to assessing the nature and constitutional import of the purported state interest tracks precisely Justice O’Connor’s approach. Admittedly, it is unlikely that a university pressing for express approval of “benign” discrimination would be able to muster majority support on the current Court for a ruling that would “construe remedial [measures] designed to eliminate discrimination against racial minorities in a manner which would [not] impede efforts to attain this objective.” As Adarand makes clear, the Court’s adherence to a regime of “skepticism” and “consistency” insures an analytic approach within which “[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.” But how many people are willing to say with a straight face that they believe Justices Brennan and Marshall would not have embraced diversity as a compelling interest in Bakke, but for the particular approach before them?

The departure from true strict scrutiny in Justice Brennan’s Bakke opinion comes not in its assessment of the strength of the University’s interest in the use of race as a factor in its admissions process, but rather at the second stage of the inquiry, which will sustain a program “only if no less restrictive alternative is available.” As I have already noted, Part V.C of Justice Powell’s opinion, which expressly commanded five votes, emphasized the need to attain diversity through a properly devised admissions program. Unfortunately, the Brennan group was willing to tolerate an admissions regime that did not in fact offer “competitive consideration,” but rather looked like, smelled like, and tasted like a “quota.” On the critical question of approach, the Brennan group insisted that “[f]or purposes of constitutional adjudication, there is no difference between” the Davis system, which set “a fixed number of places for [minority] applicants,” and “using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants.” Indeed, they praised Davis for undertaking expressly what other institutions did covertly, noting, for example, that “[i]t may be that the Harvard plan is more acceptable to the public than is the Davis ‘quota.’”

300. Id. at 226 (quoting Drew S. Days, Fullilove, 96 YALE L.J. 453, 485 (1987)).
301. Bakke, 438 U.S. at 357 (Brennan, J., concurring in part and dissenting in part).
302. Id. at 378.
303. Id. at 379. Once again, language may have mattered, for Justice Brennan also appeared to reject the notion that the Davis approach was a “quota.” See id. at 375 (“The program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted.”).
It is difficult to tell if these and similar statements represented the fully considered opinion of their authors, or if they were simply an attempt to put the best possible gloss on an unfortunate situation. As their opinions in Bakke made clear, Justices Brennan, Marshall, and Blackmun believed strongly in the moral imperative implicit in the Davis approach. But it is highly unlikely that they themselves would have crafted a program of the sort presented to them, if given the choice. Each, for example, had voted against granting the writ in Bakke, sensing, correctly as it turned out, that it would be "a bad vehicle for deciding whether affirmative action was unconstitutional." Justice Brennan in particular "feared that Bakke was a risky vehicle for the purpose," believing that "a majority of the Justices might be so repelled by the existence of such a 'quota' that they would not only strike down the program but also indicate that race could never be considered in the admissions process." Faced with the program Davis adopted, however, and recognizing the possible implications of a decision barring all consideration of race, Justice Brennan and his colleagues mounted a vigorous defense of an admissions regime that "us[ed] categorical means to achieve its ends."

Their willingness to do so was clearly ill-advised, for it sanctioned a form of treatment that maximized the likelihood that individuals adversely affected by measures of this sort could set themselves up as "victims" of a system in which individual rights are sacrificed for the sake of group entitlement. Tolerance for such measures, moreover, ran counter to the lessons of history noted by Justice Stevens, who stressed how fear of group entitlements dominated congressional debate over the Civil Rights Act of 1964. Indeed, that history is worth recounting, for perhaps the dominant theme in the affirmative action debate is now, and always has been, "the 'Q' word": do affirmative action measures articulate flexible goals, or impose rigid quotas?

304. Tushnet, supra note 290, at 122. The conference vote is set forth in Schwartz, supra note 257, at 42. Chief Justice Burger also voted against hearing the case, but would ultimately join the Stevens bloc.
305. Schwartz, supra note 257, at 41-42. Many civil rights organizations shared this view, pressuring the University not to appeal and ultimately filing formal objections with the Court. See id. at 25; Lesley Oelsner, Court to Weigh College Admission That Gives Minorities Preference, N.Y. Times, Feb. 23, 1977, at 12.
307. See id. at 414-18 (Stevens, J. concurring in part and dissenting in part).
During the debate over what was to become the Civil Rights Act of 1964, Senator Hubert Humphrey responded to the charge that the measure would foster race-based employment policies by promising that "[i]f the Senator can find . . . any language [in the bill] which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there." Senator Humphrey was justifiably concerned that Southern senators would exploit the specter of quotas and, by implying that civil rights were not in fact equal rights, prevent passage of the Act. Senator Ervin of North Carolina in particular attacked the measure as an initiative calculated "to cause discrimination in reverse." In response, the floor managers for the measure emphasized that

[there is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual.]

These and similar assurances arguably expressed the central premise of "true" affirmative actions. Such measures were not intended to be, and should never be understood as, "discrimination." Rather, they were measures designed to answer the question "[a]mong the qualified, how does one choose?" That was supposedly the approach Davis embraced. But it was a theory that the realities of the program exposed as a sham or, at least, an aspiration its proponents were unable or unwilling to attain.

Like the opinion itself, reactions to Bakke were deeply divided. Each side claimed victory, even as thoughtful observers worried about the decision's long term implications. In particular, many individuals fretted about just how institutions would implement a system in which race was simply a "plus," rather than a determinative factor. And they worried that the logical outcome for any institution seeking a racially diverse student body would be to engage in conduct similar or identical to that undertaken by Davis, albeit without admitting it.

311. 110 CONG. REC. 7212, 7213 (1964).
313. For a sampling of the reactions, see Dreyfuss & Lawrence, supra note 254, at 225-28; Jeffries, supra note 269, at 496-98.
314. See Bennett & Eastland, supra note 268, at 32.
That prediction has proven tragically prophetic: Today, numerous colleges and universities continue to employ virtually the same approach the Court rejected, even as they deny that race factors into the decision-making process. These programs have managed, if anything, to deepen the judicial and public hostility toward affirmative action because it is virtually impossible to conclude that the individuals who crafted them acted in good faith, either in following the law or in creating sound education policy. Perhaps the most instructive example of this is the University of Texas School of Law admissions regime struck down in Hopwood, the current poster-child for those who castigate affirmative action.

B. Exit, Stage Right? Hopwood and the Assault on Diversity

Ironically, Hopwood was directed at the same institution that gave the Supreme Court its first real opportunity to sketch the parameters of what would ultimately become the diversity rationale articulated in Justice Powell’s opinion in Bakke. In 1950, in Sweatt v. Painter, another case involving the University of Texas School of Law, the Court first articulated the threads of the diversity rationale. The conduct at issue in Sweatt differed in fundamental ways from the issues raised in Bakke, for it was impossible to maintain that the Law School’s actions in Sweatt were in any way “benign.” Heman Sweatt was a fully qualified candidate for admission who was excluded from the Law School “solely because he [was] a Negro.” The Court rejected the state’s contention that the alternative it offered, a separate law school for African Americans, was constitutionally permissible. In doing so, it did not repudiate the “separate but equal” doctrine articulated in Plessy v. Ferguson, but held rather that Sweatt could “claim his full constitutional right: legal education equivalent to that offered by the State to students of other races.” And it stressed not simply the superior quality of the Texas program, but also, in language that foretold the rationale embraced by Justice Powell in Bakke, the nature of the educational experience:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is

317. Id. at 631.
318. See id. at 634.
319. 163 U.S. 537 (1896).
320. Sweatt, 339 U.S. at 635. Plessy’s demise came six years later, when the Court extended the logic of Brown to higher education in a case involving the University of Florida College of Law. See Florida ex rel. Hawkins v. Board of Control, 350 U.S. 413 (1956).
willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.\footnote{Sweatt, 339 U.S. at 634.}

Heman Sweatt would soon leave the law school "without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings,"\footnote{Hopwood v. Texas, 861 F. Supp. 551, 555 (W.D. Tex. 1994).} experiences replicated in a variety of ways for the next forty years as Texas struggled to free itself from a heritage of discrimination. During that period, the law school implemented a variety of admissions programs designed simultaneously to control the size of the entering class and to increase the number of minority students enrolled. These efforts took various forms, with two themes eventually emerging: a desire to maintain its status as the premier law school in Texas and one of the best in the nation, and a competing desire to achieve a student body whose composition reflected the demographics of the state. As part of that process, the law school seemed to be sensitive to the need to pursue these objectives in light of the Court's pronouncements. In the early 1970s, for example, it created a separate committee to review applications from minority students, a procedure it abandoned in 1978 as "defective" given the Court's decision in Bakke.\footnote{See id. at 558; see also Barbara Bader Aldave, Hopwood v. Texas; Much Ado About Nothing?, TEx. LAW., Nov. 11, 1996, at 43. As Professor Aldave notes in this article, she was Chair of the Minority Admissions Committee at Texas when Bakke was decided and participated in a "redesign" of the process that "followed the road map provided by Justice Powell's pivotal opinion," id. at 43, a redesign that eliminated a two-track system.}

Eventually, the law school adopted the admissions program under which Cheryl Hopwood would apply. That approach, as the ensuing litigation revealed, pursued a series of minority enrollment goals in ways that did not simply test the limits of the Bakke rationale, but actually embraced many of the characteristics the Court had expressly condemned. The Texas program created a two-track system within which the applications of non-minorities and those of the "favored" minorities, African Americans and Mexican Americans, were evaluated separately.\footnote{See Hopwood v. Texas, 78 F.3d 932, 936 (5th Cir. 1996).} The program's numerical screening device, the "Texas Index," which reflected a composite of the applicant's undergraduate grade point average and score on the Law School Admissions Test, used two standards, one for white applicants and
another for minority candidates. And the law school routinely adjusted these numerical standards to produce an entering class that closely approximated its racial goals.

Both the district court and the court of appeals had little difficulty rejecting an admissions program that the law school itself appeared to concede was indefensible by abandoning it prior to trial. The district court, which treated Justice Powell's Bakke opinion as controlling precedent, held that the 1992 admissions procedure was not narrowly tailored, because it "fail[ed] to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race." However, the court of appeals was unwilling to accept Bakke as law and affirm. Rather, the panel rejected Justice Powell's opinion in Bakke, holding that "the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny."

As I have already explained, the Hopwood panel's conclusion that the Powell opinion was not controlling precedent is of doubtful validity, resting as it does on an ironically activist view of what the current Court might hold on the issue, as opposed to what Bakke and the cases that followed held. It is important, however, to keep in mind exactly what the court was asked to assess, for the conclusion is virtually inescapable that Texas acted in a defiant and irresponsible manner.

The law school's motives in designing its admissions program were commendable. As the current dean of the law school has stressed, in the wake of Bakke, "the Law School began a difficult process of designing an admissions system in an increasingly competitive environment that would both ensure the highest possible caliber of students and break down the legacy of exclusion that continued to plague Texas higher education." The law school faced admittedly formidable obstacles, given its aspirations and situation. As numerous studies have documented, relatively few minority applicants satisfy the current numerical standards of the elite institutions. Perhaps more to the point, any process that screens

325. See id.
326. See id. at 936 n.6.
327. See Hopwood v. Texas, 861 F. Supp. 551, 582 n.87 (W.D. Tex. 1994). The record seems to indicate that the law school did so reluctantly, and only because it was found out. See, e.g., Janet Elliott, UT Responds to Suit With Policy Changes, TEX. LAW., May 23, 1994, at 10 (indicating that the suit was the precipitating factor and quoting the chair of the admissions committee as testifying that "[w]hen one gets sued in federal court, it catches one's attention").
329. Id. at 579.
330. Hopwood, 78 F.3d at 948.
applicants in a less objective manner is time-consuming and expensive. For example, the system employed for undergraduate admissions at Harvard requires the time and energy of a substantial staff, an official admissions committee of thirty-five, and the volunteer efforts of 5,000 alumni who conduct applicant interviews around the world. Apparently, Texas did not have the resources, or simply did not wish to commit the time and energy required to implement such a process. Instead, Texas embraced an approach consistent with its desire to fashion an entering class that tracked closely its proportional goals, even at the risk of "lowering standards" and returning in important respects to a regime that it had abandoned in the wake of Bakke. While Texas did not set up a quota system like Davis, the approach at issue in Hopwood, undertaken after considerable experimentation over the years, was "markedly similar to [its own] pre-Bakke procedure of two separate committees." Indeed, in language that tracked the fault identified by Justice Powell, the district court stressed that the Hopwood approach "fail[ed] to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race." It seems that at Texas, "[f]or whatever reasons, the law school administration apparently no longer felt bound by the restraints imposed by Bakke."

Perhaps the most troubling aspect of Hopwood was that a law school, fully aware of the Bakke decision, created a two-track admissions process within which minority candidates competed only against themselves for admission and were assessed at a lower objective threshold than individuals considered under the regular admissions process. Most people assume—and certainly most courts expect—that "[l]aw schools are filled with faculty sensitive to law and legal decisions." Accordingly, even if the record had not indicated that Texas had altered its admissions system in response to Bakke, it is appropriate to believe that the law school was aware of, and would respect, the mandates of that decision. Thus, although the panel appeared to accept that the law school acted "[w]ith the best of

333. See Weber, supra note 13, at 47. Harvard received 18,000 applications for the 1,620 slots available during the admissions cycle described in the article, id. at 46, a ratio of slightly over 11 applicants for each space. In the fall of 1992, the year Cheryl Hopwood applied, Texas received 4,494 applications for the approximately 500 spaces available, a ratio of 9 applicants for each slot. See Hopwood, 861 F. Supp. at 563 n.32.

