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BAKKE TO THE WALL: THE CRISIS OF BAKKEAN DIVERSITY

Gabriel J. Chin*

In the years since the United States Supreme Court's affirmative action holding in Board of Regents v. Bakke, many educational institutions have struggled to apply Bakke's doctrine to their admissions policymaking. Professor Chin asserts that Bakke is incoherent because it does not explain whether the diversity it tries to foster is cultural or racial. Furthermore, he argues that neither a racial nor a cultural basis works under the Bakke scheme, leading to the difficulties schools confront in framing an affirmative action program.

Focusing on law school admissions policies, Professor Chin argues that because of Bakke's weakness as law, it is largely ignored. He shows that many law schools explicitly base their affirmative action programs on non-diversity grounds, such as remedying societal discrimination or increasing the numbers of minority professionals, despite Bakke and subsequent Supreme Court cases that find such grounds illegal. In addition, many law schools that purport to have diversity programs instead have racially selective programs, perhaps suggesting that some non-white races add to the quality of their academic programs while others do not.

Professor Chin concludes that schools' refusal to follow Bakke ultimately may lead the Supreme Court to implement a strict colorblind rule. He proposes that schools follow Bakke because its holding is better than the alternative—the removal of affirmative action considerations from the admissions process. A Postscript to this Article discusses the recent Fifth Circuit decision in Hopwood v. Texas, a case in which the Circuit found the University of Texas Law School's admissions policy to be unconstitutional.

* * *

INTRODUCTION

As Justice Lewis Powell's "diversity" rationale for affirmative action admissions in higher education nears the end of its second decade of

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existence,¹ there is real doubt whether it will survive much longer. Affirmative action is in full retreat: the Supreme Court is increasingly hostile to it;² Republican presidential candidates denounce it;³ and even the Regents of the University of California, the inventors of the plan attacked in *Board of Regents v. Bakke*,⁴ recently voted to end race consciousness in hiring and admissions.⁵

Ironically, *Bakke* may be jeopardized as much by friends of affirmative action as by conservative backlash. Affirmative action plans often treat *Bakke* not as controlling law, but as one not-very-appealing point of view among many. As a result, plans are designed to achieve ends that *Bakke* and other Supreme Court cases have held to be illegal. Proving by their conduct both that *Bakke* is not being followed, and that it is not worth being followed, these supporters of affirmative action may, paradoxically, be the ones who ensure its demise. This Article identifies the problems with *Bakke* that have led to its tepid reception and, using law school admissions policies as an example, shows how it has been rejected.

The conditions that created *Bakke* continue to prevail. The disparity in traditional admissions criteria between white and minority applicants is too large for schools to hope that many students of color will appear on campus through the normal admissions process.⁶ Accordingly, unless

¹ See *Board of Regents v. Bakke*, 438 U.S. 265, 311-20 (1978).

² See, e.g., *Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995) (holding that federal minority set-aside program must satisfy strict scrutiny), *overruling in part*, *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (upholding constitutionality of federal set-aside program); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding unconstitutional local set-aside program); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding unconstitutional layoff protection for minorities).

³ See David S. Broder & Robert A. Barnes, *Few Governors Join Attack on Racial Policies*, WASH. POST, Aug. 2, 1995, at A1 (noting that 1996 Republican presidential candidate Robert Dole and then-candidates Phil Gramm and Pete Wilson oppose affirmative action).

⁴ 438 U.S. 265 (1978).

⁵ Amy Wallace & Dave Leshner, *U.C. Regents, In Historic Vote, Wipe Out Affirmative Action Diversity*, L.A. TIMES, July 21, 1995, at A1.

⁶ See LAW SCHOOL ADMISSIONS COUNCIL/LAW SCHOOL ADMISSIONS SERVICES, MINORITY PARTICIPATION IN LEGAL EDUCATION AND THE PROFESSION: A COMPENDIUM OF DATA (1990) (hereinafter MINORITY DATABOOK). I do not concede that the traditional measures of qualifications—LSAT scores and college grades—necessarily capture anything fundamental about an individual's ability to succeed in law school or to be a good lawyer, although they are not necessarily irrelevant. Cf. Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995). Nevertheless, as a practical matter, I doubt that rethinking these measures will be effective. Most decision-makers in the legal academy got where they are in large part based on their LSAT scores and college and law school GPAs. Accordingly, a policy that

law schools are willing to accept a return to the days of virtually all-white institutions, some kind of intervention is necessary. The challenge university administrators face is that the tools they have been given to achieve minority representation have been circumscribed by the Supreme Court. In *Bakke*, the Supreme Court, speaking through Justice Powell, rejected most justifications for affirmative action for minority groups.⁷ In the absence of prior discrimination, the Court left schools only promotion of "diversity" as a ground for taking race into account in admissions.⁸ Accordingly, Part I of this Article briefly describes the formal limitations imposed by *Bakke*, and the diversity justification it left available.

Part II suggests that *Bakke's* diversity rationale is unsatisfying in principle. *Bakke* does not clearly identify the value it intended to promote; as a result, it is hard to construct a program to achieve diversity. The most obvious possible goals of *Bakke* do not work. If *Bakke* was meant to promote diversity of culture per se, then it rapidly becomes unmanageable, as scores or hundreds of cultures justly claim equal representation under affirmative action plans adopted by schools. If the characteristic *Bakke* found diversifying was race alone, distinct from culture, other problems arise. How, for example, could such a rationale justify a group preference for Latinos and Latinas, who can be of any race? Moreover, the question of why race is important apart from its cultural content is not explained; the most obvious explanation—that members of the same race bear similarities in spite of what may be vast cultural differences—is problematic because it seems deeply racist.

Part III assumes away any conceptual difficulties with *Bakke* for the purpose of examining how the diversity principle has been applied in practice. Significant portions of the academic community have shown that diversity per se is not the sole basis for race-based affirmative action, even though for most schools it is the only basis in law. First, many schools and the American Bar Association itself explicitly rely on the justification of remedying past societal discrimination rather than promotion of diversity alone. This rationale is legally foreclosed by *Bakke* and its progeny. Second, many affirmative action programs are racially selective, offering benefits to some racial groups but not to others. This is inconsistent with the diversity rationale, as well as impermissible under *Bakke*.

requires them—us—to admit that we might not be as meritorious as we think we are will face significant resistance.

⁷ See *infra* notes 18-26 and accompanying text.

⁸ See *infra* notes 27-33 and accompanying text.

Part IV discusses the consequences of the academic community's rejection of *Bakke*. One critical effect is that *Bakke* is an easy target for overruling. Real evidence supports the argument that *Bakke* has not proven to be a workable model. Another important consequence of *Bakke*'s unworkable nature is that law schools apparently have felt free to implement whatever programs they think just. Grounding programs on other rationales, however, may suggest that diversity is a pretext. In addition, the lack of clear standards has given rise to discrimination against racial minority groups who are not the beneficiaries of particular affirmative action programs. Nevertheless, as unsatisfying as *Bakke* and its consequences may be, refusing to follow it is worse.⁹

I. THE LEGAL BASIS FOR LAW SCHOOL AFFIRMATIVE ACTION: *BOARD OF REGENTS V. BAKKE*

Bakke is the starting point for all non-remedial affirmative action analysis in education. Allan Bakke, a white male, was twice denied admission to the University of California at Davis Medical School in spite of the fact that his grades and Medical College Admissions Test (MCAT) scores were much higher than those of some minority applicants who were admitted.¹⁰ In response to his second denial, Bakke challenged Davis's affirmative action program, which set an admissions target for members of certain minority groups, on the grounds that the program violated his constitutional right to equal protection of the laws and the statutory prohibition against racial discrimination in federally funded programs.¹¹

A divided Supreme Court upheld Bakke's claim in part. Justice Powell concluded that although the specific affirmative action program was unconstitutional and violated Title VI of the Civil Rights Act,¹²

⁹ A reader might claim that this Article flinches from the logical conclusion of its argument. Why not overrule *Bakke* if it is so bad? The answer is that there is nothing to replace *Bakke* if it is overruled. At present, many elite campuses would have a racially homogeneous student body without some race-consciousness in admissions. In my view, it would be unjust for important social institutions to be without representation from discrete social groups. *Bakke* is the only doctrinal justification for steps to ensure such representations happen. That being said, I believe that the long term solution to *Bakke*'s weaknesses and the question of racial justice does not lie in affirmative action. Rather, I have faith that there is an approach or series of approaches that will result in America being a nation which is hospitable to all of her citizens, and in which the characteristic of race is not such a powerful predictor of social position. I, however, do not know what that approach should be.

¹⁰ *Board of Regents v. Bakke*, 438 U.S. 265, 265 (1978).

¹¹ *Id.* at 277-78.

¹² *Id.* at 319-20 (citing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d

race could, under some circumstances, be taken into account as a legitimate factor in a program intended to achieve diversity among the student body.¹³ Justice Stevens, joined by three other Justices, concluded that Title VI prohibited race-based decision-making, and thus concurred in the result; he found it unnecessary to reach the constitutional issue.¹⁴ Justice Brennan and three other Justices, however, agreed with Justice Powell that the school could consider race as a *factor* in a program aimed at achieving a diverse student body.¹⁵

Justice Powell's opinion probably represents the holding of the Court, at least to the extent that it interpreted Title VI. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"¹⁶ Four members of the Court said that remedial, "benign" preferences were usually in accord with Title VI and the Fourteenth Amendment. Four members of the Court said that racial discrimination was flatly prohibited by Title VI. Because Powell said that racial preferences were usually illegal, his view of the circumstances when such programs are permitted generally represents the narrowest ground of concurrence.¹⁷

Justice Powell identified a number of asserted interests as being insufficiently compelling to warrant racial classifications. U.C. Davis claimed that "reducing the historic deficit of traditionally disfavored minorities" was a sufficient justification for use of racial classifications,¹⁸ but Powell rejected this appeal for distributive justice:

(1988)).

¹³ *Id.* at 312-15.

¹⁴ *Id.* at 412-13 (Stevens, J., concurring in judgment in part and dissenting in part, joined by Burger, C.J., Stewart & Rehnquist, JJ.). Although some ambiguity exists in the Stevens opinion, this is its most plausible reading. See Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 24-30 (1979). At a minimum, racial classification clearly is not permitted for the reasons advanced by U.C. Davis.

¹⁵ *Bakke*, 438 U.S. at 324-26 (Brennan, J., concurring in judgment in part and dissenting in part, joined by White, Marshall & Blackmun, JJ.). The Brennan group would have upheld the program on broader grounds, but agreed that a diversity plan would be constitutional under their approach. *Id.* at 326 n.1 (Brennan, J., concurring in part and dissenting in part).

¹⁶ *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

¹⁷ Arguably, the Brennan group's rationale was narrower. See *infra* notes 195-98 and accompanying text.

¹⁸ *Bakke*, 438 U.S. at 306.

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no other reason than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.¹⁹

This aspect of the *Bakke* decision remains solidly entrenched in the law.²⁰

Justice Powell also rejected the argument that a preference was a legitimate remedy for past societal discrimination: "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."²¹ This holding has also been embraced by subsequent cases.²² *Bakke* recognized that an institution may act to remedy its own prior discrimination,²³ but most United States law schools will be unable to demonstrate a history of constitutional or statutory violations sufficient to warrant such a remedial program.²⁴

¹⁹ *Id.* at 307.