334. See Hopwood, 861 F. Supp. at 558 (noting that in 1978, "[t]he law school determined that, although its procedure differed from that at issue in Bakke, the use of the separate committees to evaluate applicants was defective").

335. Id. at 560.

336. Id. at 579; cf. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (characterizing a system that "insulat[es] each category of applicants with certain desired qualifications from competing with all other applicants" as "inconceivable" and "illogical").

337. Aldave, supra note 323, at 43.

338. Welch & Gruhl, supra note 186, at 2.
intentions," it is unlikely that the panel actually believed this to be the case.

The law school's protestations that its approach was "consistent with similar processes used at major law schools across the country" rang hollow in light of both the law, which does not excuse illegal conduct simply because others act in a like manner, and the evidence, which indicated that institutions employing such systems had abandoned them. And while its Statement of Policy on Affirmative Action offered an eloquent explanation of the approach taken, that statement was a post hoc formulation and thus contrary to clear Court precedent. These and other factors almost certainly undermined the panel's willingness to ascribe the requisite good faith to the law school's efforts, efforts that created the impression that factors other than sound educational considerations and a respect for the law informed and compelled the law school's actions.

The law school vigorously asserted two plausible explanations for its behavior during the litigation. First, the law school clearly believed that attaining a diverse student body was a moral and educational imperative, one the institution had an affirmative obligation to pursue. As I have already noted, that position was worthy of respect in light of the law school's history and a measured reading of Bakke, which extolled the virtues of a diverse learning environment. Second, the law school was under considerable pressure to meet the requirements of a 1983 consent decree negotiated with the federal Office of Civil Rights that imposed specific minority enrollment targets.

But even if the law school's ends were noble, what can be said in support of adopting a means expressly condemned by Justice Powell? The most likely explanation, and perhaps the least defensible one, seems to be that Texas's approach offered a convenient and cost-effective means for achieving the desired objectives. Indeed, the chair of the University of Texas Law School Admissions Committee conceded as much in his

340. Hopwood v. Texas, 861 F. Supp. 551, 576-77, n.72 (W.D. Tex. 1994). Texas was correct in one sense: its two-track system was markedly similar to those employed by a number of law schools during the same period that Texas used that approach. Unfortunately, most of them abandoned those aspects of their admissions regimes that tracked the Texas approach prior to the Hopwood trial, a fact expressly noted by the trial court with respect to Stanford. See id. at 576 n.72. I discuss the programs and experiences of these other schools infra at text accompanying notes 361-67
341. See id. at 569-70 & n.55 (quoting the statement and noting that it was developed in February 1994).
342. See Hopwood, 78 F.3d at 948.
343. See Hopwood, 861 F. Supp. at 555-57 (detailing the history of the negotiations with the Office of Civil Rights and noting that it was then-Assistant Secretary of Education Clarence Thomas who notified Texas of specific failures regarding numeric goals for professional schools).
testimony. The Texas Index provided an initial screening device that substantially reduced the workload associated with the admissions process, and the two-track system allowed the law school to focus on identifying and possibly admitting qualified minority candidates with credentials that might otherwise fail to gain them admission. But the Court has made it clear that administrative convenience will not excuse an otherwise questionable policy. And, as the court of appeals panel noted, while compliance with federal mandates may well constitute a “compelling” interest, the means selected must nevertheless be appropriately tailored.

Moreover, even if a two-track system is appropriate under Texas’s assumption that the separate subcommittee “had a feel” for the entire process and the full applicant pool, how does one explain the extent of the preference reflected in a system in which “the presumptive denial score for nonminorities was higher than the presumptive admission score for minorities”? The law school insisted that its preferences were “modest” and that the applicants who received them were “only marginally distinguishable from the students admitted without [the] benefit of affirmative action.” But a preference that reduces the admissions threshold from an LSAT of 163 to an LSAT of 157 for the class admitted to Texas in the fall of 1996 is anything but modest. For example, a six point adjustment for the pool of applicants taking the LSAT from June 1995 through February 1996 would include within its ambit 17,620 individuals, of whom only a very small number are minorities, much less individuals that Texas would normally consider for admission absent the intervention of a preference. Not all of the white applicants included

344. See Janet Elliott, UT Admissions Case May Hinge on Dual Committees, Tex. Law., May 30, 1994, at 1 (“Johanson said the main reason behind the change was to save the full committee the time required to go through all of the minority files.”).
345. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989) (characterizing the city’s program as a “quota system” and a matter of “simple administrative convenience” that fails the narrow tailoring requirement); Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (“[T]here can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.”).
346. Hopwood, 78 F.3d at 954 n.46.
349. See id. (characterizing the preference as “modest” in the sense that “the mean difference in LSAT was 6 on a scale that goes from 120 to 180, or 10% of the criterion’s predictive range”). Viewed in that manner, it is.
350. See Law School Admissions Council, Score Distribution—Law School Admission Test (on file with author). These are national totals representing only individuals who took the LSAT from June of 1995 to February of 1996. Not all of these individuals applied to Texas; however, the data accurately describe the nature of the national arena within which Texas believes it must compete.
351. See, e.g., Morris, supra note 332, at 4 (noting that when race and ethnicity, along with grade point average, are factored in, available data indicate that only “103 blacks and 224 Hispanics . . . had both an LSAT of 160 (83.5 percentile) or better and a college grade point average of 3.25 (a low B+ average)” for the class entering in the fall of 1997, versus “7,715 whites with comparable figures”).
within this pool of 17,000 would meet the high admissions standards at Texas. I suspect that enough would, however, to make it clear that a preference of this magnitude has substantial implications.

As a result, one of the key factors in *Hopwood* was the University’s loss of the moral high ground. Like Allan Bakke before them, the *Hopwood* plaintiffs successfully cast themselves as “victims,” individuals whose objective qualifications made them “more” qualified than the minority students arguably admitted in their stead. Of course, compelling reasons suggest that matters were not quite that simple. For example, the district court found on remand that a reasoned examination of the actual credentials of the four *Hopwood* plaintiffs made it highly unlikely that they would have been admitted even in the absence of constitutionally infirm procedures. Unfortunately, the system on trial was not the one described on remand. The law school did not undertake that sort of detailed, comparative review, and the mechanics of the actual admissions program created the distinct impression that something other than individual merit was at stake.

Ultimately, Texas may have felt that social and political realities counseled an approach within which results mattered more than strict fidelity to the law. Whatever else might be said about the law school’s actions, its assessment of the external pressures it faced was clearly correct. For example, the federal government still has not found the State of Texas in compliance with the mandates imposed by the Office of Civil Rights, a situation that arguably leaves it at risk of losing all federal funding for higher education.

Perhaps the most telling source of pressure was political. As the “flagship” public campus in a highly diverse state, the University of Texas faced considerable pressure to admit a “representative” group of minority students. In response to *Hopwood*, the Texas legislature passed the Uniform Admission Policy Act, a measure that now requires that the University of Texas admit any “applicant . . . from a public or private high school in this state accredited by a generally recognized accrediting organization with a grade point average in the top ten percent of the

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353. See Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 9, Texas v. Hopwood, 78 F.3d 932 (5th Cir. 1996) (No. 95-1773) (“[The United States Department of Education] has yet to determine that Texas’ higher education system has come into compliance with Title VI and the Fourteenth Amendment.”) (citation omitted).
student's high school graduating class."³⁵⁵ The Act was an emphatic,
and highly political, expression of the state's collective belief that the
University had a positive obligation to admit a broad spectrum of its citi-
zens to its public university, even if that meant departing from previous
assumptions about the importance of grades and standardized tests. This
initiative, which is limited to undergraduate admissions, is almost certainly
permissible: It mandates a straightforward admissions standard within
which no characteristic other than class rank matters. The measure speci-
thes that individuals who do not finish in the top ten percent of their class
be assessed according to eighteen specific “socioeconomic indicators or
factors” spanning virtually all possible admissions considerations except
race.³⁵⁶ It therefore appears to be well within both the letter and the spirit of
the Hopwood panel's observation that a legislative mandate “limit[ing]
carefully the ‘plus’ given to applicants” would “pass constitutional
muster.”³⁵⁷ Indeed, the Uniform Admission Policy should survive quite
easily if challenged, for while undoubtedly directed toward an increase in
the enrollment of minority students, at no point does the Policy expressly
mention that objective.³⁵⁸ That makes it precisely the sort of measure that
banishes “‘simple racial politics’” from the halls of academe,³⁵⁹ something
the Texas Law School appeared unwilling to do.

C. Enter Stage Left? Hopwood and the Future

What can be learned from the Texas experience? At a minimum, I
suspect it instructs us in the need to consider carefully both ends and
means. Like Davis, Texas sinned in the manner in which it acted, not on
the basis of its goals. If, as I have argued, the attainment of a diverse stu-
dent body is in fact a compelling interest, the primary lesson of Hopwood
is that one cannot cut corners. As I indicated at the beginning of this
Article, there is a broad consensus in higher education that diversity and
affirmative action are essential elements in the quest for excellence.³⁶⁰ But

³⁵⁵. TEX. EDUC. CODE ANN. § 51.803 (West 1998). For a discussion of the legislation and the
circumstances surrounding its adoption, see William E. Forbath & Gerald Torres, The 'Talented Tenth'
³⁵⁶. TEX. EDUC. CODE ANN. § 51.805(b) (West 1998).
³⁵⁸. The program is at least arguably at odds with some Court precedent. As Professors Forbath
and Torres stress, “[t]he Texas legislators knew the 10 percent plan would change the post-Hopwood
racial composition of entering classes and that the measure was before them for that very reason.”
Forbath & Torres, supra note 355, at 24. It is unlikely, however, that any court would strike the
program on the basis of Hunter v. Underwood, 471 U.S. 222 (1985), in which the Court held a racially
neutral measure was, nevertheless, invalid given the “discriminatory” circumstances and impulses that
surrounded its adoption. But stranger things have happened in a circuit where a panel appeared to take
upon itself the solemn obligation of overruling binding Supreme Court precedent.
³⁵⁹. Hopwood, 78 F.3d at 940 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493
(1989)).
³⁶⁰. See supra Part I.B.
there is a price to be paid. Institutions hoping to achieve racial diversity must be willing to expend the time, energy, and funds required to craft a constitutionally permissible program.

Texas was not alone in its determination to use a questionable approach. Unlike Davis, whose admissions regime was apparently unique in medical education, variations on a “two-track theme” were a respected, if not legally respectable, option in legal education. In 1992, for example, the Department of Education ended a two-year investigation into the admissions practices at the University of California, Berkeley, School of Law (Boalt Hall) and entered into a consent agreement with that institution under which Boalt Hall agreed to change practices the Department believed to be in violation of Title VI. The Department justifiably maintained that “[t]he manner in which race and ethnicity were considered had the effect of circumscribing competition and effectively excluding applicants from consideration for available positions based on their race or ethnicity.”

Boalt Hall apparently had implemented a system within which minority applications were evaluated separately, and through that system routinely met its professed goal of admitting a substantial number of minority students each year.

This approach was curious given Justice Powell’s declaration in Bakke that “it is inconceivable that a university would thus pursue the logic of petitioner’s two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.” Officials from the University “insisted that they have violated no laws and that university policies were ‘fully consistent’ with the Bakke decision.” Nevertheless, Boalt ended the two-track admissions program before litigation arose. The same was true at Stanford, where the law school had set up a system in which a single person reviewed only the files of minority applicants and made recommendations to the admissions chair on that basis, and at Michigan, where minority students helped evaluate the applications of minority applicants,

362. See id.
363. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978). External critics, perhaps unaware that both the University of Texas and Stanford University Law Schools were doing virtually the same thing at exactly the same time, castigated the system as “clumsy,” and stated that they did not “know of another law school that had a policy structured like Berkeley’s.” Don J. DeBenedictis, Boalt Hall Settles With Government: California Law School to Re-Evaluate “Clumsy” Minority-Admissions Policy, 78 A.B.A. J. 17, 17 (1992) (quoting, respectively, Dean Howard Alan Glickstein, Touro College, and Denise W. Purdie, Executive Director, Council on Legal Education Opportunity and Assistant Dean, Howard University School of Law).
but no student review was provided for white applicants. In each instance, school officials defended the practices even as they abandoned them.

These systems were illegal, not because they took minority status into account, but because they did so in a clumsy and ill-advised way. Arguably, the Davis formulation represented at least a tolerable mistake, arising as it did during a period in which legal guidance was minimal. However, the same cannot be said for the programs at issue in Hopwood or, for that matter, those abandoned by Boalt Hall and Stanford. Indeed, the tenacity with which some of these institutions defended the indefensible gave the opponents of affirmative action ample bases to question the sincerity of their efforts. The Hopwood panel, for example, was clearly aware of the fact that the University of Texas had abandoned its two-track approach. Indeed, the University asked the panel if it could continue to take race into account provided that it acted in relative good faith. The panel rejected that appeal, arguably because of a sincere belief that the diversity rationale was not the law of the land, but almost certainly because it also believed that a law school faculty that had acted in this matter was not to be trusted.

In each instance, the medium became the message, namely that diversity and affirmative action are shorthand for a racial spoils system within which only numbers matter. That is, Davis and Texas each asked a court to approve a system that appeared to both compromise academic standards and ascribe totemic significance to the color of a student’s skin, rather than to the conditions that qualified students for admission in light of the

366. See Scott Jaschik, 2 Law Schools Scale Back Affirmative-Action Programs as Education Dept. Continues Scrutiny of Such Plans, CHRON. HIGHER EDUC., Dec. 16, 1992, at A19, A20. The Michigan program apparently did not provoke formal government investigation, although Lee Bollinger, then Dean of the Law School, and now President of the University, observed that “the government appeared to be prepared to attack that as an improper procedure and we felt it was not ‘worth trying to maintain the program.’” Id.

367. See id. at A20.

368. Similar protestations were made in the University’s petition for a writ of certiorari from the Court, which argued that “the aspect of the 1992 program invalidated by the district court has long since been discontinued and will not be reinstated.” Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 28, Texas v. Hopwood, 78 F.3d 932 (5th Cir. 1996) (No. 95-1773).

369. A similar impulse is apparent in Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995), where an institution protesting valiantly that it sought to repair its relationship with its own citizens crafted a program that both appeared to compromise academic standards and extended its largesse far beyond the borders of the state where its sins were committed. For example, the court rejected the reference pool offered by the university based on its perception “that the goal of the program . . . cannot be used to lower the effective minimum criteria needed to determine the applicant pool.” Id. at 157. In its discussion of whether the program is properly tailored, the court notes, among other things, that the university’s willingness to award a substantial proportion of the scholarships to non-residents belies its professed goal of “correcting the condition” in question, the paucity of “qualified African-American Maryland residents attend[ing]” the university. Id. at 159.
university’s professed academic objectives. These considerations almost certainly produced a profound skepticism regarding the motives and good faith of these universities. That attitude is perhaps characteristic of the assumption that strict scrutiny tends to be “fatal in fact.” But it is difficult to be overly critical when courts strike down institutional policies that pursue laudable goals in such ill-advised ways.

At the same time, there is ample reason to believe that the Hopwood panel was correct in a predictive sense: Affirmative action proponents most likely cannot muster five votes on the current Court to agree that diversity is a compelling interest in a properly presented case. Justices Scalia and Thomas have made it quite clear that they oppose virtually all race-based measures, and both Chief Justice Rehnquist and Justice Kennedy have been consistently skeptical of affirmative action programs. Justice O’Connor has at least intimated that her prior embrace of appropriate race-based initiatives teeters on the abyss, fueled by her perception “that even ‘the most rigid scrutiny’ can sometimes fail to detect an illegitimate racial classification.” She has, nevertheless, categorically stated her belief that the Court as a whole has embraced the views expressed by Justice Powell in Bakke, observing in Wygant that “although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in


372. The Chief Justice has been consistent in his opposition to race-conscious measures. See, e.g., Shaw v. Hunt, 517 U.S. 899, 904-05 (1996) (writing for the Court and rejecting a distinction between “benign” and “remedial” classifications). Justice Kennedy, in turn, has emphasized his belief that “[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause.” Croson, 488 U.S. at 518 (Kennedy, J., concurring).

373. Adarand, 515 U.S. at 236 (citation omitted). Indeed, at least one scholar has expressly rejected the theory that Justice O’Connor now represents a viable “swing vote” in this quest, maintaining that “she has almost always voted against the racial minority in favor of the white majority, except where the Supreme Court is unanimous or near-unanimous.” Herman Schwartz, O’Connor as a ‘Centrist’? Not When Minorities Are Involved, L.A. Times, Apr. 12, 1998, at M2; cf. Joan Biskupic, A Justice in the Spotlight: O’Connor’s Vote Could Be Crucial In One of the Supreme Court’s Most Closely Watched Cases, Wash. Post Nat’l Wkly. Ed., Oct. 13, 1997, at 29 (maintaining that the then-pending Piscataway case “will probably be decided by the views of just one justice, Sandra Day O’Connor”).

the context of higher education, to support the use of racial considerations in furthering that interest.\footnote{375}{Id. at 286 (O'Connor, J., concurring). Ironically, given the frequency with which universities have crafted suspect affirmative action programs, Justice O'Connor has also suggested the overarching importance of values in this adjudicatory process. She stressed in \textit{Adarand} that “general propositions” should control the Court’s treatment of such matters, even in the face of “lingering uncertainty in the details.” \textit{Adarand}, 515 U.S. at 223-24 (identifying “skepticism,” “consistency,” and “congruence” as the central propositions).}

On this point, at least, I tend to agree with Justice O'Connor. As indicated above, I believe the diversity rationale articulated in \textit{Bakke} commanded the support of at least five members of the Court, and has subsequently been embraced by Justice Stevens, who dissented in that case.\footnote{376}{\textit{Id.} at 286 (O'Connor, J., concuring).} Justice O'Connor's observation in \textit{Wygant} is consistent with this interpretation, speaking as it does of an interest that “has been found” compelling, a formulation that strikes me as describing her sense of what the Court itself has held. Assuming, as we must, that Justice O'Connor writes with care, she would have described the view of a single member of the Court quite differently. And she would certainly not have pointedly speculated about the possibility that the Court might eventually find “other governmental interests which have been relied upon in the lower courts but which have not been passed on here... sufficiently ‘important’ or ‘compelling’ to sustain the use of affirmative action policies.”\footnote{377}{Id. at 286 (O'Connor, J., concurring).}

The \textit{Hopwood} panel dismissed Justice O'Connor's statement in \textit{Wygant} as purely descriptive,\footnote{378}{\textit{Wygant}, 476 U.S. at 286 (O'Connor, J., concurring) (emphasis added).} which it surely is, in that it describes quite accurately the compelling educational value articulated, and accepted, in \textit{Bakke}. The panel also focused on her rejection of the particular diversity rationale advanced in \textit{Metro Broadcasting},\footnote{379}{See supra text accompanying notes 257-79.} where her dissent characterizes the diversity interest at issue as “simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.”\footnote{380}{\textit{Id.} at 612 (O'Connor, J., dissenting).} The \textit{Hopwood} panel describes that dissent as “vindicated” in \textit{Adarand}.\footnote{381}{\textit{Hopwood v. Texas}, 78 F. 3d 932, 945 n.27 (5th Cir. 1996).} But as Justice Stevens observed in that case, the only element of \textit{Metro Broadcasting} that was discarded in \textit{Adarand} was its tolerance of intermediate scrutiny as the standard when the federal government acts in a race-based manner.\footnote{382}{\textit{Metro Broadcasting Inc. v. FCC}, 497 U.S. 547 (1990)} Justice O'Connor's repudiation of the particular approach to diversity advanced in \textit{Metro Broadcasting} must, accordingly, be considered carefully, and on its own terms, as a distinctive statement falling outside the parameters of Justice Powell's rationale in \textit{Bakke}. Instead, in \textit{Metro Broadcasting}, Justice O'Connor simply
took "issue with the crude view that race is by itself—without ever looking at the whole person—enough to presume that one has a certain set of beliefs."383

Disputes about what was said in Wygant, Metro Broadcasting, and Adarand are arguably beside the point. None of these cases dealt with higher education, and there are substantial differences between the issues posed by the radio programming interests in Metro Broadcasting and the educational considerations raised in Bakke. We will not know how Justice O'Connor will react to the questions posed by a university affirmative action initiative until such a program comes before her in a properly presented case. We can, however, probe with care what she and her colleagues have said about Bakke, and place those statements in the contexts provided by other opinions dealing with similar issues. Those cases and statements document considerable skepticism about the constitutionality of many measures that make group identity a dispositive factor in the decision-making process. But they most assuredly do not treat such programs as inevitably and fatally flawed. Rather, they suggest the need for a truly principled approach in any regime that values and pursues diversity. It is to that aspect of this debate that I now turn.

IV
FROM PRACTICE TO FIRST PRINCIPLES:
AFFIRMATIVE ACTION AND THE VALUES OF HIGHER EDUCATION

"I think I'd make a good Handicapper General."
"Good as anybody else," said George.
"Who knows better'n I do what normal is?" said Hazel.384

Each of us knows, in our heart of hearts, that the world would be a much better place, if only we were in control. Each of us, like Hazel, suspects we are at least as good as anybody else and each, one hopes, has at least one George to press our case. I, for example, believe that a principled program of affirmative actions designed to create a diverse student body will be approved by a Court that has repeatedly sustained the carefully controlled use of otherwise "suspect" criteria. I find it telling that the Court has acknowledged the complexity of the academic enterprise and has counseled appropriate deference when academics exercise their professional, academic judgment. I can easily envision the Court sustaining affirmative measures that comport with the best academic traditions. If that is to occur, however, it will be essential for each university and college to adopt programs that are defensible as a matter of fundamental academic policy.

They must identify in advance the values that inform the creation and implementation of such programs. And, if challenged in the courts, they must defend these programs on the basis of these educational precepts.

Appropriate implementation of such measures requires that six special policy imperatives attach, each of which reflects fundamental academic values: honesty about the nature of the academic enterprise; openness regarding what is done, and why; reasoned articulation, within a matrix of sound educational policies; comprehensive solutions; steadfast adherence to principles; and patience. These, I believe, constitute the "first principles" of affirmative action. They express, in the words of Cardinal Newman, "one tone and one character,"385 the assumption that "race-sensitive admissions policies . . . advance educational goals important to [the universities that use them] and societal goals important to everyone."386

Before I discuss the nature and implications of these principles, and the values that inform them, I will address three initial issues. The first is the need for an appropriate affirmative action policy to make clear that group membership is simply one factor among the many that inform the admissions decision. The second is the need for the Court to acknowledge the unique and important role that higher education plays in our society, a responsibility that makes our colleges and universities precisely the sorts of entities that should be empowered to act on behalf of us all. Finally, I will maintain that all parties to the debate should acknowledge that, while a matter of the utmost importance, affirmative actions in fact affect the lives of our nation's students in only a limited sphere.

A. One Factor Among Many

First, policies of the sort I envision would not be "affirmative" action, at least as that term has been traditionally understood. As indicated, my argument turns on the central assumption that most university admissions policies incorporate a comprehensive conception of academic merit within which group identity, particularly race and ethnic identity, functions as only one of several factors in the admissions decision.387 These characteristics serve, then, not as a simple "plus," either in the sense that some have characterized Justice Powell's discussion of the matter in

385. Newman, supra note 9, at 130.

386. Bowen & Bok, supra note 14, at 290. The Bowen and Bok study is one of the most recent and most significant empirical examinations of the problem. It rests on a comprehensive analysis of the "grades, test scores, choice of major, graduation rates, careers and attitudes of 45,000 students at 28 of the most selective universities" in the nation. Ethan Bronner, Study Strongly Supports Affirmative Action in Admissions to Elite Colleges, N.Y. Times, Sept. 9, 1998, at B10.

387. Indeed, as Professor Hall argues, race itself may be one of the least important considerations if the institution is actually interested in a true diversity of viewpoints and perspectives. See Timothy L. Hall, Educational Diversity: Viewpoints and Proxies, 59 Ohio St. L.J. 551 (1998). For a contrary view, see Sheila Foster, Difference and Equality: A Critical Assessment of the Concept of "Diversity," 1993 Wis. L. Rev. 105.
VALUES OF AFFIRMATIVE ACTION

Bakke, or as identified in current litigation, within which race more often than not serves as an express and distinctive automatic trigger for various forms of favorable treatment. They function, instead, simply as one possible consideration of many, none of which are applied reflexively or for their own sake in a constitutionally sound admissions regime.

Viewed in this light, characteristics such as race serve as legitimate proxies for a variety of individual attributes that may appropriately form a part of an admissions process that evaluates "the whole person." Such policies are both conscious of the individual applicant's race or ethnic identity and, in appropriate instances, willing to take it into account in order to fashion an entering class that offers the range of characteristics and interests necessary to create the critical mass required to enrich the learning process. This is, admittedly, a very imprecise formulation. Indeed, I suspect many of the same individuals who castigate Justice Powell's approach as "pure sophistry" will find this description of a constitutionally permissible admissions regime equally suspect. They should. In most important respects, I am in fact suggesting that theories described by Justice Powell should be embraced. But I am also suggesting that the particular approach adopted matters a great deal. If, for example, discussion of these matters is shaped by an admissions system within which a single characteristic can be isolated as the favored attribute, it is virtually impossible to escape the conclusion that that factor, and that factor alone, is the one that matters. Bakke and Hopwood are especially pertinent examples of that reality. In each instance, the admissions program at issue functioned in ways that isolated race and ethnicity as very specific, and arguably dispositive, considerations.