²⁰ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (noting that in *Bakke* "[f]ive Members of the Court determined that [neither increasing the number of disfavored minorities who were doctors nor countering the effects of societal discrimination] could justify a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities"). Many lower federal courts also have followed Justice Powell's view. See, e.g., *Associated Gen. Contractors v. City of S.F.*, 813 F.2d 922, 935 (9th Cir. 1987); *Hammon v. Barry*, 813 F.2d 412, 431 (D.C. Cir. 1987) (relying on *Bakke* and *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 475-77 (1986), to hold that under the Constitution, "discrimination on grounds of race is absolutely forbidden if the purpose is to achieve racial balance"), *cert. denied*, 486 U.S. 1036 (1988); *Hayes v. City of Charlotte*, 802 F. Supp. 1361, 1376 (W.D.N.C. 1992), *aff'd in part, vacated in part*, 10 F.3d 207 (4th Cir. 1993); *Davis v. Halpern*, 768 F. Supp. 968, 980-81 (E.D.N.Y. 1991); *Covington v. Beaumont Indep. Sch. Dist.*, 714 F. Supp. 1402, 1409 (E.D. Tex. 1989); *Slade v. Billington*, 700 F. Supp. 1134, 1147 (D.D.C. 1988), *aff'd*, 871 F.2d 155 (D.C. Cir. 1989); *Peters v. Moses*, 613 F. Supp. 1328, 1334 (W.D. Va. 1985); *Uzzell v. Friday*, 592 F. Supp. 1502, 1520 (M.D.N.C. 1984).

²¹ *Bakke*, 438 U.S. at 307.

²² See, e.g., *Croson*, 488 U.S. at 497.

²³ *Bakke*, 438 U.S. at 307-10; see also *Croson*, 488 U.S. at 490-93, 509 (holding that city could employ remedial program if it had become a passive participant in the discrimination of others).

²⁴ Since the adoption of ABA Accreditation Standards in 1973, all member schools have been prohibited from discriminating on the basis of race. See APPROVAL OF LAW

Justice Powell also found that the Regents could not defend their program on the ground that special admissions would improve "the delivery of health care services to communities currently underserved."²⁵ Although Powell did not deny that providing needed medical services could constitute a compelling interest, or even that special admittees would be more likely to serve those communities, he concluded that "there are more precise and reliable ways to identify applicants who are genuinely interested in medical problems of minorities than by race."²⁶

The "attainment of a diverse student body" was, according to Powell, a compelling interest for an educational institution.²⁷ He noted: "The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."²⁸ Nevertheless, Powell determined that even a "diversity" program was unconstitutional if it focused on the single factor of race:

It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to 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.²⁹

Accordingly, Justice Powell approved of programs where "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."³⁰ Thus, the Court found no "facial infirmity . . . in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process."³¹

SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE § 211 (1973). Additionally, schools receiving federal funds have been prohibited from such discrimination since 1964 by virtue of the Civil Rights Act of 1964. See 42 U.S.C. § 2000d (1988).

²⁵ *Bakke*, 438 U.S. at 310.

²⁶ *Id.* at 311.

²⁷ *Id.*

²⁸ *Id.* at 312.

²⁹ *Id.* at 315.

³⁰ *Id.* at 317.

³¹ *Id.* at 318.

Justice Powell attached the Harvard College Admissions Program as an appendix to his opinion, apparently in the belief that it was the kind of program appropriately calculated to achieve true diversity.³² The Harvard program set no quotas, but the admissions committee recognized that some minimum diversity was necessary as a practical matter:

[I]f Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.³³

The *Bakke* diversity rationale has been embraced at the level of rhetoric by academics and commentators. "Differences and distinctions between people," argues one proponent of diversity, "benefit the educational environment by making the environment more conducive to education by filling the air with a vast array of distinct and dissimilar thoughts. Placing dissimilar students together enables and compels them to learn from one another."³⁴ The idea that diversity promotes academic excellence is widely repeated:

In educational settings, the diversity principle has been developed as a means to promote educational excellence through exposure to a wide variety of viewpoints and ideas in the classroom and in scholarship Moreover, the benefits of such diversity are deemed to extend not only to members of those underrepresented minority groups who

³² *Id.* at 316.

³³ *Id.* at 323 (alteration in original).

³⁴ Vince Herron, Note, *Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth*, 67 S. CAL. L. REV. 407, 407 (1994).

may benefit from the policies at issue, but also on the majority recipients of such viewpoints.³⁵

Similarly, Stanford Dean Paul Brest testified that his school's diversity policy rests on a belief that diversity is directly connected to the quality of the educational program:

[T]here are few major areas of legal doctrine, of legal policy, that don't have implications with respect to race, ethnicity and a whole variety of other factors of that sort.

And in order to explore them in a vigorous way in the classroom, it seems to me and my colleagues that it is important to have students who bring different perspectives to the discussion of that doctrine.³⁶

Another educator writes:

[A] law school should value the recruitment of students and faculty from diverse backgrounds because regardless of the political programs to which these individuals subscribe, the varied experiences they bring to the educational process and share with their colleagues contribute importantly to better illumination of the matters being taught and studied.³⁷

This rhetoric is often consistent with *Bakke's* focus on pedagogical, as opposed to remedial, ends. As a commentator explained:

The diversity justification requires no directly compensatory purpose, but rather seeks to challenge harmful stereotypes, combat intolerance, and realize intellectual and competitive benefits by creating inclusive workplaces and educational institutions. Though terms such as "exclusion" and "outsiders" almost invariably relate to a history of subordination

³⁵ Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity"*, 1993 WIS. L. REV. 105, 138-39; see also Judith Areen, *Affirmative Action: The Benefits of Diversity*, WASH. POST, May 26, 1991, at D7.

³⁶ 22 Trial Transcript at 22, *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994) (No. A-92-CA-563-SS), [hereinafter *Hopwood Transcript*].

³⁷ J. Clifton Fleming, Jr., *Thoughts About Pursuing Diversity in Legal Education for Pedagogical Rather Than Political or Compensatory Reasons: A Review Essay on Stephen L. Carter's "Reflections of an Affirmative Action Baby"*, 36 HOW. L.J. 291, 300 (1993) (book review).

and discrimination, affirmative action justified by diversity focuses solely on the benefits derived from inclusion. Indeed, the many practical benefits of diversity in the workplace have become increasingly popular justification for nonremedial, voluntary affirmative action.³⁸

Accordingly, "the recruitment of persons from different backgrounds is appropriate, not for overarching political ends, but for achieving the more modest, but still important objectives of enriching legal education and making the learning experience more vibrant for both majority and minority participants."³⁹

The notion that racial diversity per se contributes to educational diversity has been criticized because it assumes that a person's viewpoint may be presumed from their skin color.⁴⁰ Regardless of the merits of that criticism, it is an assumption the Supreme Court has been willing to make.⁴¹ Educational diversity continues to justify affirmative action programs in school admissions programs.

II. *BAKKE'S* WEAKNESS AS LAW

A central defect of Justice Powell's decision is its failure to identify a reason for diversity which is sufficiently clear and specific that it can be used to design a program for diversity admissions. Although Justice Powell told us that diversity was good, he did not explain what characteristics would contribute to achieving diversity. Accordingly, *Bakke* is not very useful in determining who should be admitted to schools to achieve diversity. Because Justice Powell purported to apply strict scrutiny in *Bakke*, and because the current Supreme Court is likely to apply that standard of review to any new plan, this lack of explanation is particularly worrisome.

³⁸ Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL'Y REV. 47, 71 (1993) (footnotes omitted).

³⁹ Fleming, *supra* note 37, at 302.

⁴⁰ See, e.g., STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 29-45 (1991).

⁴¹ In *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), *overruled in part by Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995), the Court concluded that racial diversity in and of itself would lead to other kinds of diversity: "A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group." *Id.* at 579. Although certain features of *Metro Broadcasting* were overruled in *Adarand*, this factual assumption may be intact.

To survive strict scrutiny, a racial classification must be "narrowly tailored" to achieve a compelling interest.⁴² Narrow tailoring "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."⁴³ Recent Supreme Court decisions have demanded, as an essential feature of a narrowly tailored solution, a clear basis for including particular groups that benefit from the classification.⁴⁴ In a remedial affirmative action admissions program, for example, the compelling interest provides a very satisfying means of determining who should be helped and who should not.⁴⁵ If a school discriminated against only African-Americans in admissions, a narrowly tailored solution would grant a remedy to that group. The compelling interest of remedying discrimination against only African-Americans explains why other racial groups are not included in the remedy. The link between goal and remedy is close. Although it now seems clear that "strict scrutiny will be mercilessly harsh on loosely crafted affirmative action programs,"⁴⁶ *Bakke* does not offer a convincing means of calculating who should be helped. The four most promising means for calculating who should be helped—representation according to population, maximization of cultural diversity, cultural selectivity, and maximization of racial diversity—do not stand up to close examination.

A. *Representation Proportional to Population*

Achieving diversity through representation proportional to population is an appealing solution to the problem of who should be included in a diversi-

⁴² See, e.g., *Adarand*, 115 S. Ct. at 2101.

⁴³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion) (discussing "narrowly tailored" requirement of strict scrutiny); *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) (noting "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification").

⁴⁴ *Croson*, 488 U.S. at 505 (observing that "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination"); *Wygant*, 476 U.S. at 284 n.13 (noting that "[t]he Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan") (citation omitted).

⁴⁵ Identification of the compelling interest does not necessarily, in and of itself, explain how that interest is to be achieved. Cf. *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (striking down program implemented by district court to achieve desegregation of school system).

⁴⁶ K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 12 (1992).

ty program. Such a plan would be easy to implement and administer: identify the racial and cultural makeup of the school's applicant base, and offer preferences aimed at achieving a student population proportionally identical to that makeup. Indeed, in practice, sufficiency of representation in a school or profession is sometimes measured by a comparison of the percentage of the group in the profession to the percentage in the population.⁴⁷ The goals of *Bakkean* diversity, however, cannot be satisfied by giving each group representation proportional to population, and therefore representation cannot necessarily be linked to any extrinsic measure of population.

The theory of *Bakkean* diversity is that it may be beneficial for persons who are not members of a particular group to have contact with others who are. Accordingly, the number of minority students admitted is driven not by the percentage of minorities in the population, but by the number needed to achieve the goal of educational diversity. As the Harvard Plan explained, because

10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States . . . there is some relationship between numbers and achieving the benefits to be derived from a diverse student body.⁴⁸

This is a generic principle which, if true at all, is applicable to all groups, not just African-Americans.⁴⁹

It seems likely that the goal of exposing students, white and minority, to members of other groups would be ideally satisfied through a school having

⁴⁷ See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 338-39 (1974) (Douglas, J., dissenting) (noting the difficulty of admissions committee at the University of Washington Law School in evaluating the claims of Japanese-Americans, who constituted two percent of the population and two percent of the bar).

⁴⁸ *Board of Regents v. Bakke*, 438 U.S. 265, 323 (1978).

⁴⁹ This point is supported by the testimony of Dean Mark G. Yudof of the University of Texas, which had a 10% admissions goal for Mexican-Americans, but only a five percent goal for African-Americans. When asked why twice as many Mexican-Americans as blacks were needed to achieve diversity, Dean Yudof indicated that the difference was related not to achievement of diversity per se, but rather to remedying past discrimination:

Diversity is just one of the factors. If you are interested in quality students and you're interested in the integration of the bench and bar and training leaders and you're trying to redress past discrimination, diversity is but one factor, and if the whole system [were justified] by just diversity, my personal view is that the program would not be as large as it is today.

20 *Hopwood* Transcript, *supra* note 36, at 42-43.

roughly the same number of members of every group. That is, if a school determines that X percent of its student body, ideally, should be African-American in order "to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States,"⁵⁰ it is hard to see how .1X percent representation of Native Americans could provide the same kind of enrichment to the non-Native American students.⁵¹ The Native Americans in that group would have to have ten times as many contacts with the other students, or many non-Native students would not get the benefit of interaction with a person of that background. This result is acceptable only if the school is less concerned with exposing other students to Native American culture than to African-American culture.

In addition, there is no necessary relationship between the percentage of a group in the population of the state, nation, world, or applicant pool, and the representation of that group in the school population necessary to achieve diversity.⁵² As Professor Greenawalt observed:

it should not be assumed that because some preferential representation of a group is permitted to encourage diversity, members of that group can be admitted on a preferential basis until they constitute the same percentage of the student body as their percentage of the general population. It is not certain, for example, that relevant communication between blacks and whites will be much greater if the student body is ten per cent black than if it is five per cent black. Of course, it may be unfair to impose on a small number of blacks the responsibility to communicate the "black experience" to a large number of whites; but a law school justifying its pref-

⁵⁰ *Bakke*, 438 U.S. at 323.

⁵¹ Cf. J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, at 282 (1979) ("To work, diversity required more than token numbers A few blacks, moreover, could no more communicate the 'black experience' to whites than a Montanan or two could convey the 'big sky' country to the City University of New York.").

⁵² Robert M. O'Neil, *Bakke in Balance: Some Preliminary Thoughts*, 67 CAL. L. REV. 143, 160-61 (1979) (noting that because programs designed to mirror population are suspect in light of *Bakke*, "a general range of minority representation, or perhaps even a presumptive minimum, is more likely to show a genuine quest for flexibility than a target percentage tied strictly to the demography of the state or region"); Terrence Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 685 n.96 (1975) (observing that "[t]here is no 'rational connection between seeking proportional representation of minorities, on the one hand, and enhancing the quality of the educational experience by providing some representation for members of minority groups who could not gain admission on the basis of academic promise alone, on the other'").

erential policies in terms of law school diversity should make some effort to decide how widely applicable racial preferences should be to achieve adequate diversity.⁵³

In short, if the representation of a particular minority group in the general population is large, the goal of diversity might be achieved even if the percentage of that group in the student body was lower than its representation in the general population. If, by contrast, a particular minority group is small compared to the general population, then "overrepresentation" of that group might be necessary to achieve diversity, because, as the Harvard Plan pointed out, minority "presence in very small numbers[] may significantly detract from the educational experience of those students who are admitted."⁵⁴

Relatedly, no necessary connection exists between the groups to be benefitted by affirmative action and the racial or cultural composition of the community, professional or otherwise, that the graduates will face. Diversity-based affirmative action was not justified in *Bakke*, and it cannot be justified on the ground that it is helpful as a practical matter for non-African-American students to have African-American classmates so that they can learn how to deal with African-American colleagues and clients in the future. Such a rationale would not justify affirmative action programs in a state or region with a low minority population if most law school graduates remained in the area. Yet the educational value of a diversity program in such a school would be just as strong, and perhaps more so, than in a community that was already more racially diverse.

Moreover, one of the premises of affirmative action is that the ordinary admissions process will not result in a large number of minority professionals. Were this not true—if the demographics of the institutions employing affirmative action were largely the same even without such programs—there would be no justification for such programs. In short, it appears that the goals of diversity would be best satisfied if each minority group was represented by more-or-less the same number of students.

B. *Cultural Diversity*

Justice Powell did not state precisely whether the compelling interest is diversity of race or diversity of culture. His citation of the Harvard Program as the primary example of a program that would satisfy *Bakke* perhaps makes it too easy to avoid this hard question. Although the African-American community is by no means monolithic, they share a common language,

⁵³ Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions*, 75 COLUM. L. REV. 559, 591 (1975) (footnotes omitted).

⁵⁴ Sandalow, *supra* note 52, at 685 (footnote omitted).

unlike Asian-Americans and Native Americans. Furthermore, unlike Latinos and Latinas, African-Americans share a common race. Until recently, virtually all African-Americans were the descendants of former slaves, and they had this important history in common. Thus, although even for African-Americans there was never a perfect identity between race and culture, it might have been justifiable for Powell to think that there was a fair degree of correlation between the two. However, expansion of this idea to Asian-Americans, Latinos and Latinas, and Native Americans simply does not work. For these groups, there must be a choice between race and culture.

If the ideal institution would have equality in its representation of every group, culture cannot be the determinative category. Even treating culture as synonymous with national heritage,⁵⁵ there are scores upon scores of Asian-American, Native American, and Latinos and Latinas national subgroups such as Korean-Americans and Mexican-Americans, each of which would be entitled to have attention paid to its numbers under a Harvard-style plan.

Moreover, if culture is the touchstone, then it seems hard to defend a failure to include white subcultures. Although whites as a race are well-represented in American higher education, little attention is paid to making sure it is a culturally diverse group of whites. To be sure, there is some concern for geographical diversity, but that seems to be more of a recruiting stunt than a genuine commitment to white cultural diversity.⁵⁶ If no one cares about, say, Irish-American admission rates, it is not because Irish-American culture is moribund or uninteresting.⁵⁷ Finally, the argument that Irish-Americans or Italian-Americans will take care of themselves in admissions is less likely to apply to smaller groups like Armenian-Americans or to disadvantaged whites like Appalachians.

C. *Cultural Selectivity*

One way to avoid degeneration into unmanageability would be to make a decision that some cultures are going to be helped, and some are going to be left to fend for themselves. This cure would be dreadful. How would such preferred groups be chosen? The Court has foreclosed racial classifica-

⁵⁵ Culture clearly is not synonymous with national heritage. A nation—the United States being a prime example—does not necessarily have a monolithic culture. Even nations far more homogeneous than the United States, such as Switzerland and Belgium, may have more than one distinct culture.

⁵⁶ Accordingly, it is probable that a school seeks a Nebraska farm girl not because she is, necessarily, so different from the Iowa farm girl already admitted, but so the school can say “we draw our student body from all 50 states.”

⁵⁷ Cf. *THE AMERICAN IRISH REVIVAL: A DECADE OF THE RECORDER, 1974-1983* (Kevin M. Cahill ed., 1984) (discussing some of the cultural contributions of Irish-Americans in the United States).

tion based on remedying historical discrimination, so that otherwise promising avenue could not be a basis.⁵⁸ Relying on purely political grounds—if a group has the power to obtain a preference, fine; if not, too bad—seems both unappealing and unjustifiable as an exercise of the sensitive power of racial classification.

Stanford Dean Paul Brest and Miranda Oshige offer the most sophisticated argument in favor of selectivity, which, although thoughtful, illustrates the practical difficulty with this kind of solution. They advocate a system that is unabashedly arbitrary and discretionary.⁵⁹ Recognizing that there are many different cultures that could be included,⁶⁰ they offer “salience” as a criterion for determining which groups should be offered a preference by a particular school:

In deciding whom to include in an affirmative action program, a law school might appropriately consider the salience of the group in contemporary American society or in the geographic region in which its graduates tend to practice. Among the determinants of a group's salience are its numerical size and the extent to which its culture differs from the dominant culture of students attending the school.⁶¹

The authors further assert that “the opportunity to encounter people from different backgrounds and cultures allows students to explore the nature of those differences and to learn to communicate across the boundaries they create Even more is gained by learning about particular cultures likely to be encountered in one's personal and professional life.”⁶²

Dean Brest and Ms. Oshige insist that educators should be given broad discretion in choosing groups to favor:

[I]n view of the vast number of groups and subgroups that are arguable candidates for such programs, it suggests that policymakers may reasonably come to different conclusions about which groups to include, and that different institutions may appropriately decide to focus on different groups, based, for example, on the demography of the region. To decide not

⁵⁸ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989).

⁵⁹ “Any diversity or affirmative action policy is likely to reflect the local history of a particular institution and is bound to be somewhat arbitrary with respect to the groups that it includes.” Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 856 (1995).

⁶⁰ *Id.* at 873.

⁶¹ *Id.*

⁶² *Id.* at 862-63.

to include a particular group in an affirmative action program does not entail complacency about its members' circumstances.⁶³

This scheme is horrifying for a variety of reasons. First, to the extent that the authors are concerned with off-campus effects, the program seems inconsistent with *Bakke*, which, of course, determined that several non-pedagogical effects were insufficient to constitute compelling interests.⁶⁴ The idea that a program designed to help students succeed by offering them cultural exposure to their likely future customers and colleagues could survive strict scrutiny is troubling, because it would seem to permit discrimination in favor of the largest and most "salient" American racial group: whites. The structure is also political in a particularly pernicious way. Only relatively weak, small groups can be excluded, for groups with the power to avoid subordination would be unlikely to allow themselves to be branded as non-salient.

More fundamentally, selectivity represents an institutional judgment about the merits, importance, and value of a particular group. It may well be impossible for excluded groups, comprising whole races of people, to avoid reading their exclusion as meaning anything other than a determination that "you are just not salient, at least not here at our school." Which races *specifically*, Dean Brest and Ms. Oshige, are so irrelevant to American society that they are not "salient" in a law school's educational program?

The authors' suggestion permits a bootstrapping, self-fulfilling prophesy, given the authors' assumption that "but for affirmative action, there would be significantly fewer students from certain minority groups in many of the nation's law schools."⁶⁵ If the elite law schools decide that, for example, Native Americans are salient but Puerto Ricans are not, then there will be in the future more Native Americans among the elite lawyers and fewer Puerto Ricans—but the fact that the opposite result would obtain if Puerto Ricans had been found "salient" rather than Native Americans suggests that salience is an empty concept. The self-fulfilling nature of the salience label is even more apparent in the context of academic programs. An academic lawyer's understanding of the "role law has played in [a group's] history"⁶⁶ will be determined by the interest that has been shown by previous generations of scholars. The groups that have been considered of legal interest in the past

⁶³ *Id.* at 900.

⁶⁴ See *Board of Regents v. Bakke*, 438 U.S. 265, 310-11 (1978) (noting that goal of providing health care to underserved communities is insufficient to constitute compelling interest); see also *supra* text accompanying notes 18-26.

⁶⁵ Brest & Oshige, *supra* note 59, at 857.

⁶⁶ *Id.* at 880.

will continue to benefit from that attention, while less prominent groups will continue to be ignored.

Moreover, the authors' scheme appears to permit discrimination against blacks. Imagine a school in a state with a small black population, little history of *de jure* discrimination against blacks, and in which a different non-white group played a larger historical role and has a larger population relative to blacks. Under the criteria set forth, the law school might "reasonably" conclude that another group is salient, while blacks are not. Ironically, affirmative action, which Brest and Oshige acknowledge was designed to help blacks, could, through application of the concept of salience, be turned against them. Indeed, if schools are free to decide that some races "belong" more than others and to allocate scarce spots based on that belief, then it is hard to identify precisely what was wrong with segregation in the first place.

At bottom, Brest and Oshige seem to reject the notions underlying the presumption against racial classifications in precisely the context in which they are most acutely needed—the determination of what colors belong, are good, and matter. They seem to think that these kinds of racial choices are so likely to be correct and unbiased that they should be treated deferentially. They find an almost entirely subjective and manipulable multi-factor analysis—which, depending on the emphasis placed by a particular decision-maker on a particular factor, could lead to any result—perfectly sufficient to protect against abuse. The problem, which they recognize, is that "[p]olicies that seem 'neutral' to a dominant group may have quite different meanings for the members of other racial or ethnic groups."⁶⁷ Therefore, when, as is contemplated by their system, a group of Americans is told that it does not count, and not to worry, because that determination was made carefully and after much thought, it will be justifiably suspicious. The authors offer no means of determining whether a particular decision is a dispassionate and correct weighing of all relevant factors rather than an exercise of old-fashioned discrimination. If we live in a world that is largely free from discrimination, we do not need affirmative action. If, on the other hand, we live in a world that has not yet achieved the goal of equality, then a program which assumes that decision-makers usually make unbiased decisions based on race is unwise.⁶⁸

⁶⁷ *Id.* at 862.

⁶⁸ Other possible cultural solutions avoid the hierarchy problem but raise others. Cultures could be chosen, for instance, based on their dissimilarity to the majority culture. But how could this possibly be determined? Which is more different from white American culture: descendants of Uruguayan tribe members or descendants of Hmong villagers? These questions seem unintelligible and answerable only in an arbitrary way. Or, cultures could be chosen based on the extent to which the majority culture is unfamiliar with them; presumably the less they are known, the greater the educational effect their presence would have. This would have some of the same arbitrariness problems,

D. *Racial Diversity*

The problems arising from understanding *Bakke* as largely being concerned with culture can be elided by treating the case as based on race. Instead of the virtual impossibility of dividing the pie among members of multitudinous cultures, law school administrators could ignore culture and consider only the finite number of racial groups. Practically, it would be easy to identify the races⁶⁹ and allocate each of them an equal share. In that case, however, a new set of challenges to *Bakke* appears.