If, however, the admissions system expressly values a wide range of factors, of which group identity is simply one of many valued attributes, the situation changes. The Harvard Plan applauded by Justice Powell, for example, speaks globally of the value of diversity and concedes that in some instances race will matter. But it goes on to make it clear that this is simply part of a larger process that values many factors, no single one of which is determinative:

When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring

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389. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), reh'g denied, 84 F.3d 720 (5th Cir. 1996), and cert. denied, 116 S. Ct. 2580 (1996).
something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.  

This system captures the principles that inform the quest for diversity, within which a complex set of considerations shapes each admissions decision. This formulation is no more, or less, capable of implementation than virtually any other approach in a system of constitutional analysis that claims an ability to distinguish between and among interests that are described variously as "compelling," "exceedingly persuasive," merely "important," and those that are simply "rational."  

Under this regime, applicants would find it extraordinarily difficult to prove that a given admissions decision was in any meaningful sense "based on race." The range and complexity of qualifications identified in the relevant policies would make it virtually impossible to single out that characteristic as determinative. For that matter, race itself need never be mentioned. The Texas Uniform Admission Policy illustrates the point nicely: Neither race nor ethnicity are included in the eighteen admissions factors listed, although it is quite clear that several of them were included precisely because they have a high correlation with race. Measures of this sort are affirmative in the sense that they identify specific and valued characteristics that can and should be sought when fashioning an entering class. They are also expressions of a more traditional academic postulate, the notion that personal merit should control. They make it quite clear that
individual background and circumstances control, regardless of racial identity, and that admissions decisions are made on the basis of what each unique student brings to the educational mix.

At the same time, racial composition constitutes one important element of a truly diverse student body. Indeed, an argument can be made that racial identity is important in and of itself in a society in which discrimination and its consequences persist. The case for diversity as an educational matter, however, functions independently of any purely remedial justification. It posits that one important benefit of a high quality education occurs when students interact with individuals unlike themselves. This does not mean that colleges and universities can or will avoid mention of race. Government agencies will still require institutions to provide enrollment figures indicating the racial identity of their student bodies. Indeed, the institutions themselves will also wish to do so in order to fashion the message that individual campuses welcome minority students. And colleges and universities will almost certainly continue to use a number of the traditional, "objective" yardsticks for admission in ways that facilitate the simplistic impression that numbers matter and that statistical disparities in credentials exist between and among various identifiable groups of applicants.

Because numbers will continue to matter, aggrieved individuals will probably still be able to make at least an initial showing that a "less qualified" individual has been admitted "solely" on the basis of race. But that is a price we must continue to pay given the mistakes of the past; it is the deserved legacy of clumsy affirmative action plans that provided the fodder necessary to make out a persuasive claim of actual discrimination. Nevertheless, the sorts of policies I envision, coupled with the kinds of institutional discipline I request, will go a long way toward eliminating the ability of the litigant to frame a case, and a court to accept it.

B. Higher Education and Society: Accounting for Inequities and Recognizing Potential

A second important factor is addressed to the Court itself. As I have already noted, the Court has of late expressed an inclination to limit the group of actors that may adopt race-conscious remedies to those entities that have actively engaged in overt discrimination in the past. Indeed, the Hopwood panel cited Texas's failure to show past discrimination in rejecting the university's attempt to justify its actions.397 However, reflexive adherence to that requirement, if indeed it is the law, seems unwise in the specific context of college and university admissions. I believe, accordingly, that the Court should recognize that educational institutions

397. See supra note 282 and accompanying text.
must be allowed to consider the fact that many individuals are denied meaningful opportunities to secure the skills and characteristics traditionally valued in a competitive admissions process.

Universities, and in particular the “great” universities, labor under the mandates imposed by two simultaneously contradictory yet complementary obligations. They must, on the one hand, articulate and adhere to standards appropriate to their professed mission. For the “elite” institutions, this inevitably involves the assumption that rigor must obtain. At the same time, these are the institutions where potential is realized, where individuals may well be able to succeed, in spite of deficits imposed by inferior schools and by individual circumstances that thwart learning.

Harvard, in this respect, will always remain Harvard, just as the University of Arkansas will always remain the University of Arkansas. Assuming each institution’s minimum thresholds are met, however, why should it be precluded from including within its student body individuals whose “objective” credentials belie their academic promise? In this respect, I agree with Professor Wright and his colleagues that “[p]ublic education is part of the process by which skills and credentials are created; it cannot be simply a reward for pre-existing skills and credentials, many of them created at earlier stages of the public education system.”

That is probably why the Texas legislature now requires its public institutions to take into consideration such factors as “the financial status of the applicant’s school district” and “the performance level of the applicant’s school as determined by the school accountability criteria used by the Texas Education Agency.” For it is with the use of measures of this sort, which address fundamental aspects of the learning process, that institutions will be able to identify individuals with potential, rather than simply those with current accomplishment.

In many instances, the particular problems an individual experiences are in fact the vestiges of centuries of discrimination. The perpetrators of that discrimination may, or may not, be the institutions of higher education asked to deal with its consequences. A regime that insists, however, that “societal” discrimination is not the proper concern of a college or university substitutes form for substance. It divorces higher education from the very society that shapes it, and denies institutions the opportunity to redress problems that, while not of their own making, fall within their unique competence to solve.

400. Id. § 51.805(b)(6).
C. What Is at Stake?

Finally, it is essential to recognize that, at the same time, so much and so little rests on this debate. Undoubtedly, affirmative action lies at the heart of the modern dialogue about the nature and obligations of our universities. Both the proponents of diversity and the adversaries of affirmative actions correctly maintain that they wish to “offer all Americans the prospect of living in a society marked by more equality and racial harmony than one might otherwise anticipate.” 401 The proponents, of course, believe that race-sensitive decisions are both moral and practical necessities. In their estimation, “[t]he alternative seems . . . both stark and unworthy of our country’s ideals . . . .” 402 Critics of affirmative action, in turn, maintain with equal vigor that affirmative actions function as the refuge of 

[r]acially well-meaning whites, terrified of the label racist, [who] remake themselves as angels of mercy, embracing policies built on deference to black victimization through which they can display their racial virtue. These recomposed narratives—psychologically soothing tales—are an educational disaster. They are the morass in which rigid academic standards sink. 403

In most instances the intensity of the rhetoric disguises the actual impact of affirmative actions in university admissions as a whole. As Bowen and Bok have stressed correctly in their recent study, “[m]any people are unaware of how few colleges and universities have enough applicants to be able to pick and choose among them.” 404 Their work, and that of others who have examined the question, suggests that “the vast majority of undergraduate institutions accept all qualified candidates and thus do not award special status to any group of applicants, defined by race or on the basis of any other criterion.” 405 Indeed, the only major study to examine the actual impact of Bakke on admissions trends in law and medicine found that “the decision largely served to institutionalize existing patterns and practices. The institutions that had large minority enrollments [before Bakke] also had them [after that decision].” 406 Of course, many of these same studies show that while affirmative action may govern admissions at few institutions, it has an extraordinarily important effect on the

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401. Bowen & Bok, supra note 14, at 285; see also Stephan Thernstrom & Abigail Thernstrom, America in Black and White: One Nation, Indivisible 22 (1997) (positing as the central theme in their work the “optimistic premise” of “racial decency in most Americans”).
402. Bowen & Bok, supra note 14, at 286.
403. Thernstrom & Thernstrom, supra note 401, at 348.
404. Bowen & Bok, supra note 14, at 15.
405. Id.
406. Welch & Gruhl, supra note 186, at 131. The authors stress, however, that the symbolic impact of the decision was “significant because it legitimated and institutionalized the practice of affirmative action in admissions decisions.” Id. at 133.
lives of those students admitted in its wake. And they recognize that affirmative action has dramatic effects at the graduate and professional level, where there are fewer seats and substantially more competition for admissions. Indeed, as Professor Sandalow has noted, many of the studies that argue for the value of affirmative measures have an important but unintended consequence, for they "demonstrate that, in regard to preparation for graduate education, minority preference programs at the undergraduate level are 'successful' mainly in the sense that they enable many black students to gain admission to graduate schools that also have preferential admission policies."

It is also apparent that questions about the means used to admit individuals are often more important than inquiries regarding the actual qualifications of those who received "preferential" treatment. Virtually every study conducted establishes differences by race in the objective credentials of admitted individuals. The disparities are often substantial, and that reality creates the impression that standards have been compromised. Viewed in the abstract, they have been. However, these same studies document the fact that the objective credentials of minority students admitted through preferences are higher than those of both the average black and white student. And many studies suggest that distinctions in objective credentials do not predict future performance. Bowen and Bok, for example, found that African-American matriculants at the colleges surveyed graduated in "very large numbers," intended to earn advanced degrees from top-ranked graduate and professional schools at a slightly higher rate than white students, and realized substantial comparative employment, earnings, and job satisfaction benefits. Wightman's study

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407. See generally Bowen & Bok, supra note 14, at 91-154 (documenting the substantial educational and economic benefits attained by individuals admitted to selective universities through affirmative action).

408. See id. at 100-03 (discussing professional admissions), 282 (emphasizing that "[i]n law and medicine, all schools are selective").

409. See id. at 1894.

410. See, e.g., id. at 26-27; Wightman, The Threat to Diversity in Legal Education, supra note 100, at 20 tbl.3.

411. See, e.g., Bowen & Bok, supra note 14, at 29 (noting an average combined SAT of 1157 for black matriculants versus an average combined score of 1331 for white matriculants at five elite institutions).

412. See id. at 18 ("The large majority of black applicants [to selective institutions that practiced affirmative action] handily outscored not only the average black [SAT] test-taker, but also the average white test-taker.").

413. Id. at 59.

414. See id. at 93-94 (63% versus 61%).

415. See id. at 152-53 ("Compared with college graduates of every race, black graduates of [schools in the College and Beyond database] are not only more likely to be employed, they are much more highly represented in professions such as law and medicine [and] they are ... earning more within whatever sector of employment or occupation they have chosen."). These findings comport with those of a major recent descriptive study, which canvassed the available social science findings and
of affirmative action in law school admissions found "substantial law school graduation rates and bar examination passage rates among Fall 1991 first-year students who would not have been admitted" solely on the basis of grades and test scores.416 Those findings are echoed in a recent study undertaken at the University of Michigan, which found that minority graduates of that institution's Law School "have fully entered the mainstream of the American legal profession. As a group, they earn large incomes, perform pro bono work in generous amounts, and feel satisfied with their careers."417 And a twenty-year retrospective study of the graduates of the University of California, Davis, School of Medicine done by two members of the school's faculty maintained that "[a]n admissions process that allows for ethnicity and other special characteristics to be used heavily in admission decisions yields powerful effects on the diversity of the student population and shows no evidence of diluting the quality of the graduates."418

Not all study results are positive. A more recent study completed by Wightman, for example, has established that there are substantial differences in the bar passage rates for law school graduates.419 The study also found that a "relatively large proportion of examinees of color, particularly black examinees . . . failed the bar examination on the first attempt and did

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416. Wightman, The Threat to Diversity in Legal Education, supra note 100, at 34.
417. David L. Chambers et al., Doing Well & Doing Good: The careers of minority and white graduates of the University of Michigan Law School, LAW QUADRANGLE NOTES, Summer 1999, at 60, 62. The study also found that while the combination of LSAT scores and undergraduate grade point averages "do correlate strongly with law school grades . . . those numbers that counted so much at the admissions stage tell little if anything about . . . later careers." Id. at 62.
418. Robert C. Davidson & Ernest L. Lewis, Affirmative Action and Other Special Consideration Admissions at the University of California, Davis, School of Medicine, 278 JAMA 1153, 1153 (1997). The study produced both positive and negative reviews. Compare Ethan Bronner, Study of Doctors Sees Little Effect of Affirmative Action on Careers, N.Y. TIMES, Oct. 16, 1997, at A1 (quoting Dr. William Jacott, a trustee of the American Medical Association, who characterized it as a "landmark study, which shows we should do more with applicants from special circumstances who are not quite optimal tickets in their grade point averages and test scores"), with Gail Heriot, Doctored Affirmative-Action Data, WALL ST. J., Oct. 15, 1997, at 22 (criticizing the study methodology and asking "[w]hen doctors are torturing data to make a political point, whom can you trust?"). Heriot's critique seems justified, at least to the extent that the positive results reported were for individuals who fell in the "special admissions" category, which was not in fact limited to individuals from racial or ethnic minorities. On the other hand, the study does demonstrate that a "special admissions" program does not mean that the individuals admitted are either unqualified for medical studies or incapable of gaining board certification.
419. See Linda F. Wightman, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 75 (1998) ("These data . . . substantiate that significant differences in first-time and eventual bar passage rates exist between white examinees and examinees of color within the study population and that the magnitude of these differences varies across different ethnic groups.").
not make a second attempt." And, as indicated, one of the most disturbing aspects of the Bowen and Bok study is its indication that minority students admitted to the College and Beyond institutions earn substantially lower grades and rank in the bottom quarter of their classes. Nevertheless, considerable evidence indicates that carefully controlled affirmative action programs can facilitate access for individuals who are qualified for the studies they will undertake.