If diversity represents a concern for racial inclusion, and diversity is divorced from the association of race with culture, what happens to Latinos and Latinas? Latinos and Latinas can be of any race, so it is hard to justify having an independent concern for Latino and Latina whites, blacks, Asians, and Native Americans, if other racial subcultures are not entitled to consideration. Because Latinos and Latinas are very often included in affirmative action admissions programs, and because they were included in the Davis program reviewed in *Bakke*, the conclusion that Latinos and Latinas are not a group cognizable under a diversity program would be remarkable.

Moreover, Powell could not have meant to focus on race divorced from culture. He wrote: "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."⁷⁰ This clearly suggests that he was interested in something beyond biology or skin

and would have paradoxical results in that whites are probably more familiar with the cultures of the larger racial groups, such as African-Americans and Latinos and Latinas, which are usually included in affirmative action programs, than the smaller ones, such as Asian-Americans and Native Americans, which sometimes are not included. Another solution would be to aggregate cultures; a school could determine, for example, that "Central Americans" are similar and thus have a goal for them as a group, rather than an individual goal for descendants of every country in Central America. It is probably not too much to assume that few law school faculty admissions committees would be prepared to aggregate the world's cultures in an informed way. Moreover, this solution would have the feature of arbitrariness that is problematic for a narrowly tailored solution.

⁶⁹ There is, however, some debate about whether there is any such thing as race. See, e.g., Christopher Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994). Nevertheless, many people clearly think that races exist. In at least one context, the law has given definitional force to the "common understanding" of that which constitutes a race. See, e.g., *United States v. Thind*, 261 U.S. 204, 214-15 (1923) (finding that provision of a statute allowing naturalization of "free white persons" was "to be interpreted in accordance with the understanding of the common man," thus excluding natives of India).

⁷⁰ *Board of Regents v. Bakke*, 438 U.S. 265, 307 (1978).

color. In addition, the Harvard Plan he endorsed also made distinctions between African-Americans of different backgrounds, suggesting that it was not race per se that motivated the preference.⁷¹

What could justify treating race as an intelligible organizing category, from Powell's point of view, if it is not the association of race with particular cultures? Perhaps race can provide clues about possible viewpoints and cultural background. Based on these associations, it might be reasonable to assume that minorities, as a group, will have different views than whites on some issues.⁷² This was the notion underlying Justice Brennan's majority opinion in *Metro Broadcasting v. FCC*.⁷³ The Court in *Metro Broadcasting* assumed that there are *differences* between whites and non-whites, but if the *Bakke* decision divides by race rather than culture, it assumes meaningful *similarities* between those of similar racial background. This presumption of similarity is unwarranted. If the *Bakke* standard would consider a fourth generation Japanese-American in Sacramento to be much the same as a freshly naturalized Vietnamese-American in Texas, it is wrong. If this is the rationale behind *Bakke*, it is more than erroneous—it is racist; such a rationale takes the old slur that minority racial groups “all look alike” one step further: it maintains that they actually *are* all alike.

Of course, *Bakke* was motivated by a concern for the education of students who were already in the educational institution—whites. One could argue that because white students may see Native Americans or Latinos and Latinas as “all being alike,” the white definition should control. Even assuming that such a simplistic view accurately represents the understanding of whites, there is no reason to indulge that mistaken view, given the educational purpose of diversity.

Groups might be identified by their shared history of racial discrimination; for example, Native Americans are not all alike, but they were all treated as Native Americans by the national government and by white society. Although possibly a more refined diversity justification, especially for a law school, such a rationale does not save *Bakke*. First, there is no reason to believe that Justice Powell was an early critical race theorist who wanted to

⁷¹ *Id.* at 324 (noting that when choosing between A, the child of a black doctor, and B, an inner city black child, “[i]f a good number of black students much like A but few like B had already been admitted, the Committee might prefer B, and vice versa”). In that instance, Harvard is differentiating between African-Americans, not taking non-racial diversity characteristics into account. That is, in making the choice, Harvard asks how many *black* doctors' children had been admitted, not how many doctors' children in total.

⁷² See, e.g., Howard Goldberg, *Bigotry Crosses Several Racial and Religious Lines, Poll Shows*, FORT WORTH STAR-TELEGRAM, Mar. 3, 1994, at 5 (citing poll which shows “a yawning gulf between white and minority group perceptions about America”).

⁷³ 497 U.S. 547, 569-84 (1990), *overruled in part* by *Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995).

expose truths about subordination. This rationale cannot be what motivated Powell, and thus is not a plausible interpretation of *Bakke*.⁷⁴ Moreover, such a rationale does not identify the groups to be helped. Narrowing identification of groups down to racial minorities simplifies matters, but it does not explain whether goals should be set for all non-whites by racial group, by historical similarity, by national origin, or by some other factor. For example, if many Mexican-American but few Puerto Rican applicants have been admitted to a law school class, should the school offer a preference to Puerto Rican applicants on the ground that their group's history of subordination was different, or deny a preference, on the ground that there are already plenty of Latinos and Latinas in the class? If a school has already admitted many Puerto Ricans, should a school offer a preference to a Filipino-American because the Filipino is Asian, or deny it, on the ground that the school already has plenty of people whose ancestors had been forcefully colonized by the United States as a result of the Spanish-American War? A shared history of subordination does not divide non-whites into tidy categories.

Another improbable explanation for the quandaries that *Bakke* leaves unresolved is that *Bakke* can be based on what might be called an anti-diversity rationale, exemplified by Justice Stevens's dissenting opinion in *Wygant v. Jackson Board of Education*.⁷⁵ Stevens argued that affirmative action for teachers might be justified for the pedagogical purpose of showing "that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. . . . [C]olor, like beauty, is only 'skin deep . . .'"⁷⁶ This rationale might justify organization of affirmative action on purely racial grounds, but it cannot be what Powell meant. Powell insisted that inclusion of non-white groups added something *different* to a school. That does not make sense if Powell thought all races were not "essentially different."⁷⁷

⁷⁴ Justice Powell wrote, for example, that an applicant "with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school . . . experiences, outlooks, and ideas that enrich the training of its student body." *Bakke*, 438 U.S. at 314.

⁷⁵ 476 U.S. 267, 313-20 (1986) (Stevens, J., dissenting).

⁷⁶ *Id.* at 315 (Stevens, J., dissenting).

⁷⁷ It also seems difficult to justify admissions preferences on the Stevens ground. If there are measurable differences in indicators of future performance among minority applicants, an admissions preference would seem to undermine the goal of demonstrating to white students that whites and minorities are essentially the same.

III. THE REJECTION OF *BAKKEAN* DIVERSITY

Even if *Bakke* is not completely satisfying from an intellectual standpoint, it nevertheless permits race-based affirmative action programs. Following *Bakke*'s formal limitations, a school can offer admissions preferences to members of non-white races. If Justice Powell does not have to explain in more detail just what, exactly, diversity is or how it is achieved, a school applying *Bakke* should not either.⁷⁸

Unfortunately, the affirmative action programs that have been implemented by schools show that many of them are not motivated by any form of diversity per se. Rather, many programs explicitly acknowledge that other ends also motivate their preferences. Some programs that purport to promote diversity are racially selective, offering benefits only to some races, which seems counter to the end of diversity. Not every admissions program has these features, but enough of them do to suggest that, for many schools, *Bakkean* diversity is not the driving force behind their affirmative action programs.

A. *Explicit Denial of a Diversifying Purpose—ABA Accreditation Standard 212 and Its Progeny*

Kent Greenawalt wrote that *Bakke*'s "diversity" rationale was a fig leaf covering up a different goal:

I have yet to find a professional academic who believes the primary motivation for preferential admissions has been to promote diversity in the student body for the better education of all the students while they are in professional school. Diversity is undoubtedly one reason for such programs, but the justification of countering the effects of societal discrimination relied on by Justices Brennan, White, Marshall, and Blackmun comes closer to stating their central purpose, and Justice Powell offers no convincing reason for rejecting that justification and accepting the diversity argument.⁷⁹

⁷⁸ For a detailed history of the development of one law school's special admissions policies, see Albert Y. Muratsuchi, *Race, Class, and UCLA School of Law Admissions, 1967-1994*, 16 CHICANO-LATINO L. REV. 90 (1995).

⁷⁹ Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979). Similarly, Leslie Pickering Francis recently wrote a defense of affirmative action in higher education, exploring compensatory, corrective, and redistributive rationales. Although Professor Francis never said she was *against* diversity for its own sake, her failure to discuss it suggests that she did not regard it as one of the more persuasive rationales for affirmative action. See Leslie Pickering Francis, *In*

In the context of law school affirmative action, there is strong evidence that Professor Greenawalt is correct; the primary purpose for many programs seems to be something other than diversity. The foundational law school affirmative action policy was established by Standard 212 of the American Bar Association Standards for the Accreditation of Law Schools.⁸⁰ Standard 212 requires all law schools to have affirmative action policies for "qualified members of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms."⁸¹ Because failure to maintain accreditation renders a law school's graduates ineligible to sit for most state bar examinations, law schools have little choice but to comply with this requirement.⁸²

Standard 212 is not identical to *Bakkean* diversity. Instead, its explicit concern is addressing historical discrimination, not pedagogical enrichment.⁸³ Indeed, an entirely separate ABA rule "supports the use of admis-

Defense of Affirmative Action, in AFFIRMATIVE ACTION AND THE UNIVERSITY: A PHILOSOPHICAL INQUIRY 25-32 (Steven Cahn ed., 1993).

⁸⁰ APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE § 212 (1980).

⁸¹ The rule provides in full:

Consistent with sound educational policy and the Standards, the law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and ethnic minorities) which have been the victims of discrimination in various forms. This commitment would typically include a special concern for determining the potential of such applicants through the admission process, special recruitment efforts, and a program which assists in meeting the unusual financial needs of many such students, provided that no school is obligated to apply standards for the award of financial assistance different from those applied to other students.

Id.

⁸² Indeed, the Massachusetts School of Law at Andover was denied accreditation in part because of its failure to comply with Standard 212. *Massachusetts Sch. of Law at Andover, Inc. v. ABA*, 857 F. Supp. 455, 457 (E.D. Pa. 1994).

⁸³ The "legislative history" of Standard 212 helps to clarify that it is intended in important part to increase the number of disadvantaged minorities, rather than simply to improve the educational experience for all students. The August 1980 recommendation of the ABA Section of Legal Education and Admissions to the Bar in support of adoption of Standard 212, for example, demonstrates that the standard was intended to achieve social change as well as educational improvement. Diversity, the recommendation argued, "is important both to a meaningful legal education and to meet the needs of a pluralistic society and profession." ABA Section of Legal Education and Admissions to the Bar, Recommendation on Standard 212, at 3, in ABA REPORTS WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES, 1980 ANNUAL MEETING (Aug. 5-6, 1980). "The Task Force concluded that the Proposed Standard is necessary to ensure that disadvantaged members of minority groups will not be excluded from law schools and the profession, but will have the opportunity, as law students and lawyers, to participate in

sions standards . . . which promote diversity in law schools.”⁸⁴ To the extent that Standard 212 is treated as purely aspirational, or is implemented in a way that does not result in admission of students who otherwise would have been rejected, it may be unproblematic. If, however, a school implements policies that result in the admission of applicants who would otherwise have been rejected, compliance with Standard 212 likely would be illegal for any school that was not acting to overcome its own history of discrimination.⁸⁵ Other quasi-official sources are similar to Standard 212.⁸⁶

Davis v. Halpern,⁸⁷ a federal civil rights action from the Eastern District of New York, supports this conclusion. *Davis* may be the most important interpretation of *Bakke* in the context of law school affirmative action, but it has been widely ignored. In *Davis*, the plaintiff, a disappointed applicant to the City University of New York Law School at Queens College (CUNY), challenged the school’s affirmative action program.⁸⁸ CUNY’s admission policy essentially paraphrased Standard 212. The school explained:

and contribute to this country’s development.” *Id.* at 4. The Standard was intended to support “programs at law schools having as their purpose the admission to law school and ultimately to the legal profession of greater numbers of interested but disadvantaged members of minority groups who are capable of successful completion of law school.” *Id.* at 3 (internal quotations omitted).