These realities suggest that it is essential that we place the debate about affirmative action and diversity in context. The normative issues are enormous, and no proper discussion of these matters should discount their significance. At the same time, it is quite clear that instances where affirmative action has an impact are far more limited than is commonly assumed, whether the issue is the number of individuals admitted under such programs or their qualifications. It is unlikely that true believers on either side will be swayed by these realities. For most of us, however, recognizing both how much and how little is at stake may offer important perspectives on these matters.

D. First Principles

With these caveats in mind, I now turn to the values I believe should inform an appropriately affirmative approach to admissions in higher education. My own view on these matters is simple. An admissions policy predicated on the values I am about to discuss will in almost all important respects offer a means for fashioning a diverse student body without expressly making group status a dispositive factor. That does not mean that group status cannot be mentioned as one consideration. Indeed,
institutions firmly committed to diversity will wish to at least mention group identity for any number of instrumental reasons. The Harvard Policy championed by Justice Powell in *Bakke*, for example, almost certainly reads as it does precisely because Harvard wished to make clear its commitment to identifying and admitting students from “disadvantaged economic, racial, and ethnic groups.” The Texas Uniform Admissions Policy, in turn, after first offering automatic admission to those who finish in the top ten percent of their class, expressly values diversity when it stipulates that “[b]ecause of changing demographic trends, diversity, and population increases in the state, each academic teaching institution shall also consider all of, any of, or a combination of [eighteen] socioeconomic indicators or factors in making first-time freshman admissions decisions.”

The operative question is not, however, whether such characteristics are mentioned, but rather how they operate in the actual admissions decision. As I stressed in Part I.B of this Article, my assumption is that an appropriate admissions policy will assess the academic and other merits of each individual applicant within the contexts provided by the character and needs of the institution itself and the overall pool of applicants. That process will, in many instances, be expensive and time consuming. However, institutions truly dedicated to the value of diversity will be willing to bear these costs. They will strive to fashion their admissions programs in a constitutionally permissible manner, by which I mean that they will take into account and employ otherwise “suspect” characteristics only to the extent that the use of such characteristics can be justified by compelling educational necessity. That necessity is not, to paraphrase one opponent of preferences, simply a desire to achieve the “right” numbers. It is, rather, a desire to choose an entering class that is both qualified to do the work and
offers to each member the characteristics and opportunities that make their education "effective." 429

The principles I propose reflect what I believe to be necessary and appropriate educational values. Like so many lists of analytic principles, many of the points I make may seem self-evident to the thoughtful reader. As I will make clear, however, the principles I identify are in many instances notable precisely because all too often they have not been apparent as guiding precepts in many of this nation's affirmative action initiatives. This does not mean that I believe the majority of these programs are "unprincipled," at least to the extent that they express an abiding belief in the value of diversity. Rather, I maintain simply that in most instances it is difficult, if not impossible, to identify with any degree of confidence precisely what values these programs advance, other than an often malleable combination of doing the "right thing" and getting the "right numbers."

Too often, affirmative action initiatives can be explained only as an expression of the appropriately dishonored belief that a sufficiently noble end justifies the embrace of otherwise inappropriate means. Our colleges and universities can and should do better. The question now is whether they are willing to do so in an environment in which skepticism is the rule rather than the exception.

1. Honesty

The first requirement is that we speak honestly about what we are about. The threshold assumption in much of the anti-affirmative action rhetoric is that these policies pose stark aberrations from the norm. Indeed, in some instances those pressing for affirmative action as the only appropriate means of compensating for past discrimination fuel that perception by implying that only substantial change will suffice. And, all too often, those who defend affirmative measures attempt to deny precisely what it is they are doing, fearing perhaps that their policies cannot withstand the light of day. That may well be the case, and is certainly one of the central lessons of Bakke and Hopwood. But it is important for any discussion of affirmative action and diversity to proceed on the assumption that all parties must be honest about what they seek and what they do.

For example, affirmative action on the basis of gender or race does not now, nor did it ever, constitute an exception to the rules in an otherwise neutral, merit-based system. As various parties made quite clear in Bakke,

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429. See Bakke, 438 U.S. app. at 322 ("The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements." (quoting Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 OFFICIAL REG. OF HARVARD UNIV. 93, 104-05 (1968) (emphasis deleted))).
and as numerous individuals have since documented, "pure academic merit" measured by objective credentials has never been the sine qua non of college and university admissions. This does not mean that individual academic qualifications have no importance, or that the objective measures usually invoked as hallmarks of merit should play no role in the decision-making process. Most institutions, and in particular those with perhaps the most fervid commitment to diversity and affirmative action, the so-called elite universities, adhere to an admissions regime within which grades and scores on standardized tests provide at least the initial foundation for most of their admissions decisions. These same universities, however, also routinely consider a welter of other factors, many of which arguably have little to do with the actual academic competence of the individuals who exhibit them.

"Tips" granted to the sons and daughters of alumni, for example, are no less preferences by mere virtue of long-accepted practice. The same may be said of policies that mandate a certain proportion of state residents in public universities, even if it makes perfect sense to reserve space in these universities for the sons and daughters of the individuals whose taxes support them. And what are we to conclude about the role of academic merit in an admissions process that year after year yields an extraordinary number of superbly talented football players In each instance, the granting of the preference signals a fundamental reality: Conceptions of merit are in fact fungible. As such, they reflect an appropriate ideal, rather than an immovable standard against which to assess all applications for admission.

Most participants in the dialogue about affirmative action and diversity understand these realities. When challenged, however, many individuals tend to deny them. In particular, institutions confronted with the truth of their actions either refuse to admit that they in fact do precisely what their opponents claim, or dismiss the logical implications of their own conduct. Of course, if the universities must be honest about what they do, so too must the courts that evaluate these policies and assess the actions of the parties that appear before them. In Podberesky v. Kirwan, the University of Maryland argued vigorously that the race-specific scholarship program it crafted was necessary—a constitutionally permissible attempt to remedy the present effects of its past discrimination against Maryland citizens. The University offered substantial evidence in support of its position, highlighting a history of invidious treatment that

430. See supra text accompanying notes 32-41.
431. I ask that question acutely aware of the fact that I spent thirteen years as an administrator at, and earned two advanced degrees from, the University of Nebraska, which owes no apologies to anyone for its football prowess.
433. See id. at 154-55.
numbered among its victims Thurgood Marshall, a native of Baltimore who was forced to secure his legal education at Howard University. That evidence was compelling, and the Court’s refusal to consider it in a reasoned manner seems to reflect a fundamental hostility toward race-conscious actions.\textsuperscript{4} It is, however, one thing to say that the University’s justifications met the threshold requirement of a compelling interest, and quite another to say that the program was narrowly tailored. Skeptical judges can properly ask what relationship there is between a record of discrimination against the citizens of Maryland and a program that extends its benefits to a substantial number of non-residents. The result in \textit{Podberesky} is understandable, even if much of the court’s reasoning is suspect.

The need for honesty is especially important when the issue is “merit,” a term whose nature and implications lie at the heart of the affirmative action debate. I assume that in the distinctive world of higher education merit is, and should remain, the dispositive factor in admissions. As the philosopher George Sher has stressed:

When we [admit] by merit, we abstract from all facts about the applicants except their ability to perform well at the relevant tasks. By thus concentrating on their ability to perform, we treat them as agents whose purposeful acts can make a difference in the world. Moreover, by concentrating on abilities that are internally connected to jobs and opportunities that exist to serve independent purposes, we affirm the applicants’ involvement in the wider life of the community. For both reasons, selecting by merit is a way of taking seriously the potential agency of both the successful and the unsuccessful applicants.\textsuperscript{435}

Merit is then a means by which we affirm the worth of each individual. That measure may be relative, in the sense that its presence or absence depends on our understanding of why we are assessing it. The decision we make in selecting competing candidates turns on the criteria we establish, and what emerges from this is the relative merit of the people examined.

This assessment should not turn on the simple compilation of numbers, especially where recourse to grades and standardized test scores is a substitute for a more resource-intensive effort to evaluate the individual. As one thoughtful critic has noted, “[t]he scores provide a false sense of security because they seem so scientific: Faculty members and administrators alike are attracted by the apparent quantitative distinctions

\textsuperscript{434} The court, for example, simply discounted the district court’s finding that there was connection between past discrimination by the University and a current, racially hostile campus climate, observing simply that the incidents “do not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination.” \textit{id.} at 154. The court rejected, accordingly, the proffered social science findings, an attitude toward such matters that does not bode well for my assumption that social science evidence can and should make a difference.

\textsuperscript{435} \textit{Sher, supra} note 10, at 121.
among applicants’ scores, which suggest distinctions among applicants’ competencies that often do not exist.\footnote{36}

This does not mean that test scores and grades can be dismissed out of hand as either imperfect predictors\footnote{37} or as measures whose origins and current effects mark them as discriminatory.\footnote{38} Various studies have verified the important role test scores and grades play in selecting students for admission, especially at the “right tail,” the pool of applicants from which most elite institutions wish to draw the majority of their students.\footnote{39} Professor Robert Klitgaard undertook perhaps the most interesting and comprehensive of these studies. He found that in “highly selective universities, test scores and previous grades are quite helpful in assembling a class that on the whole will perform well academically” and that “[o]ther information now used in selection—such as essays, recommendations, interviews, and biographical information—do not add much of importance to the prediction of various kinds of later success.”\footnote{40} Some have criticized Klitgaard’s work as an expression of a “narrow view of education and the merit theory of admissions to which it leads.”\footnote{41} But while Klitgaard notes that the results of his study were a “surprise” to him, in the sense that they “ended up supporting an admissions system giving more weight to ‘academic merit’ at selective universities like Harvard,”\footnote{42} he concedes that in an ideal world of perfect information, students should not be chosen solely on the basis of “academic merit.” If a university aspires to produce leaders in the real world, then it should also select students for the qualities that make leaders. Grades and scores on standardized tests are insufficient; using these alone substitutes precision for accuracy. The ancients added “virtue” to “wisdom” as criteria for rulers; today, we talk of character and commitment and personality in addition to academic achievement.

\footnote{37}{See, e.g., \textit{id.} ("Those tests weakly predict grades during the first year of a multiyear program, but they predict little or nothing else.").}
\footnote{38}{See, e.g., Richard Delgado, \textit{Rodrigo’s Tenth Chronicle: Merit and Affirmative Action}, 83 Geo. L.J. 1711, 1740-45 (1995) (maintaining that the test movement was originated by “an out and out white supremacist” and suggesting that “[g]lobal standards of merit, like the SAT, may be unfair, overbroad, and prone to . . . abuses” (emphasis deleted)). The publication of \textit{Herrnstein & Murray, The Bell Curve}, \textit{supra} note 48, in large measure fueled the recent and extensive literature on the testing controversy. Regardless of its cause, the test gap is both real and a source of concern. See generally Ethan Bronner, \textit{Colleges Look for Answers to Racial Gaps in Testing}, \textit{N.Y. Times}, Nov. 8, 1997, at A1.}
\footnote{39}{The “right tail” lies at the “high” end of the traditional Bell Curve’s distribution of “talent.” See Robert Klitgaard, \textit{Choosing Elites} 4 (1985).}
\footnote{40}{\textit{id.} at 183.}
\footnote{41}{David E. Van Zandt, \textit{Merit at the Right Tail: Education and Elite Law School Admission}, 64 Tex. L. Rev. 1493, 1516 (1986).}
\footnote{42}{Klitgaard, \textit{supra} note 439, at 191.}
Indeed, even the developers of aptitude tests have repeatedly said that tests should be only part of the answer in choosing elites.\textsuperscript{443}

Discussions of merit should, accordingly, reflect honesty not just in terms of how decisions are made, but also in terms of what is at issue. It is the individual who matters, and the characteristics sought can be found only by studied consideration of the full range of each applicant's personal traits and circumstances. This poses a profound dilemma, for merit arguably implicates moral as well as objective issues, and preferences based on race embrace a far more compelling moral imperative than do those that simply recognize economic or geographic accidents of birth. At the same time, as Professor Stephen Carter has argued, "our position should not be privileged simply because we are black."\textsuperscript{444} The moral imperative must, accordingly, reflect the intrinsic worth of the applicant seeking admission, rather than an appealing but ultimately hollow conception of that person's status as a "representative" of class needs and interests.

The moral predicate for affirmative action also presents a practical difficulty: Any selection process that does in fact consider the entire individual will be time consuming, labor intensive, and expensive. If, as Justice Powell believed, the Harvard approach is an exemplar of admissions practices, it is worth remembering just what that system entails.\textsuperscript{445} We must understand, as one law professor has observed, that while "[t]he whole-person approach is 'a very simple concept, [it is] one law schools are not ready to embrace .... It's labor-intensive, [and] it's time-consuming.'"\textsuperscript{446} Institutions that shy away from an admissions regime whose components reflect the seriousness of the task reveal a very great deal about the true nature of their commitment. If, however, we are honest about our objectives, and those goals involve considered decisions reflecting a desire to assemble a truly diverse student body, we must also be willing to pay the costs associated with them.

2. \textit{Openness}

Openness, in turn, requires that there be full disclosure of detailed policies and candor regarding the nature of what is actually being undertaken. It also counsels that institutions be willing to concede the obvious even where, as has so often been the case, doing so involves admitting that the institution has acted in an indefensible manner.

\textsuperscript{443} Id. at 181.
\textsuperscript{445} See supra text accompanying note 333.
\textsuperscript{446} Deirdre Shesgreen, Legal Educators Weigh Effects of Hopwood, Abandoning LSAT, Tex. Law., Jan. 20, 1997, at 5, 20 (quoting Professor Alex Johnson, Jr., University of Virginia School of Law).
There is substantial evidence, both experimental and anecdotal, indicating that the single most important factor in current antipathy toward affirmative action is "a mind-set that treats [it] like an embarrassing family secret." Detailed policies will not eliminate all opposition to affirmative action, or make the costs of such programs palatable for individuals who believe they have been denied admission in favor of obviously less qualified or unqualified minority candidates. However, such policies will eliminate the room for error that has plagued implementation of affirmative action by making clear to all parties both the assumption that diversity reflects sound educational practice and the means by which that objective is to be attained.

These policies must be developed in the open and command the support of the full range of constituencies comprising the institutions that embrace them. One of the more interesting aspects of many of the affirmative measures that have been invalidated is the extent to which they appear to have been developed and approved outside normal channels. As one of the attorneys for Cheryl Hopwood has noted, one of the most ironic aspects of the Hopwood litigation is that the attorneys pressing her claims were unaware of the Texas two-track system when the case was filed. Indeed, Professor Charles Alan Wright, who has expressed strong support for appropriate forms of affirmative action, has stated both that he "was surprised to learn of the two committees in 1992 and did not see how UT could defend the practice." And various individuals on the faculty of the Boalt Hall School of Law have also conceded that "in all the years the school practiced affirmative action, the issue never came up for a full-fledged debate in faculty meetings."


450. See Elliott, supra note 344, at 1. Interestingly, in a statement whose significance apparently escaped the individuals bringing the suit, Texas's most outspoken critic of affirmative action, Professor Lino Graglia, had indicated much earlier that at Texas "black applicants compete only with other blacks, not with whites." Lino A. Graglia, Killing the Politically Incorrect Messenger, TEx. LAw., July 22, 1991, at 12, 13. Perhaps they simply could not believe that the system would be as contrary to Bakke as it was.


These rather startling revelations reflect a reality identified by Professor Sandalow: The extent to which university faculty are uniquely ill-suited to make these sorts of decisions. He notes, for example, that “[a] law school faculty . . . is not well situated to acquire information about the impact of its decisions upon persons outside the law school community and the legal profession.” Law faculty would likely disagree with this, but the point is well taken, especially where, as is clearly the case, there is no real social consensus on the wisdom of affirmative actions, much less on the details of a given policy. Professor Sandalow argues, accordingly, that “[b]alancing the dangers of these preferences against their potential gains is a delicate, and ultimately legislative task.” That may or may not be a wise or workable approach in today’s fragmented and contentious political environment. It is nevertheless an open process, and to that extent clearly preferable to the secretive and irresponsible manner in which so many university faculties have acted.

Finally, it is essential that universities in particular concede the obvious. Texas arguably did this when it abandoned the two-track system prior to trial, but at the same time it cast doubt on the nature and force of that concession by insisting throughout the Hopwood litigation that “[t]he Texas approach to affirmative action is in the mainstream of the approach used by law schools and other schools throughout the country.” Texas was not alone in this regard, either in its adoption of suspect practices or its determination to defend them. In 1992, officials at the Boalt Hall School of Law claimed that they were “proud” of their admissions system, and insisted, in the face of overwhelming evidence to the contrary, that its approach was “fully consistent” with the Bakke decision. In 1997, officials at the University of Michigan, now a target of a suit by the same organization that brought the Hopwood litigation, maintained that the

454. Id. at 698. Justice Stevens, for one, appears to question the extent to which this is a proper matter for the legislature, at least to the extent that affirmative measures are justified as remedial. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 513-14 (1989) (“It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed.”). Most affirmative programs in higher education today are embraced for different reasons, mainly, under the assumption that they represent educationally sound practices. To the extent that institutions believe, however, that their efforts can properly be grounded in past discrimination, a prominent argument in both Hopwood and Podberesky, they should proceed with caution.
455. Richard Bernstein, Racial Discrimination or Righting Past Wrongs?, N.Y. TIMES, July 13, 1994, at B8 (quoting Harry Reasoner, the private attorney who represented the University in Hopwood).
456. Mary Jordan, Berkeley Law Admission Policy Voided: Racial Diversity Effort Found Illegal, WASH. POST, Sept. 29, 1992, at A1 (quoting Dean Herma Hill Kay, who stated: “We are proud of this policy.”). I discuss the Boalt Hall program supra at text accompanying notes 361-64.
University did not have separate standards for minority candidates under the undergraduate admissions system in place when the plaintiff in the current lawsuit was denied admission, even in the face of evidence indicating that such had been the case.  

Claims of these sorts may serve short-term litigation strategies, and may also provide necessary political cover for institutions eager to appease special constituencies. They are, nevertheless, profoundly harmful in a political and social environment within which even those who might otherwise be favorably disposed toward diversity initiatives recognize that "[d]enying the existence of racial preferences implicitly concedes their immorality." Candid acknowledgment of both the strengths and weaknesses of diversity measures treats such policies as appropriate elements in the educational continuum. But denying that the policies have flaws, often as the institution changes them in the face of litigation, cedes the moral high ground to those who seek to eliminate any mention of race or other group characteristics. And pretending that the process has not operated as it has subjects each participant to a reign of uncertainty within which professed academic values ring hollow in the light of lingering uncertainties about precisely what and who a university values.

3. Reasoned and Sound Policies

The reality of strict scrutiny makes it essential that institutions ground their actions in fully reasoned and academically sound educational policy. The Court has emphasized repeatedly that any program that takes race into account, or even appears to do so, must have "a strong basis in evidence" and that this evidentiary foundation must be established prior to the initiation of the race-conscious programs and actions. I believe that requirement can be met only when affirmative action policies clearly articulate the precise educational objectives they are pursuing, with the institution prepared to document the positive educational outcomes that flow from its implementation.

The bases for an affirmative action undertaken in support of the quest for a diverse learning environment must be perceived to be educational, rather than political or social. In Hopwood, for example, the University of Texas's political agenda arguably clouded its academic judgment. The law


460. See supra text accompanying note 246.
school, or at least the segment of its faculty and administration that participated in the formulation of the admissions policy at issue, clearly believed that attaining a diverse student body was a moral and educational imperative. Additionally, the university itself was under considerable pressure to comply with the Office of Civil Rights mandate and meet the expectation of its citizens and legislature that this “elite public institution in a populist state . . . serve, and be seen to serve, all the people of the state.” The admissions regime the law school embraced allowed it to meet these obligations. But by returning to the very approach condemned by Bakke, a system it had itself abandoned in that decision’s wake, Texas created the very strong impression that demographic results mattered more than constitutionally sound process. That was, however, precisely what Justice Powell rejected in Bakke. This may, as many of Justice Powell’s critics have noted, ultimately involve an elevation of form over substance. But form matters a great deal in a legal regime that insists on the use of the “least restrictive means.” And perceptions of fairness are absolutely essential in a public relations environment within which citizens insist on at least an appearance of propriety.

Diversity is clearly something more than a matter of simple appearances. The case for diversity assumes, rather, that a diverse learning environment makes a difference in the quest for important, positive student outcomes. Universities wishing to pursue diversity in ways that create even the inference that group identity is an admissions consideration must be prepared to bolster their case with something more than the simple assurance that they are enclaves of educators, and that diversity is an accepted educational construct. They must, rather, be in a position to provide tangible evidence that their instincts are correct.

This is a matter of considerable importance, as various advocates for affirmative action and diversity have now realized. In Taxman v. Board of Education of the Township of Piscataway, for example, various higher education organizations, fearful of the consequences of a negative decision in that case, went to considerable lengths to inform the Court that “social science research provides concrete findings of measurable positive effects

461. Wright et al. Brief, supra note 7, at 10.
462. See, e.g., Jeffries supra note 269, at 484-85.
463. For a discussion of three examples of what such evidence might look like, see supra text accompanying notes 117-57.
464. 91 F.3d 1547 (3d Cir. 1996) (en banc). Taxman is the case that various civil rights groups settled rather than allow the Court to issue a decision that might further undermine the already tenuous legal status of affirmative action. See, e.g., Steven A. Holmes, Rights Groups Folded on Case In Bid for Time, N.Y. Times, Nov. 23, 1997, § 1, at 1; Stephen Labaton, Liberals to Court: Don't Take This Case, Please, N.Y. Times, Nov. 23, 1997, § 4, at 6. Given the result obtained in Bakke, which presented a factually difficult scenario and produced a badly fragmented Court, their reticence seems appropriate, just as it was almost certainly fortunate that the Court refused the invitation to review the particular admissions regime at issue in Hopwood.
of diversity as an educational outcome." The briefs they filed stressed their belief that "studies find that such diversity initiatives produce concrete educational benefits for white as well as minority students."

Unfortunately, responsible individuals have only recently realized the need to provide compelling evidence, rather simply continuing to rely on what some have aptly characterized as "an article of faith." But "articles of faith" have little force when presented to a panel of agnostics, as was so clearly the case in both Hopwood and Podberesky. At best they are of limited value when, as Judge Posner has indicated, the actual operation of a particular admissions system poses substantial problems for judges who assume a degree of knowledge, but who may or may not "know enough . . . about education to make intelligent decisions."

These are, presumably, the sorts of decisions represented by Wittmer v. Peters, which sustained a hiring plan for a prison "boot camp" that treated selection on the basis of race as an appropriate selection criteria sustained by "expert evidence." Writing for the court, Judge Posner stressed that the argument for taking race into consideration was not predicated on the assumption that guards, like teachers or professors, provided "role models" for those with whom they interacted. In that respect, he signaled agreement with the Wygant Court that "[t]here are many weak arguments for discrimination, and the 'role model' theory, at least to the extent it has been developed in the cases to date, is one, because of lack of substantiation and a well-nigh unlimited reach." In Wittmer, however, the "argument for the black lieutenant is not of that character," but was rather "backed up by expert evidence that the plaintiffs did not rebut."
The evidence offered in that case was not "academic" in the traditional sense. But it is quite clear that it was of the sort Judge Posner is describing when he stresses that

[[little is known about what makes for effective education. The role of resources, of class size, of curriculum, of racial or other demographic sorting or mixing, of extracurricular activities, of technology, of standardized testing, of family structure, of homework—the significance and interaction of these elements of the educational process remain largely unknown. Judges can certainly be forgiven for not knowing what people who devote their lives to a specialized field do not know; it is less easy to forgive them for not knowing that they don't know.\(^\text{473}\)

Universities must devote their considerable expertise to the task of documenting what they have always assumed. As it has to date, that process may involve close examination of student attitudes on racial issues and the effect of various programs that focus expressly on the impact of specific, race-sensitive programs. Such evidence will, for example, allow advocates for affirmative action to maintain that "\([o]\)verall, the research indicates a powerful positive impact of diversity initiatives on minority and white students."\(^\text{474}\) Studies of this sort are, however, only a necessary first step. They deal, as critics of the approach taken by some of the parties in Taxman observed, with "secondary educational outcomes such as race relations and attitudes, which may relate to positive effects of educational experiences but not to the quality of the education delivered."\(^\text{475}\) The appeal to diversity is ultimately predicated on the assumption that a diverse student body in and of itself matters, and that the educational benefits that flow from entering such an environment are substantial. Studies that emphasize the positive impact of directed programming answer, accordingly, only one of the myriad questions that must be addressed.\(^\text{476}\)

Of course, if the studies do not document actual educational benefits, we must be willing to acknowledge the implications of such findings. The few rigorous examinations of actual educational outcomes conducted to date, while arguably limited in scope and in some respects flawed, seem to indicate that positive benefits do in fact accrue.\(^\text{477}\) Professor Gurin's recent study, for example, provides considerable support for the belief that a diverse learning environment provides real benefits for virtually all

\(^{473}\) Posner, supra note 160, at 19.

\(^{474}\) ACE Brief, supra note 465, at 9.

\(^{475}\) Brief of the National Association of Scholars as Amicus Curiae in Support of Respondent at 13, Taxman, 91 F.3d at 1547 (No. 96-679).

\(^{476}\) The ACE Brief concedes as much, shifting as it does from a discussion of "research findings" to the "broad consensus among leading educators" when the question becomes the wider impact of a diverse student body per se. See ACE Brief, supra note 465, at 9.

\(^{477}\) See supra notes 106-09.
students in a wide variety of institutional situations. I suspect, accordingly, that the picture that emerges will support the assertion that diversity is a compelling interest. If the studies do not, however, provide appropriate evidence, it is quite clear that the case for diversity rests on nothing more, nor less, than a value judgment. That value may, as many champions of diversity believe to be the case, reflect transcendent moral norms. But it is unwise to assume that these are the same norms shared by either a Court or a populace that has to date invested considerable faith in a series of assumptions about just what the Constitution means when it declares that we are each entitled to the equal protection of the laws.