⁸⁴ ABA COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR Policy 14 (1981).

⁸⁵ The argument could be made that Standard 212 is saved from illegality because it does not require any particular forms of affirmative action; that is, it does not require, for example, the kind of admissions program that *Bakke* held unconstitutional. Moreover, although the kinds of programs that Standard 212 appears to require (“special concern for determining the potential of such applicants through the admissions process [and] special recruitment efforts”) seem highly subject to being implemented in unlawful ways (especially in light of the programs that actually exist), possible illegality in form could be avoided. Thus, my conclusion that Standard 212 is illegal rests on a belief that a racial classification must be founded on a compelling interest, even if the means used are wholly unobjectionable. If the *goal* of Standard 212 is to increase the representation of historically disadvantaged minorities, and law schools take action based on the Standard, it appears that the law, as laid down in *Bakke*, has been violated.

⁸⁶ See, e.g., LAW SCHOOL ADMISSION COUNCIL, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 10 (1995) [hereinafter GUIDE TO U.S. LAW SCHOOLS] (“Almost all law schools have active recruitment programs for students who are members of minority groups to help insure greater minority representation in the legal profession. Law schools strongly encourage minority applicants.”).

⁸⁷ 768 F. Supp. 968 (E.D.N.Y. 1991).

⁸⁸ *Id.* at 972. The suit was settled when the school agreed to admit Mr. Davis and pay damages and attorneys fees. *Today’s News: Update*, N.Y. L.J., June 30, 1992, at 1.

Because minorities and other groups are underrepresented in the legal profession and because of the diverse composition of New York City and State and the Law School's commitment to diversity in its student body, membership in underrepresented groups is one of several factors, such as GPA and LSAT scores, which Committee members may consider, in determining an applicant's request for admission.⁸⁹

Another portion of the affirmative action policy stated that the law school's admission policy was intended to "help create a bar that is more diversified, and more representative of the full range of peoples that make up New York City and the United States."⁹⁰

Judge Glasser noted that CUNY's policies "seem[] to confuse or merge the goal of diversity, whose intent is to cultivate a richer academic environment, with that of the remedial consideration of race and ethnicity, which in this case seems directed at addressing the inadequate minority representation in the legal profession."⁹¹ For Judge Glasser, the invalidity of CUNY's policies was apparent:

If the policy expressed in these statements is a simple preference for members of certain minorities over other individuals, then it is unconstitutional as "discrimination for its own sake." If it is to combat the effect of societal discrimination on the legal profession, then it is unconstitutional for its failure to be limited to the goal of remedying specific prior discriminatory practices by the law school. Neither side in this case has proffered a shred of evidence suggesting that the law school has ever engaged in discrimination against those underrepresented groups. Lastly, if it is to produce lawyers committed to serving underrepresented segments of our population, it is unconstitutional not because the goal is an impermissible one for the state to pursue, but because "there are more precise and reliable ways to identify applicants who are genuinely interested in the . . . problems of minorities than by race."⁹²

⁸⁹ *Davis*, 768 F. Supp. at 980 (quoting affidavit of CUNY Law School's Director of Admissions, Carlton Clark).

⁹⁰ *Id.* at 972 (quoting the 1990-91 CUNY Law School catalog).

⁹¹ *Id.*

⁹² *Id.* at 980-81 (alteration in original) (citations omitted).

Judge Glasser may not have realized the significance of his decision, but it is fairly momentous. Given that the criticized portion of the CUNY policy was essentially the same as that of Standard 212, *Davis* suggests that Standard 212 is illegal. There seems little question that Judge Glasser has correctly interpreted *Bakke*, and that the aspects of *Bakke* he relied on remain sound law.⁹³

Standard 212 was adopted in 1980, two years after *Bakke* was decided.⁹⁴ Several years later, the ABA had an opportunity to rethink the validity of the policy when it adopted a regulation requiring all schools to implement written policies for the execution of Standard 212 as a condition of accreditation.⁹⁵ Yet Standard 212 seems to invite affirmative action programs to achieve goals that were proscribed by *Bakke*, ignoring the constraints set down by the Court, and without explaining why they are inapplicable. Given that the policy was vetted by lawyers, law school professors, and deans who were quite capable of reading and understanding *Bakke*, this omission is very difficult to explain or understand.⁹⁶

Dean Brest and Ms. Oshige also suggest that remedying past discrimination is a sound basis for an affirmative action program, insisting that an affirmative action program can have the goal of increasing minority underrepresentation.⁹⁷ Accordingly, "[a]n affirmative action program seeks to remedy the significant underrepresentation of members of certain racial, ethnic, or other groups through measures that take group membership or identity into account."⁹⁸ Brest and Oshige also deny that educational enhancement is the only legitimate goal for affirmative action, arguing:

There are two broad sets of rationales for an affirmative action program for law school admission or hiring. First, a racially and ethnically diverse student body and faculty can

⁹³ See *supra* notes 18-26 and accompanying text.

⁹⁴ ABA, APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE at ix (1983).

⁹⁵ ABA COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR Policy 19 (1983).

⁹⁶ Perhaps part of the answer arises from a phenomenon described by Judge Harry Edwards: "[M]any law schools—especially the so-called 'elite' ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy. . . . The 'impractical' scholar . . . addresses concrete issues in a wholly theoretical manner." Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34-35 (1992). It may be that some scholars felt no greater need for slavish adherence to precedent in the operation of their law schools, particularly if the case law was "wrong," than they did in their scholarship.

⁹⁷ Brest & Oshige, *supra* note 59, at 856.

⁹⁸ *Id.*

serve an institution's missions of teaching and scholarship. Second, the visible presence and success of minority professionals can help secure compensatory or distributive justice for other members of their racial and ethnic groups.⁹⁹

They recognize that this second goal is illegal:

[A]n institution may treat an applicant's minority status as a 'plus' in the admissions process. It may do this only for the purpose of increasing the diversity of its student body for educational reasons, and not to increase the number of minority graduates in society as a whole or to redress past societal discrimination.¹⁰⁰

Nevertheless, the authors find remedying past societal discrimination to be a good ground for affirmative action.¹⁰¹

Brest and Oshige also discuss at length the corrective and distributive justice rationales for affirmative action.¹⁰² Although corrective justice and distributive justice have some attractive features, they have one disadvantage that would seem to disqualify them from implementation—namely, their current illegality, which the authors acknowledge.¹⁰³ Yet the authors do not discuss those compelling features for the purpose of demonstrating why Supreme Court doctrine is wrong. Instead, they appear to propose that distributive or corrective models might well be implemented or continued in spite of their unlawfulness.¹⁰⁴ Their article hopes "to formulate some principles for determining what groups should be included in affirmative action programs".¹⁰⁵

Our aim is not to engage in a fundamental philosophical or legal defense or critique of affirmative action, but rather to identify criteria for determining which groups should be included in law school admissions or hiring programs.

. . . .

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 857. The authors quite properly note that "a discussion of a subject of such broad importance ought not be limited to the particular rationales favored at any one time by a particular alliance of justices." *Id.* at 858.

¹⁰¹ *Id.* at 858-59.

¹⁰² *Id.* at 867-75.

¹⁰³ *Id.* at 856.

¹⁰⁴ *Id.* at 898-900.

¹⁰⁵ *Id.* at 856.

A law school's affirmative action program for admissions or faculty appointments may be premised on any of three rationales: (1) the educational benefits of a diverse student body and faculty; (2) corrective justice, or compensation for discrimination against the members of a group; or (3) distributive justice, designed to ensure that no group is significantly and intractably disadvantaged.¹⁰⁶

Surprisingly, the article suggests that one might want to engage in conduct that the authors admit is unlawful, giving little attention to the question of whether a school *should* do so. Yet, the form of affirmative action advocated by Brest and Oshige is common. Many law schools, following the example set by Standard 212, openly state that their policies are designed to increase the representation of underrepresented minorities, without reference to some independent pedagogical purpose.¹⁰⁷ For instance, then-Dean Mark Yudof of the University of Texas School of Law testified that at one point the school's affirmative action program was revitalized because "[t]here was some concern expressed . . . that the representation of Mexican-Americans and African-Americans in the student body was not adequate."¹⁰⁸ There was no mention that the educational goals of diversity were not being satisfied.¹⁰⁹

The Texas policy frankly admits that its goal is to provide a first-class education to the future leaders of the bench and bar, and to provide meaningful representation of the two largest minority groups in Texas: Mexican-Americans and African-Americans.¹¹⁰ Dean Yudof believed that a state law school was obligated

to engage in affirmative action efforts to provide meaningful representation of Mexican-Americans and African-Americans in the legal profession

I think it's very important in a state that is 35 percent Mexican-American and African-American, in my judgment, that the legal system begin to reflect those types of numbers,

¹⁰⁶ *Id.* at 859, 898-99.

¹⁰⁷ See *infra* notes 118-23 and accompanying text (describing admissions policies of the University of Southern California, Chicago, Duke, Emory, UCLA, Cornell, Michigan, and Texas law schools); see also GUIDE TO U.S. LAW SCHOOLS, *supra* note 86, at 61 ("Many law schools give special admission consideration to members of minority and disadvantaged groups because traditionally they have been underrepresented in the legal profession.").

¹⁰⁸ 20 *Hopwood* Transcript, *supra* note 36, at 22.

¹⁰⁹ 20 *id.*

¹¹⁰ 20 *id.* at 37-38.

that the system be treated as involving all our citizens, and that legal education be perceived as open to all citizens.¹¹¹

The motive of this policy seems to share the same defect as that of CUNY—it is designed to address underrepresentation, not to achieve academic diversity.

B. *Racial Selectivity*

Some law schools' policies extend to all races.¹¹² Rutgers Law School¹¹³ and Minnesota Law School,¹¹⁴ for example, offer admissions preferences to African-Americans, Asian-Americans, Native Americans, and Latinos and Latinas.¹¹⁵ Other affirmative action programs appear inconsistent with *Bakkean* diversity because they are racially selective. The principle of diversity would seem to preempt any question that racial selectivity could be legitimate.¹¹⁶ Seeking out fewer than all of the various racial groups is simply incompatible with diversity, unless some races have little or no contribution to make, an argument at odds with the idea that, at some level, all races should be equally valued. Put another way, there would seem to be no reason for a school that believed in racial diversity to seek representation of less than all of America's racial groups. Nevertheless, selectivity is more readily understandable if the program is motivated by ends other than diversity.

Almost immediately after *Bakke*, it became clear that the diversity principle would not be employed to benefit all non-white groups. Archibald Cox, for example, who was counsel for the Board of Regents in *Bakke*, perceived no problem with a program designed to achieve "admission of some qualified black, Chicano, and Native American students in preference to some applicants who scored better on numerical indicators and perhaps other conventional admissions criteria,"¹¹⁷ in spite of its exclusion of

¹¹¹ 20 *id.* at 41. After making these statements, the Dean testified that *another* reason for affirmative action was to achieve diversity. 20 *id.* at 42.

¹¹² I was unable to find a comprehensive description of the current affirmative action programs at all law schools. The information exists in the form of reports that all accredited law schools are required to provide to the ABA, but the ABA would not make the reports available to me.

¹¹³ Rutgers offers special admissions to "Black/African Americans, Asian-Americans, Hispanic-Americans, and Native Americans." 1994-96 VIEWBOOK OF THE RUTGERS SCHOOL OF LAW-NEWARK 20.

¹¹⁴ 18 *Hopwood* Transcript, *supra* note 36, at 35.

¹¹⁵ I believe that these policies are intended to cover all non-Caucasian people, even if some would not fit neatly into these categories.

¹¹⁶ See *supra* part II.D.

¹¹⁷ Archibald Cox, *Minority Admissions After Bakke*, in BAKKE, WEBER, AND AFFIR-

Asian-Americans. Following this approach, affirmative action programs at some schools are restricted. One group of schools focuses on African-Americans only.¹¹⁸

Other law schools, while encouraging applications from members of other races in addition to African-Americans, fail to offer special consideration to all non-whites. Stanford "especially encourages applications from African Americans, Mexican Americans, American Indians, and Puerto Ricans, as well as others whose ethnic and social background provide additional dimensions that will enhance the school's programs."¹¹⁹ Thus, Stanford does not give a preference to Latinos and Latinas of other than Mexican or Puerto Rican descent, nor does it grant a preference to Asian-Americans.