Finally, the need to press the case for diversity within accepted academic norms is especially compelling when the debate focuses, as it virtually always does, on conceptions of merit. In Part I of this Article, I indicated that my understanding of diversity is one in which ethnic and racial identity are appropriate aspects of what an institution seeks as it assembles each entering class. But that approach to merit assumes that there are specific, individual thresholds below which an institution should not be willing to go. That is, depending on institutional mission and type, there should be a common understanding of the academic skills requisite to success, and that understanding should structure the admissions process.

It is virtually impossible to conceive of a system of this sort within which objective measures will not matter. Grades and test scores, for all the criticism that excessive reliance on them engenders, nevertheless provide an appropriate measure of many of the skills an institution seeks in its students. Jencks and Phillips, for example, argue persuasively that test scores matter, that there is a recognizable difference between black and white achievement on such tests, and that positive, albeit expensive, educational intervention techniques can in fact narrow the gap. And a recent study of bar examination passage rates, which was characterized as "likely to provide important support for advocates of affirmative action," verified that "the academic achievement underlying the grades and test scores of these study participants was strongly related to bar outcomes."

Unfortunately, many critics of the traditional regime seem unwilling to concede this, arguing that the very notion of "merit" is itself

478. See supra text accompanying notes 131-42.
479. This does not mean that a specific college or university should undertake an affirmative admissions program only if it has studied these matters, or that affirmative measures should be abandoned if initial studies prove inconclusive. Rather, it means that individuals proceeding in the face of such realities should be realistic about their prospects for success if and when their programs are challenged in court.
482. WIGHTMAN, supra note 419, at 77.
inappropriate. The argument is not, as is sometimes alleged, that merit is not now and never has been the dispositive factor in the admissions decision. Every admissions policy stresses, and every affirmative action plan pays at least lip service to the notion that applicants must be qualified when measured against specified criteria. Rather, the individuals I have in mind maintain that traditional conceptions of merit have "little correlation to effective teaching or significant scholarship" and serve simply as "power-preserving and community-comfort considerations" by which universities "get beyond this nation's racial past by the simplest means possible, which is to pretend it never happened." Professor Williams, for example, characterizes standards as "mind funnels" and argues that they "are nothing more than structured preferences." Professor Bell insists that "the qualifications [universities] insist on are precisely the credentials and skills that have long been denied to people of color." And Professor Delgado argues that "acquiescence in treating" these matters "as 'a question of standards' is absurd and self-defeating when you consider that we took no part in creating those standards and their fairness is one of the very things we want to call into question."

Some of the realities these individuals highlight are undeniable, and many of the traditional assumptions and practices are difficult to defend. Unfortunately, none of the individuals criticizing traditional notions of merit offer anything that approximates a cogent substitute for the criteria they condemn. Most of the discussions are simply silent. The few options that are offered leave one searching for some basis on which to make an informed decision between and among competing candidates. Professor Bell, for example, argues that aspiring law professors should simply be "empathetic" individuals who have "extensive experience practicing law, and want [to] both . . . train law students and to write about their views on law which have come out of their practice and training." These "standards" would view as acceptable any "experienced" lawyer who applies for the position. But that is not what these individuals seek, for they seem to assume that the only "appropriate" decisions are those that add women and minorities to faculties and increase the number of women and minorities admitted to the nation's very best universities. Some are candid in this regard, arguing, for example, that "women, people of color, and the

483. See supra text accompanying notes 41-47.
484. DERRICK BELL, CONFRONTING AUTHORITY 76 (1994).
485. Id. at 77.
487. Bell, supra note 4, at 1605.
489. For an interesting perspective on these matters, see DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).
490. Bell, supra note 484, at 79.
disable...are entitled to the preferences not only to remedy past discrimination and abate the effects of today's exclusionary practices, but also to stem the tide of perpetual domination that has been the prerogative of the "normal" white male for all too long." Others, however, mask their objectives with rhetoric that obscures rather than enlightens, often in ways that confirm the worst fears of those who oppose diversity precisely because they suspect it reflects a policy of group entitlement.

If, as I have stressed, it is important for universities to eschew simple reliance on mechanical admissions formulas, it is equally important for critics of traditional conceptions of merit to offer something more than the rhetoric of discrimination. Former Attorney General Ramsey Clark was perhaps correct when he argued after Bakke that "[s]urely half our college graduates are capable of practicing law and medicine." But I have my doubts, and there is much to be said for an argument in favor of diversity that simultaneously presses the case for social justice and reassures skeptical observers that standards matter. Universities must clearly articulate and rigorously adhere to standards they establish if they are to have any hope of benefiting from the traditional presumption that courts should show "great respect for the faculty's professional judgment" when they make "a genuinely academic decision." If they do so, however, there is every reason to believe that they will be entitled to a respectful hearing, and that courts otherwise disposed to the rule of law will find it neither necessary nor appropriate to condemn their judgment.

4. Comprehensive Solutions

A fourth requirement is that universities fashion programs that are proactive, and reach across the entire social and economic spectrum. It is not enough, for example, for a university to simply admit individuals in an effort to foster the benefits that diversity brings and then leave them on their own. Facilitating access is not enough. There is a substantial body of literature supporting the notion that an institutional commitment to diversity must involve something more than the attainment of appropriate admission or hiring ratios. Diversity, often expressed through gender- or


492. For an insightful and, in my view, generally accurate critique of many of these views, see DANIEL A. FABER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997).


495. See, e.g., Gregory A. Jackson, Financial Aid, College Entry, and Affirmative Action, 98 AM. J. EDUC. 523 (1990); Marvel Lang, Barriers to Blacks' Educational Achievement in Higher
race-based goals, is ultimately a means rather than an end, a mechanism that allows institutions of higher education to assist individuals who have particular needs and have the capacity to make specific contributions to the institution and society. Accordingly, an institution that conceives of affirmative action as a simple exercise in bottom line reporting commits a profound error.

Higher education must also recognize that its obligations begin far in advance of the time that students make the decision to seek admission. Perhaps the single most important thing an institution can do is to recognize that the very best affirmative actions—initiatives that will both enhance educational access and maximize individual attainment—will often take forms other than the consideration of race or ethnic identity as part of the admissions process. For example, we have known for at least the past thirty years that "[p]ersistent poverty over generations creates a culture of survival," and recent studies verify the profound importance that health, social, and economic conditions have on individual development, both mental and physical. If, as these studies suggest, intelligence and adaptive behavior are strongly influenced by socioeconomic status, and in particular include important prenatal dimensions, the need for intensive early medical, social, and educational support becomes compelling.

Universities, with their substantial expertise, and their expectation that faculty engage in productive, socially responsible service, have a primary responsibility to develop and implement policies and programs that address these concerns. Some are doing so. In California, for example, a twenty-five year old program for twelve- and thirteen-year old students at the University of California at Berkeley, which has been likened to an "academic boot camp," now assumes much greater significance in the search for creative ways to instill basic academic skills and a thirst for knowledge. There is also a series of partnerships between various universities in the California system and local school districts that are focusing on

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and encouraging "[e]lementary, middle and high school students who are identified as needing academic guidance or who are exceptional students but who might fail because of behavioral problems or neighborhood and peer pressures." Such programs can be expensive, and arguably divert university faculty and resources from their primary tasks. Service is, nevertheless, one of the three traditional university responsibilities, a necessary adjunct to teaching and research. This is especially so for public institutions, which have specific, positive obligations to serve the people of the state that supports them. Moreover, universities cannot argue, on the one hand, that discrimination and social dislocation justify their affirmative programs and maintain, on the other, that crafting solutions to those problems is someone else's responsibility. Programs of this sort, accordingly, both reflect the best academic traditions and offer meaningful ways to instill necessary skills in potential applicants.

Such activities are, in every sense of the words, affirmative actions. Too often, however, institutions seem unwilling to recognize that these sorts of initiatives are at least as important as the enrollment of students in appropriately representative numbers. As Professor Steele has noted,

"There is little talk about affirmative action as public policy. One reason, I think, is that affirmative action has always been what might be called iconographic public policy—policy that ostensibly exists to solve a social problem but actually functions as an icon for the self-image people hope to gain by supporting the policy."

The assumption seems to be, in the rhetorical formulation embraced by President Johnson, that the only appropriate affirmative actions are those that involve actually "walk[ing] through th[e] gates" of this nation's colleges and universities. That mind-set must change. Universities must craft measures that reach across the entire social spectrum, recognizing ultimately that true educational attainment is a matter of individual, rather than group, need. But will higher education recognize this? And will such efforts become regular features of a comprehensive affirmative strategy, rather than simple post-litigation bandages?

Universities have little to gain by supporting policies that distract from achieving the "right numbers." Programs that actually assist individuals in need, but do little if anything to alter actual patterns of enrollment are, accordingly, suspect. Higher education has, nevertheless, both a special opportunity and a special responsibility. In spite of decades of active intervention, substantial economic and social dislocations persist for what one might characterize as the "underclass." While predominantly minority


in character, this group is one in which the dispositive disabilities are matters of basic economic, educational, and social opportunity largely dictated by income, rather than persistent legal disqualification on the basis of race or gender. These are matters that universities can and should address through initiatives that will, over the long term, pay substantial dividends if the true objective is to foster the identification and admission of qualified individuals. Programs directed toward the amelioration of those deficits are, accordingly, at least as important as those that simply adjust admissions standards under the assumption that the only things that matter are current numerical expressions of actual participation.

5. **Steadfast Adherence to Principles**

There is, of course, an obvious danger posed by the requirement that a diversity initiative be articulated with clarity and tied to specific, sound educational policies. What is an institution to do when it has acted in this manner, and still does not have a “sufficiently” diverse student body? One solution might be, as has so often been the case, to continuously adjust matters until goals are met. That was quite clearly what happened in *Bakke*, *Podberesky*, and *Hopwood*, where both the goals and mechanics of the programs were such that an almost irresistible pressure raised the number of minority admissions to the desired threshold. Actions of this sort have a fatally corrosive effect. At a minimum, they provide the opponents of diversity with crucial ammunition in their quest to characterize affirmative measures as quotas.502 Furthermore, when institutions continuously adjust preset definitions of merit, they cast substantial doubt on the legitimacy of the university’s contention that it is in fact pursuing sound educational practices.503

Institutions of higher education are in a preferred position to articulate the values and defend the practice of diversity and affirmative action. As I have indicated, universities and university faculty are routinely afforded respect by the courts, a form of judicial deference that offers them considerable leeway if they act on the basis of professional judgment, professionally exercised. Affirmative measures that fail to define in advance what it means to be qualified for admission, or constantly adjust any predetermined criteria for the sake of results, create an almost irrebuttable presumption that such programs are simply exercises in social engineering. As such, they become recipes for disaster.

502. *See, e.g.*, Michael S. Greve, *Hopwood and Its Consequences*, 17 PACE L. REV. 1, 8-12 (1996) (maintaining that the evidence in *Hopwood* established that the “goals... were quotas in all but name”).

503. An interesting contrast to the norm is found at the Georgia Institute of Technology, which has found “that success lies in expecting more from students, not less.” Ronald Smothers, *To Raise the Performance of Minorities, a College Increased Its Standards*, N.Y. TIMES, June 29, 1994, at A21.
Ultimately, results do matter. But those results are not institutional profiles that enable a particular university to tout itself as an exemplar of the diversity ideal. The best outcomes are those attained when qualified minority students enter an academic environment that enriches the experiences of each participant by virtue of their very presence. In legal education, for example, the individuals who lament "[w]hat is it going to be like teaching *Brown v. Board of Education* with no blacks in the classroom" have a point.\textsuperscript{504} The dynamics of a diverse classroom, for example, make the classes in which the profound constitutional issues posed by the realities of invidious discrimination into something more than a simple exercise in constitutional theory.\textsuperscript{505} We do not know for certain that these dynamics in fact make the learning process better as a matter of educational outcomes. To date, there have been only a very small number of truly rigorous efforts to examine the extent to which the composition of the student body measurably influences actual learning. But it does seem clear that diversity may well matter, and it is on that predicate, rather than on simple assurances that educators have our best interests at heart, that the fate of affirmative actions will rest.

Finally, there is a collateral difficulty that universities are in an especially preferred position to address: the inculcation of the fundamental importance of education and the values implicit within an academic regime dedicated to individual excellence. This is both an obvious need and a matter of considerable embarrassment given the manner in which the issue has been discussed. Recently, for example, Professor Lino Graglia triggered an outpouring of abuse when he declared that disparities in academic performance between minority and non-minority students are "the result primarily of cultural effects. They have a culture that seems not to encourage achievement. Failure is not looked upon with disgrace."\textsuperscript{506} Graglia's remarks were characterized as "abhorrent" by top officials at the university,\textsuperscript{507} and the eventual decision not to punish him for his remarks

\textsuperscript{504} The quote appears in Anthony Lewis, *Abroad at Home; Whiter Than White*, N.Y. TIMES, May 23, 1997, at A31, who characterized the question as "anguished."

\textsuperscript{505} One member of the Texas law faculty, for example, has observed that "[a]s someone who regularly teaches courses involving the great issues of American society, I can testify to the importance of such diverse classes in generating acute, even if at times uncomfortable, discussions." Sanford Levinson, Hopwood: *Some Reflections on Constitutional Interpretation by an Inferior Court*, 2 TEX. F. CIV. LIBERTY & CIV. RTS. 113, 116 (1996). As someone who teaches many of the same courses, I agree; the teaching dynamic is different, in positive ways. But I cannot prove that the learning process is better for my students. And I must acknowledge, and respect, the contrary experiences of individuals such as Professor Sandalow, who "cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by white students." Sandalow, supra note 15, at 1906.


\textsuperscript{507} Id.
was characterized as a "cowardly move on the part of the administration not to face something that demands critical attention." 508

As he admits, Professor Graglia is a conservative gadfly who often speaks in a deliberately provocative manner. 509 The nature and extent of the reaction to Graglia's remarks was nevertheless interesting, given that so many respected African Americans have said precisely the same thing and have not provoked a similar response. Professor Stephen Carter has written that "there exists among many young people in the inner city, and sometimes elsewhere as well, an ethic suggesting that academic achievement is a betrayal of the group." 510 Hugh Price, president of the National Urban League, has described "a street culture that has taken over that devalues educational achievement." 511 Another observer has noted that "[s]omehow over the past two or three decades a lot of black kids absorbed the message that academic achievement was something to be shunned . . . . Academic achievement, according to this mind-bogglingly destructive way of thinking, was a white thing, and thus in some sense contemptible." 512 And, in the wake of the highly publicized events surrounding the fortieth anniversary of the integration of Little Rock's Central High School, current students spoke of the "peer pressure not to take honors classes. 'You get called names: Oh, you are a little white girl. You are an Oreo cookie.'" 513

As Thomas Sowell observed, "Graglia's statement that different ethnic groups put different emphasis on education is not only true but commonplace among groups around the world." 514 By and large, these individuals have not been labeled, as Professor Graglia was, a "racist" 515

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510. CARTER, supra note 444, at 242.


513. Julian E. Barnes, Segregation, Now, U.S. NEWS & WORLD REP., Sept. 22, 1997, at 22, 26 (quoting Tanya Corbin, a 17 year-old senior). It seems probable that Graglia was, as he maintained, simply "commenting on studies he has read." Mary Ann Roser, Call to Oust Law Teacher Gets Louder; UT Interim President Looks into Matter, AUSTIN AM.-STATESMAN, Sept. 13, 1997, at A1. It seems equally probable that three prominent University officials were wrong when they asserted that "such statements are simply not true." Donald L. Evans, UT's Commitment to Diversity Stands, AUSTIN AM.-STATESMAN, Sept. 16, 1997, at A9. Evans is Chair of the UT System Board of Regents. The Chancellor of the System, William H. Cunningham, and the then-Interim President of the Austin campus, Peter J. Flawn, also signed this statement.


515. Roser, supra note 513, at A1 (quoting University of Texas Regent Tony Sanchez).
and an individual who espouses a "fascist ideology." The point is not to

defend Professor Graglia, who nevertheless had every right to say what he
did, even though some might maintain that as an "outsider" he has no real
understanding of the cultural phenomena he identified and criticized.
Rather, it is that certain things matter, and that all parties to the debate
about affirmative action and diversity have an obligation to recognize and
adhere to certain core values.

The Graglia episode points us toward a fundamental dislocation that
must be addressed if the persistent problems of those groups now least
likely to enter a university and complete their education are to be solved in
any rigorous manner. It is the message that is important here, not the mes-
senger. That message is that education matters. And our insistence that it
matters is an essential ingredient in the quest for excellence. That principle
is, however, undermined in any environment that routinely adjusts stan-
dards in pursuit of enrollment "goals." Such systems foster the inevitable
belief that the means are more important than the ends, and that the indi-
viduals who eventually are the recipients of an education are valued not for
what they are capable of learning, but rather for what they symbolize in the
quest for racial and ethnic balance.

6. Patience

If our colleges and universities approach affirmative action as a matter
of aiding individuals, rather than themselves, they will be acting in ways
that affirm rather than deny their central tenets. And if such programs are
triggered by an assumption that educational attainment rather than group
identity is the predominant concern, they will become exemplars of the
American dream, rather than evidence that preferential treatment has
become the enemy of equality. However, in the words of the ancient cartog-
raphers, "here be dragons." To the extent that race does not remain an
overt aspect of the admissions process, a diversity measure predicated on
the sorts of considerations I have outlined will, by sheer force of numbers,
benefit a substantial number of individuals who do not reflect traditionally
favored characteristics, such as race, ethnicity, or national origin. It is
also quite possible that admission numbers for previously preferred groups
will fall below whatever goals the institution sets for itself. These realities
are, I believe, the price we must pay, a price exacted in the face of what

517. My argument is not that there should be "class-based" affirmative actions, an approach
offered by many thoughtful observers as an alternative to programs based on race. See, e.g., RICHARD
arguing for programs in which no single characteristic is the focus, albeit ones through which diversity
is attained.
will certainly be renewed suggestions that to act otherwise is to frustrate
dreams and run the risk of "resegregation." 518

That means, however, that universities must understand the impor-
tance of the "long view." An appropriate admissions policy may or may
not prove immediately effective. Goals may or may not be realized. It is
nevertheless essential that institutions stay the course and not succumb to
the temptation to compromise their academic principles for the sake of
results. The University of Maryland, for example, pinned its hopes for the
Banneker Program on the need to redress the effects of protracted dis-

crimination against Maryland citizens. But it implemented the program in a
way that belied that objective by awarding a substantial number of the
scholarships to non-residents. It is certainly conceivable that Maryland
believed that the presence of any minority, regardless of origin, contributed
in important ways to the eradication of the problems it confronted. It is also
possible that it simply lacked the patience to realize its objectives over time
and substituted short-term results for principled outcomes. If so, the deci-
dion was clearly an unfortunate one, especially since it now appears that
carefully structured, race-neutral approaches may well allow the University
to achieve precisely the same goals. 519

Similar problems arise when institutions become inflexible in their
approach. While not directly on point, in the sense that the actor in ques-
tion was not a university, the events providing the foundations for the
Court's decision in Croson 520 provide a valuable example. In that instance,
the city's minority business enterprise program provided that an exception
could be made to the mandatory set-aside in the event that a suitable
minority contractor could not be found. 521 The J.A. Croson Company
attempted to find a qualified subcontractor. When unable to do so, Croson
documented that recourse to the one available minority subcontractor, who
was not an authorized supplier for the fixtures required, would substan-
tially increase the costs involved. The company, accordingly, asked for an
exception to both the set-aside requirement and, if necessary, the contract
price, both of which the city refused to grant. 522

The litigation that followed was, then, arguably unnecessary. By
reflexively refusing to proceed in a case-sensitive manner by granting an
exception in this understandable position, the city created the impression

518. For a comprehensive picture of the current situation, including high school completion rates,
enrollment trends, and graduation rates, see Deborah J. Carter & Reginald Wilson, Minorities in
519. See, e.g., Timothy B. Wheeler & Mike Bowler, State Colleges Maintaining a Racial Mix,
Sun (Baltimore), Aug. 9, 1998, at 1B (noting that post-Podberesky Maryland institutions have been
able "to maintain—and, in a few cases, increase—the racial and ethnic variety of their students, largely
through admissions practices that consider race and many other factors").
521. The mechanics of the program are discussed in Croson, 488 U.S. at 478-79.
522. See id. at 482-83.
that race mattered above all else—mattered, indeed, more than finding a qualified subcontractor and more than conducting the city’s business in a cost-sensitive manner. More tellingly, it did so in an environment where the impression that a racial spoils system was at work was pronounced. As the Court noted, at the time of the litigation “blacks constitute[d] approximately 50% of the population of the city of Richmond [and] [f]ive of the nine seats on the city council [were] held by blacks.”

The inference that the decision to create the set-aside program was the product of “simple racial politics” may well be “insulting” and “have no place in constitutional jurisprudence,” as Justice Marshall argued eloquently in dissent. But the failure of the city to recognize the necessity and appropriateness of a flexible approach in circumstances where forced compliance seemed so contrary to traditional public norms is, to say the least, troubling, especially where those requesting judicial indulgence relied on the assumption that the Court should trust them to act in a fair and impartial manner.

Universities seeking to diversify their student bodies must exemplify patience. Diversity policies will survive constitutional attack only if they can be defended as sound educational practices that operate for appropriate educational reasons. That assumption cannot obtain in an environment where results seem to matter more than adherence to principle. The traditional civil rights chant asks: “What do we want? Justice! When do we want it? Now!” It is difficult and perhaps close to impossible to resist the appeal of such sentiments in an environment within which disparities in opportunity and attainment are the rule, rather than the exception. But universities are best advised to refuse the Siren’s call where, as is so often the case, the attainment of immediate results requires that fundamental academic principles be compromised or abandoned.

CONCLUSION

Affirmative action is both a necessary and appropriate public policy in a society in which inequality of opportunity remains a pervasive reality—assuming, of course, that by affirmative action we mean that our institutions, and in particular our colleges and universities, take positive steps to afford all individuals equal educational opportunities. Unfortunately, affirmative action as it is now commonly practiced has accumulated considerable negative baggage, as pervasive public support for the fair and equal treatment of individuals collides with an equally widespread belief

523. Id. at 495.
524. Id. at 493.
525. Id. at 554-55 (Marshall, J., dissenting). Justice O’Connor in particular sounded the alarm, speaking repeatedly of “illegitimate notions of racial inferiority or simple racial politics,” “a politics of racial hostility,” and “unthinking stereotypes or a form of racial politics.” Id. at 510.
that affirmative action inevitably involves granting preferences predicated solely on group membership.

The challenge for those shaping a new generation of affirmative action programs is to articulate clearly an appropriate vision of what it means to be affirmatively active and then adhere strictly to the professed values, forms, and procedures, regardless of consequences. As part of that process, universities must place themselves in a position where they can maintain credibly that the debate about affirmative action in postsecondary education is in fact a debate about the nature and value of diversity as an educational construct. If they are able to do so, they will find that the inevitable legal challenges will be assessed in the light of professional judgment and academic freedom, a judicial matrix that requires courts in large measure to defer to the judgment of college and university faculty members who argue that diversity should in fact be pursued.

This requires that each diversity measure reflect the sound and considered judgment of professional educators about the value and importance of diversity. The debate must be a debate about education itself, rather than about institutional prestige, political comfort, or any of the myriad other realities that have distorted and destroyed what was once an appropriate impulse. This will require that higher education confront, candidly and dispassionately, the central contradiction between its desire to maintain its image as the citadel of absolute and unflinching dedication to merit, narrowly defined, and the countervailing reality that true diversity may well be an educational aim worthy of protection.

The resulting dialogue may well prove at least as contentious as the current debate on affirmative action. Education matters a great deal to the American people, and the passions triggered by a reformulated dialogue on diversity may run just as deep. There will, however, be one very important difference. For better and for worse, the national dialogue about affirmative action and diversity has in effect become an argument about race. Indeed, one of the difficulties one has in writing about these matters is to cast the discussion in race-neutral terms, as virtually all of the cases and virtually all of the public dialogue coalesce along racial lines. Nevertheless, the sorts of measures I have discussed in this Article sweep more broadly, and the academic values identified as important are only tangentially about any single identifying characteristic. I, for one, would welcome the opportunity to address these matters in an environment in which the focus is on what people should learn, and where and how they should learn.

The argument that affirmative action conflicts with the central premise of American higher education is compelling as a theoretical matter, but loses force when assessed within actual experience. It is one thing to maintain that a preference on the basis of race violates the fundamental
premise of a system in which full equality is the norm. It is quite another to castigate such measures when similar exceptions to supposedly inviolable principles are routinely afforded the wealthy, children of alumni, athletes, and others whose presence within the educational community is deemed institutionally necessary or appropriate. And it is especially pernicious to maintain that there is any practical difference between an alumni “tip” and a race preference, much less a viable moral distinction between measures that reward prior opportunity and those that are designed to eliminate or compensate for past discrimination.

Truly affirmative measures hold great potential for transforming a debate about post-educational treatment into one about pre-educational opportunity. If, as Bowen and Schuster have postulated, college and university “faculties through both their teaching and research are enormously influential in the economic progress and cultural development of the nation,” then American higher education is now in a preferred, and appropriate, position to transform a national debate about “quotas” and “preferences” into a national dialogue about equal opportunity, a diverse and intellectually rich learning environment, and individual attainment. The kinds of programs I see as consistent with that vision have definite costs, and institutions of higher education must ask themselves what, or how much, they are willing to sacrifice to achieve a given end. The willingness and ability to do so should, nevertheless, be viewed as the moral imperative and defining characteristic of universities dedicated to the notion that a diverse student body is the hallmark of excellence.