Some schools encourage admission of "underrepresented" minorities.¹²⁰

MATIVE ACTION 80-104 (Rockefeller Foundation ed. 1978).

¹¹⁸ For example, the University of Virginia School of Law candidly states that "[t]he primary focus of minority recruitment at the University of Virginia is on black applicants." GUIDE TO U.S. LAW SCHOOLS, *supra* note 86, at 383. Nevertheless, "[m]embers of other minority groups are given special attention by the Admissions Committee." *Id.* The University of Arkansas School of Law-Fayetteville, which counts non-numerical criteria of any kind only for Arkansans, states that "Black applicants who are Arkansas residents should contact the Admissions Office concerning a minority admissions program." *Id.* at 74. Similarly, the University of Memphis-Cecil B. Humphreys School of Law has a summer program designed "to increase the number of blacks admitted to law school in Tennessee." *Id.* at 226.

¹¹⁹ *Id.* at 342-43.

¹²⁰ Dean Kay of Boalt Hall recently explained that affirmative action programs were necessary not just to improve her school's academic program, but because "'[t]he need to diversify the legal profession is not a vague liberal ideal; it is an essential component of the administration of justice.'" See Arleen Jacobius, *Affirmative Action on Way Out In Calif.*, A.B.A. J., Sept. 1995, at 22, 23. Bulletins of many law schools indicate that remedying underrepresentation of minority groups in the legal profession is an independent aim of their programs. See, e.g., THE UNIVERSITY OF CHICAGO, 1996 APPLICATION MATERIALS: THE LAW SCHOOL 17 ("We are particularly interested in receiving applications from women and minority students, two groups traditionally underrepresented in the law."); *Admission and Registration*, EMORY UNIVERSITY SCHOOL OF LAW: CATALOG 1994-1996, Aug. 1995, at 57 (observing that school seeks qualified minority applicants because "minority groups are sorely underrepresented in the legal profession"); *The Admission Process*, UNIVERSITY OF SOUTHERN CALIFORNIA LAW CENTER BULLETIN, Aug. 14, 1995, at 78 ("An applicant will be regarded as potentially contributing to student diversity if his or her background or experience would not ordinarily be well represented in the student body or the profession."); *Admissions Standards, 1995-96: The School of Law*, BULLETIN OF DUKE UNIVERSITY, Sept. 1995, at 39 (noting that affirmative action plan takes "special care . . . in evaluating applications from members of minority groups whose members have not been well-represented in the legal profession"); *Admission to the School*, UCLA: SCHOOL OF LAW 1995-1996 BULLETIN AND APPLICATION, Aug. 31, 1995, at 75 ("The University's President has made clear . . .

The application materials for Cornell graduate programs, including advanced law degrees at Cornell Law School, state that "[t]he Graduate School actively encourages applicants from minority groups that are underrepresented in United States Higher Education and the professions: African Americans, American Indians/Alaskan Natives, Mexican Americans and Puerto Ricans."¹²¹ Again, Asian-Americans and other Latinos and Latinas are not "actively encouraged" by the program.

Similarly, Michigan Law School's policy states:

In addition to its own interest in forming a class which is strengthened by the talents and diversity of its members, Michigan recognizes the public interest in increasing the numbers of lawyers from groups which the faculty identifies as significantly underrepresented in the legal profession. In particular, we strongly encourage prospective students who are African American, Mexican American, Native American, or Puerto Rican and raised on the U.S. mainland to apply.¹²²

Michigan's goal of increasing minority representation is explicitly decoupled from diversity per se, and, accordingly, Asian-American, Puerto Ricans raised in Puerto Rico, and other non-Mexican, non-Puerto Rican Latinos and Latinas are not offered a special preference. The University of Texas Law School's program also extends benefits only to African-Americans and Mexican-Americans.¹²³

[that] 'We are committed to diversity as both a powerful tool in educating our students . . . , and as an essential way of meeting our responsibility to prepare future leaders for California's diverse society.'").

¹²¹ CORNELL UNIVERSITY: THE GRADUATE SCHOOL APPLICATION 1996-97, at 6.

¹²² *The J.D. Program: Admissions Requirements and Procedures*, UNIVERSITY OF MICHIGAN BULLETIN, July 12, 1995, at 81; see also UNIVERSITY OF WISCONSIN-MADISON, LAW AT WISCONSIN 11 ("The Law School has established a program for giving special admission consideration to applicants from minority groups historically disadvantaged in the United States, underrepresented in law schools and the legal profession, and with cultural backgrounds sufficiently distinguishable that our diversity goals will be significantly enhanced. It is clear that such groups include Black Americans, American Indians, Puerto Ricans, and Chicanos. Applicants from other minorities, or from the white majority, who claim to be similarly situated, have their cases considered on an individual basis.").

¹²³ 21 *Hopwood* Transcript, *supra* note 36, at 5-7. Texas may be in a different position than other schools because of its history of racial discrimination against African-Americans. See *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that educational opportunities for the study of law offered to white and African-American students by the state of Texas were not substantially equal and therefore violated the Equal Protection Clause of the Fourteenth Amendment).

C. *Does Bakke Permit a School to Create a Class of Non-Diversifying Races?*

As a doctrinal matter, racially selective affirmative action programs appear impermissible under Justice Powell's opinion in *Bakke*. A classification of minority races into "diversifying" races and "nondiversifying" races would probably not pass constitutional muster, because racial selectivity is contrary to the end of diversity and is subject to manipulation. If race per se is diversifying, it seems almost indisputable that a school obtains a more diverse student body if it encourages the admission and attendance of African-Americans and Asian-Americans and Latinos and Latinas and Native Americans, rather than encouraging only one or some of those groups.

Justice Powell's analysis seems to foreclose racial selectivity. Although Powell identified diversity as a compelling interest, he found the program defective as implemented because it was underinclusive in that it focused exclusively on race.¹²⁴ To this extent, U.C. Davis's program was not a "diversity" program of the kind that could be justified by a compelling interest: its "special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity."¹²⁵ Notably, this was a legal conclusion, not a factual finding. Justice Powell did not use the narrow focus of the program as a basis for a conclusion that U.C. Davis was not sincerely interested in diversity. Instead, even assuming the school's good faith, it had no discretion to have a program that was limited in this way.

It is also important to contrast this approach to traditional equal protection analysis regarding classifications not affecting fundamental rights or disadvantaging racial minorities. The accepted rule is that "[l]egislatures may implement their program step by step in . . . economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations."¹²⁶ Justice Powell refused to apply this principle to the *Bakke* situation, even though the people harmed were not deprived of a fundamental right¹²⁷ and were not racial minorities—they were, for example, writers, New Englanders, carpenters, and others who might have made a contribution to the non-racial aspects of diversity that were not considered in the Davis program. Powell appeared to

¹²⁴ Board of Regents v. Bakke, 428 U.S. 265, 315 (1978).

¹²⁵ *Id.* (emphasis in original).

¹²⁶ City of New Orleans v. Duke, 427 U.S. 297, 303 (1976) (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488-89 (1955)) (additional citation omitted).

¹²⁷ See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37-38 (1973) (holding that education is not a fundamental right).

believe that partial, step-by-step diversity is not diversity—it is something else.

A racially selective program shares the defect of the U.C. Davis program. A system designed to ensure the presence of one or only some minority races does not seek the all-encompassing diversity Justice Powell held was necessary to justify a racial preference. If, under *Bakke*, a school is not free to take a first step towards diversity by beginning with race, it is hard to see how a program that was even narrower in scope could survive. Thus, in *Podberesky v. Kirwan*,¹²⁸ the Fourth Circuit expressed doubt that a scholarship program reserved only for blacks could be a legitimate diversity program under *Bakke*: “ethnic diversity does not appear to be the real interest behind the program.”¹²⁹

Post-*Brown* equal protection jurisprudence has been inhospitable to race-by-race solutions to social problems. Before *Bakke*, some legal scholars supported faculty discretion to exclude particular races (really, Asian-Americans) from affirmative action programs. Robert M. O’Neil, later President of the University of Virginia, wrote:

As a constitutional matter, it does not seem necessary that all minority groups be aided equally. Unless some minority groups are actually disadvantaged while others are preferred, or the basis for distinguishing between groups is wholly irrational, a college or university might well make a major commitment to one or two groups rather than to all. The equal protection clause does not preclude partial solutions to complex problems in this or other areas. Thus if the University of Washington determined that Asian applicants were less in need of preferential consideration than other minorities, that would appear to be a constitutionally permissible choice.¹³⁰

Kent Greenawalt, likewise, argued that racial selectivity should be permitted upon a school’s demonstration of “some reasonable basis” for their choic-

¹²⁸ 956 F.2d 52 (4th Cir. 1992).

¹²⁹ *Id.* at 56 n.4.

¹³⁰ Robert M. O’Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925, 942 (1974) (citing, *inter alia*, *Katzenbach v. Morgan*, 384 U.S. 641 (1966)) (footnotes omitted).

es.¹³¹ "Reasonable basis" and "wholly irrational" are standards normally applied to equal protection review of economic regulation.¹³²

In fact, the Court had long before rejected the idea that governments could solve problems one step at a time by drawing lines in the area of race. In *McLaughlin v. Florida*,¹³³ the Court unanimously struck down a Florida statute making it criminal for a white person to habitually reside with a black person of the opposite sex unless the couple were married.¹³⁴ The Court rejected an argument that this statute was a legitimate partial solution to a complex problem.

Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.¹³⁵

Accordingly, the Court concluded: "That a general evil will be partially corrected may at times, and without more, serve to justify the limited application of a criminal law; but legislative discretion to employ the piecemeal approach stops short of permitting a State to narrow statutory coverage to focus on a racial group."¹³⁶

O'Neil's and Greenawalt's argument that a race-by-race distribution of benefits was permissible¹³⁷ was based on *Katzenbach v. Morgan*,¹³⁸

¹³¹ Greenawalt, *supra* note 53, at 598-99 (relying in part on *Katzenbach* and apparently supporting discretion of the University of Washington Law School to exclude Japanese-American and Chinese-American applicants from its affirmative action program).

¹³² See, e.g., *Schweiker v. Wilson*, 450 U.S. 221, 230, 235 (1981) (holding that statute must "classify the persons it affects in a manner rationally related to legitimate governmental objectives"); *Gulf Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 165-66 (1879) (holding that for a classification to be valid, "it must appear [that it] is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection").

¹³³ 379 U.S. 184 (1964).

¹³⁴ *Id.* at 187.

¹³⁵ *Id.* at 191-92 (citations omitted).

¹³⁶ *Id.* at 194; see also *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967) (rejecting application of the piecemeal approach in a case involving racial classification).

¹³⁷ See *supra* notes 130-31 and accompanying text.

which held that a *benefit*, even involving a fundamental right such as the franchise, could be distributed under the piecemeal approach.¹³⁹ Thus, the Court upheld a portion of the Voting Rights Act¹⁴⁰ that exempted from state English literacy requirements persons educated in schools within American jurisdictions and whose instruction was not in English.¹⁴¹ Critically, *Katzenbach* did not involve a racial classification.¹⁴² In later cases involving distribution of benefits based on racial classifications, the Supreme Court followed *McLaughlin*, not *Katzenbach*.¹⁴³ Thus, although *Katzenbach* has been cited for the proposition that *economic* regulation may proceed in a piecemeal fashion,¹⁴⁴ it cannot begin to bear the weight that Greenawalt and O'Neil place on it.

In any event, it would strike the modern ear as odd if instead of making a provision for "all persons," for example, 42 U.S.C. § 1981 provided that "All *Hispanic-Americans*, within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."¹⁴⁵ At least from the perspective of those racial minorities left unprotected by this kind of statute, such laws might seem to lose their character as anti-discrimination provisions. That the particular group is protected is not a bad thing, but the unfairness of omitting others would make it seem arbitrary.

The possibility of stigma suggests that a selective program would be unconstitutional even under the less restrictive position taken by Justice Brennan's opinion in *Bakke*. Justice Brennan and three other Justices would have upheld the aspects of the program that Powell found objectionable, applying an intermediate level of scrutiny because the affirmative action

¹³⁸ 384 U.S. 641 (1966).

¹³⁹ *Id.* at 657-58.

¹⁴⁰ 42 U.S.C. § 1973b(e) (1994).

¹⁴¹ *Katzenbach*, 384 U.S. at 646-47.

¹⁴² See Edward D. Rogers, *When Logic and Reality Collide: The Supreme Court and Minority Business Set-Asides*, 24 COLUM. J.L. & SOC. PROBS. 117, 137-38 (1990) (noting that *Katzenbach* did not involve a racial classification and thus could not directly justify affirmative action).

¹⁴³ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500-01 (1989). That *Croson* relied on *McLaughlin* suggests *McLaughlin* established a general principle, not one that was applicable only because the challenged law involved imposed a criminal sanction. In addition, the contrary rule would be problematic; it is difficult to believe that the result in *Katzenbach* would have been the same if the statute had exempted a particular *race* from state literacy requirements.

¹⁴⁴ See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

¹⁴⁵ Compare 42 U.S.C. § 1981 (1994).

plan burdened whites.¹⁴⁶ They contended that a higher level of scrutiny was inappropriate because

whites as a class [do not] have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."¹⁴⁷

The Brennan group, then, should have a different response to a challenge to a racially selective diversity program than it did to the features of the racially inclusive program challenged in *Bakke*. Of course, the people excluded by racially selective diversity programs are not whites; they are members of historically disfavored minority groups.¹⁴⁸ Moreover, racially selective programs may communicate the message that the institution encourages the admission of some races because the presence of those races adds qualities and benefits to the institution that otherwise would not be obtained, but that other races will not be recruited because they do not contribute those special advantages. A policy justified on the basis of diversity but excluding some groups may unavoidably stigmatize the non-preferred groups. Such a policy would "contravene the cardinal principle that racial classifications that stigmatize—because they 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—are invalid without more."¹⁴⁹

Justice Brennan might have contemplated leaving inclusion decisions to politics, providing little judicial review. According to Brennan, if German-Americans had challenged the U.C. Davis program on the ground that German-Americans also had suffered discrimination, "they would have no constitutional claim unless they could prove that Davis intended invidiously to discriminate against German-Americans."¹⁵⁰ If this showing were not made, "the only question [would be] whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation

¹⁴⁶ Board of Regents v. Bakke, 438 U.S. 265, 361-62, 369 (1978) (Brennan, J., concurring in judgment in part and dissenting in part).

¹⁴⁷ *Id.* at 357 (Brennan, J., concurring in judgment in part and dissenting in part) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

¹⁴⁸ Whites may have to give up spaces for the existence of the diversity program, but excluded minority groups also are burdened by not being included in the program even though similarly situated.

¹⁴⁹ *Bakke*, 438 U.S. at 357-58 (Brennan, J., concurring in judgment in part and dissenting in part).

¹⁵⁰ *Id.* at 359 n.35 (Brennan, J., concurring in judgment in part and dissenting in part).

than the groups it excluded. Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts."¹⁵¹

The meaning of this passage probably turns on the race of the group making the claim in the hypothetical, and the fact that the U.C. Davis program actually included all minority races, including Latinos and Latinas.¹⁵² It is difficult to imagine that Brennan intended to leave racial minorities exclusively to the tender mercies of the political process in the absence of a showing of intentional discrimination. A school might, for political reasons, choose not to help a relatively powerless racial minority, in favor of helping more numerous and powerful minorities.¹⁵³ It seems unfair that groups

¹⁵¹ *Id.* at 359-60 n.35 (Brennan, J., concurring in judgment in part and dissenting in part) (citation omitted).

¹⁵² In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), in a judgment in which Justice Brennan concurred, the Court engaged in a similar analysis of a program that was similarly inclusive of non-white groups. The Court rejected a claim that limiting the program to "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts," *id.* at 454, rendered it underinclusive; *id.* at 485. The Court explained: "We are not reviewing a federal program that seeks to confer a preferred status upon a nondisadvantaged minority or to give special assistance to only one of several groups established to be similarly disadvantaged minorities. Even in such a setting, the Congress is not without a certain authority." *Id.* The Court's language probably should be read in light of the fact that the program included all or virtually all non-white groups in the United States. Moreover, none of the cases cited by the Court in support of its decision involved racial classifications. *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), involved a veteran's preference that was offered to both genders and all races, and *Califano v. Webster*, 430 U.S. 313 (1977), presented a Social Security preference that applied to all women and was denied to all men. *Morton v. Mancari*, 417 U.S. 535 (1974), involved a preference for hiring Native Americans at the Bureau of Indian Affairs. *Morton* comes closest to permitting selective programs, but no other racial or ethnic group has the same special constitutional status possessed by Native Americans.

¹⁵³ *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516 n.9 (1989) (Stevens, J., concurring in part and concurring in judgment) (noting possibility that a minority set-aside program "might be nothing more than a form of patronage").

Peightal v. Metropolitan Dade County, 940 F.2d 1394 (11th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992), is one of a handful of court of appeals decisions dealing with racial selectivity in an affirmative action program. In that case, the late Judge John R. Brown, writing only for himself, argued that exclusion of races from a remedial program should be upheld so long as there is a rational basis. *Id.* at 1409. Such a rational basis existed because "[i]n Dade County, the two most prevalent minority groups are blacks and Hispanics." *Id.* This seems an unfortunate formulation, because it invites racial politics, and seems to award a remedy based on a ground that is not linked to the nature of the injury. On appeal after remand, the panel offered a more satisfying justification: the limitation was acceptable because there was no evidence of discrimination against other groups. *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1561 (11th Cir. 1994).

with comparable histories of harm should be treated differently on that basis. Because these kinds of remedies are possible in a variety of settings, groups that are already powerful and numerous in various parts of the country will be at a significant advantage which will grow over time.

D. Other Compelling Reasons for Racial Selectivity

The doctrinal analysis above might be forced to yield in the face of some overriding reason or factual circumstance that made racial selectivity essential for the achievement of diversity. Nevertheless, I have been unable to identify such a reason.

1. Expanding Diversity Would Squeeze Out Currently Preferred Groups/Some Groups Do Not Need It

Expanding programs to include all non-white races should not result in squeezing out African-Americans and other currently advantaged groups. Nor would it result in awarding preferences to racial groups that are already represented at the level the school believes necessary to achieve diversity. Law schools clearly have the power and ability to consider an applicant's race in such a way as to promote net racial diversity, ensuring a mix of races in the admitted class. They would not be required to simply admit the most "qualified" minorities without taking into account the resulting demographic makeup. That is, if twenty-five Latinos and Latinas and eleven African-Americans had already been admitted to the class, the racial "plus" given to the twelfth African-American might be more weighty than that awarded to the twenty-sixth Latino or Latina.¹⁵⁴ If the school believes that diversity can be achieved with seven per cent representation, and a particular minority group is admitted at that level or higher without admissions preferences, then that group would be included in the program only to the extent that the school counted heads to make sure the diversity level was maintained. If diversity can be achieved without preferences, a school would not need to award preferences.

Currently advantaged minorities might be harmed in another sense. Adding new groups to the diversity list will almost inevitably have one of three results: more whites will be rejected, some of the currently advantaged minorities will be denied, or both. If the program works in accordance with the diversity principle, then more whites will be rejected.

¹⁵⁴ See Kenneth L. Karst & Harold W. Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 18-19 (1979) (noting that "if a substantial number of Asian-Americans has already been admitted to an entering class, then the next Asian-American to be considered will not get much of a 'plus' on diversity grounds").

Bakke, explains Professor Blasi, "requires that admissions programs treat minority-race applicants as persons who have something valuable to contribute to the educational environment."¹⁵⁵ Diversity is, in this sense, the recognition of a heretofore ignored qualification. Moreover, it is a qualification with no apparent inherent limitation. The most diverse possible class would be one with equal representation of every relevant group. Until that is achieved, admission of additional members of any group, other than the largest, contributes to diversity at that institution.¹⁵⁶ Thus, the result of increasing the number of races eligible to contribute their perspectives to a law school would be the same as if, say, a law school ended a policy of automatically denying admittance to graduates of non-Ivy League colleges, no matter how brilliant and accomplished. Some of those who would have been admitted under the former system will be rejected, but the resulting class will more accurately reflect the qualities that the school *now* considers important.

The problem is that there may be political constraints against policies that reduce the number of white students below a certain point.¹⁵⁷ If a class contains fewer whites but is better qualified, according to proponents of diversity, because it is more diverse, the only apparent ground for objection is that whites have some claim of right to a larger proportion of the places in the law school. Nevertheless, a pragmatist might say that in practice there is an upper limit to a diversity admissions program. A given school might determine that it cannot reduce the number of white students any further than they have already. Therefore, any increase in the number of minority groups considered in the diversity program will have to be at the expense of the minorities in the currently favored groups.

If the decision were not to expand a program, the result would be to justify discrimination¹⁵⁸ against racial minorities to protect the places of white students, a problematic concept, and one that could only be accepted willingly by a person who did not really believe in the value of diversity.¹⁵⁹ If the decision is to expand the program at the expense of the cur-

¹⁵⁵ Blasi, *supra* note 14, at 67.

¹⁵⁶ This assumes that the minority admittees have the other academic and demographic qualities schools deem desirable and that the admission of a member of a particular race will not take the place of a person who would contribute more diversity to the class.

¹⁵⁷ The controversy over minority admissions at Berkeley may be an example of this. See Richard Reeves, *White Politics Outdated in Browning California*, SEATTLE TIMES, May 30, 1990, at A8.

¹⁵⁸ That is, the non-favored minorities, though similarly situated to the favored minorities in that they can offer diversity to the class, are nevertheless not included in the diversity program.

¹⁵⁹ A school might consider diversity as a positive factor for some non-white racial groups but not others on the ground that awarding special consideration to all non-

rently favored minority groups, again, whites are protected at the expense of minorities.¹⁶⁰

2. *More Diversity Admissions Would Help the Wrong People*

A criticism of racial inclusion might be that races which do not need or "deserve" advantage would be included in a program, or, alternatively, that the benefits of the program would not be focused on the most disadvantaged students and races.¹⁶¹ Expanding the number of races eligible for the program would make the problem worse. This objection, which comes from people who think affirmative action goes too far as well as from those who think that it does not go far enough, is answered by the *Bakke* opinion. *Bakke* recognized the compelling interest to be the benefit the school and its students would gain through admission of a diverse student body, not remedying past discrimination or increasing the numbers of minority students per se.¹⁶² Given this concern, the disadvantaged nature of the individual is not necessarily relevant.¹⁶³

If a number of disadvantaged students have already been admitted to the class, or if the admissions committee is considering one of the first few

whites would be too costly in terms of the other relevant qualifications for admission. Such a decision would reveal that that school did not view diversity as a qualification—that it did not really add something to the school's program.

¹⁶⁰ This second course, however, may increase net diversity. The diversity effect diminishes as more members of a group are present. Thus, a class might be more diverse if it has 10 members of four racial groups, rather than 20 members of two racial groups. For a discussion of the problem of racial minorities being treated less advantageously than whites in an alleged affirmative action program, see Selena Dong, "*Too Many Asians*": *The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027 (1995).

¹⁶¹ Compare Foster, *supra* note 35, at 137 (arguing that Justice Powell's diversity scheme "fails to promote equality in a society where certain differences have been constructed into a basis for systematic exclusion and disadvantage, and other differences have not") with Fullilove v. Klutznick, 448 U.S. 448, 530 n.12 (1980) (Stewart, J., dissenting) (criticizing minority set-aside program with regard to federal contracts because "the statute makes no attempt to direct the aid it provides solely toward those minority contracting firms that arguably still suffer from the effects of past or present discrimination").

¹⁶² As one commentator observed, "[o]ne key aspect to observe is that Justice Powell's diversity idea is based on an interest of the *institution*—that is, an enterprise interest in an enriched educational atmosphere—rather than on an interest held by the represented minority group." Robert G. Dixon, Jr., *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69, 75-76 (1979).

¹⁶³ Indeed, Justice Powell rejected underrepresentation or disadvantage as compelling interests justifying affirmative action. See Board of Regents v. Bakke, 438 U.S. 265, 315 (1978); see also *supra* notes 18-24 and accompanying text.

spots, a privileged student might be as “diversifying” to the class or more so than a disadvantaged one. The Harvard Plan praised by Justice Powell gives the following example:

The Admissions Committee, with only a few places left to fill, might find itself forced to choose between *A*, the child of a successful black physician in an academic community with promise of superior academic performance, and *B*, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like *A* but few like *B* had already been admitted, the Committee might prefer *B*; and vice versa.¹⁶⁴

Professor Sandalow makes the same point: “If preferences are justifiable because they deal with the problems resulting from the continuing social significance of race and ethnicity, there is nothing unjust in awarding a preference to minority applicants who come from advantaged backgrounds.”¹⁶⁵ Professor Greenawalt agrees that the educational impact of diverse races is satisfied by “rich” minorities as well as poor: “So long as the superbly educated son of a black Senator or the recent immigrant from Africa are identified as relevantly ‘black’ by whites and other blacks, then this purpose of the preferential policy is served by admitting them.”¹⁶⁶

3. *Critical Mass*

Diversity proponents often argue that a “critical mass”¹⁶⁷ of minority students is necessary to ensure that the students are socially comfortable.¹⁶⁸ This may be necessary to make a diversity program work and to prevent minorities from dropping out. Sometimes this principle is used to justify racial selectivity. Dean Brest explained that Stanford’s “Minority Admissions Program” is intended “to assure a significant presence” of the preferred minority groups.¹⁶⁹ Dean Brest believes that

¹⁶⁴ *Bakke*, 438 U.S. at 324.

¹⁶⁵ Sandalow, *supra* note 52, at 691-92.

¹⁶⁶ Greenawalt, *supra* note 53, at 593.

¹⁶⁷ 22 *Hopwood* Transcript, *supra* note 36, at 18-19.

¹⁶⁸ 22 *id.*

¹⁶⁹ 22 *id.* at 14.

in order for . . . the [minority] students to prosper, to feel comfortable and to make the kind of contribution that they make to the law school's educational mission, that there need to be enough of them to feel that this is their place, that they don't feel an isolated minority in the law school.¹⁷⁰

Stanford Law School monitors the numbers of students in each of the racial groups to make sure that a critical mass is achieved.¹⁷¹ Thus, in a recent year, when it appeared that there would be an insufficient number of African-American students, a special effort was made to admit more from the remaining applications.¹⁷² The school aggregates Latino and Latina subgroups when determining whether a "critical mass" has been reached,¹⁷³ but makes no effort to determine whether there is a critical mass of Chinese-, Japanese-, or Korean-American students.¹⁷⁴ "The only groups that [there] is an explicit concern about are the ones . . . in the Minority Admissions Program."¹⁷⁵

The critical mass notion can support racial selectivity on the ground that different minority groups have different critical masses, and a sufficient number of members of a particular racial group may be admitted without a preference to establish a critical mass. Dean Bollinger of Michigan Law School testified that about twenty-two to twenty-five percent of Michigan's student body is minority; eleven to twelve percent African-American, five to seven percent Asian-American, five to six percent Latino or Latina, and one to two percent Native American.¹⁷⁶ He believes that there is a "different critical mass for different minorities."¹⁷⁷ "[I]t has to do with the . . . sense of identification and with the . . . psychological sense of what it means to be a member of that minority community within a larger community . . ."¹⁷⁸ For African-Americans, "five percent of an entering class at this particular moment is too few African-Americans within the class, and they feel alienated and alone. And somewhere perhaps over 10 percent, 10 percent or more, begin to feel more comfortable . . ."¹⁷⁹ Assuming Michigan sees no particular need to increase its Asian-American student population,¹⁸⁰ it

¹⁷⁰ 22 *id.* at 21.

¹⁷¹ 22 *id.* at 20.

¹⁷² 22 *id.* at 21.

¹⁷³ 22 *id.* at 31-32.

¹⁷⁴ 22 *id.* at 33-34.

¹⁷⁵ 22 *id.* at 34.

¹⁷⁶ 16 *id.* at 21-22.

¹⁷⁷ 16 *id.* at 33.

¹⁷⁸ 16 *id.* at 33.

¹⁷⁹ 16 *id.* at 34.

¹⁸⁰ That is suggested by the fact that Asian-Americans are not included in the diversi-

seems probable that the school has concluded that the "critical mass" for Asian-Americans, and possibly Latinos and Latinas as well, is lower than that for African-Americans.

I doubt this belief is warranted. Assuming that members of different racial or cultural groups share certain fundamental human similarities, it seems probable that members of any race or culture are happier when they are not isolated—when there are many others like themselves who are members of the institution.¹⁸¹ Many groups in addition to African-Americans experience residential and social segregation, to a greater or lesser degree, voluntarily or involuntarily. Reservations, barrios, and Chinatowns are as much a feature of the American landscape as African-American neighborhoods. Moreover, national population does not necessarily affect the degree of local segregation; any given neighborhood or area may be 100% Asian-American or Native American, even though those groups constitute a tiny proportion of the population as a whole.

Admittedly, any member of a minority group who enters the larger society must eventually reconcile him or herself to a certain harsh reality: most of the people they encounter will be members of races other than their own. This is more true for members of less numerous races, and less true for members of larger races. No matter what efforts are made, it would be hard for the nation's institutions to have as great a representation of Native Americans as African-Americans, because the population base of African-Americans is so much larger. Nevertheless, these facts of life do not change the feelings of minority people; there is no reason to believe that Native Americans have grown accustomed to isolation, or that they like it. That it might be impossible to have ten percent of every law school class be Native American does not mean that Native Americans would not prefer to attend a law school at which they were represented to that extent, or that a Native American student would be any less distressed at being one or two percent of a law school class than would an African-American student in the same position. Accordingly, there seems to be little justification for not *trying* for the same critical mass for all groups, recognizing that they will probably not all be achieved. Concretely, this means that the school should not award a "plus" to an applicant from a particular group to achieve a particular "critical mass" unless each group receives the same plus at the same level of representation. Because this is not done, the critical mass argument appears to be another way of seeking proportional representation.

ty affirmative action policy.

¹⁸¹ This is, in one sense, an empirical question, but it is made difficult or impossible of definitive resolution in the absence of a reliable means of comparing interpersonal levels of discomfort.

IV. TAKING *BAKKE* SERIOUSLY: THE COSTS OF THE REJECTION OF THE DIVERSITY MODEL

For two sets of reasons, the rejection of *Bakke* by many segments of the legal academy is unwise. First, the failure to follow *Bakke* is eloquent testimony that the decision has little intellectual support, and, perhaps more importantly, it sends a signal to a conservative Supreme Court that professors cannot be trusted with this kind of discretion. To the extent that *Bakke* is invoked to justify discrimination against historically disadvantaged minorities that particular institutions wish to exclude from their programs, the Supreme Court will be able to claim the moral high ground if they overrule the decision. Yet even if *Bakke* is never overruled, failing to follow it imposes significant costs on those minorities who do not benefit from it.

A. *Bye Bye Bakke?*

Until recently, most law schools that chose not to comply with the limitations of *Bakke* have found their conduct to be costless; since *Bakke*, there has been little reported litigation over law school admissions.¹⁸² Part of the protection was structural; most people apply to several law schools, and a decent white candidate will probably be admitted somewhere.¹⁸³ Arguably, most applicants probably calculate that it is better to go to a second or third choice than to spend the time and money to sue the school they most want to attend, particularly because even if a plaintiff wins, she may regret being known as the person who killed the school's affirmative action program. Moreover, the class of people who do not have good second choices were unlikely to make good plaintiffs; some law suits have been dismissed before trial because of the white plaintiff's sub-par credentials as an applicant.¹⁸⁴

¹⁸² See Drew S. Days, III, *Minority Access to Higher Education in the Post-Bakke Era*, 55 U. COLO. L. REV. 491, 495-99 (1984) (discussing post-*Bakke* affirmative action litigation and possible reasons for its lack of success).

¹⁸³ In 1988-89, almost 62% of white applicants were admitted to at least one school to which they applied. The average white candidate rejected from every law school to which they applied had a GPA of 2.85 and an LSAT score of 28.7 on a 48 point scale. MINORITY DATABOOK, *supra* note 6, at 47.

¹⁸⁴ See, e.g., *Doherty v. Rutgers Sch. of Law-Newark*, 651 F.2d 893, 900 (3d Cir. 1981) (holding that the white plaintiff, whose GPA of 1.85 and LSAT score of 576 of a possible 800 were below those of the minorities admitted, lacked standing to challenge the program); *McAdams v. Regents of the Univ. of Minn.*, 508 F. Supp. 354, 357, 359 (D. Minn. 1981) (granting defendant law school summary judgment because the plaintiff would not have been admitted even in the absence of the program; the program involved 15 or 20 slots for minorities, but there were over 100 applicants in each of the two years at issue who were rejected and had higher objective qualifications).

Many of these protective factors are gone. In 1993, the Supreme Court loosened the standing requirements for individuals claiming discrimination; now an applicant can challenge the affirmative action policy of a school to which the student had no hope of admission.¹⁸⁵ It may also be that more highly qualified applicants are now somewhat less hesitant to sue. For example, the lead plaintiff in *Hopwood v. Texas*¹⁸⁶ was an appealing candidate: a woman with a disabled child, she worked her way through college and nevertheless earned a 3.8 grade point average.¹⁸⁷ A sympathetic, capable, disadvantaged woman, she attacked affirmative action without apology.

That people like Hopwood are willing to sue reflects the substantial change in the political environment. In late 1987, a few short months before *City of Richmond v. J.A. Croson Co.*,¹⁸⁸ a thoughtful commentator could write that "[f]or the moment, the affirmative action wars are over."¹⁸⁹ Similarly, in July 1994, Daniel A. Farber wrote: "For both political and legal reasons, significant changes in the extent of affirmative action are unlikely."¹⁹⁰ Both of these predictions turned out to be wildly optimistic.

As a result of these new circumstances, the strength of *Bakke* as precedent becomes critical. Even apart from the current Supreme Court's hostility to affirmative action, *Bakke* is vulnerable as a technical matter. Just two years after *Bakke*, the Supreme Court pointedly declined to approve it.¹⁹¹ Given its four-one-four division, some commentators have questioned whether there was even a binding opinion in the case,¹⁹² as has the Su-

¹⁸⁵ See *Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993).

¹⁸⁶ 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, Nos. 94-50569 & 94-50664, 1996 WL 120235 (5th Cir. Mar. 18, 1996).

¹⁸⁷ *Id.* at 564; see also Richard Bernstein, *Racial Discrimination or Righting Past Wrongs?*, N.Y. TIMES, July 13, 1994, at B8; David A. Savage, "*Bakke II*" Case Renews Debate on Admissions, L.A. TIMES, July 30, 1995, at A1.

¹⁸⁸ 488 U.S. 469 (1989).

¹⁸⁹ Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524, 524 (1987).

¹⁹⁰ Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 895 (1994).

¹⁹¹ *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980) ("This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*].")

¹⁹² See, e.g., Days, *supra* note 182, at 492 (observing that "there was no opinion of the Court, strictly speaking"); Dixon, *supra* note 162, at 72 & n.11; Charles Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement*, 99 YALE L.J. 155, 158 (1989) (referring to "Justice Powell's dictum in *Bakke* about the permissibility of seeking diversity in certain educational settings"); Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 999 (1993) (noting that "[i]t is not clear that Justice Powell's opinion was, in any meaningful sense of the term, 'the law'—even at the time *Bakke* was decided"); Ralph Smith, *Affirmative Action in Extre-*

preme Court itself.¹⁹³ There is a strong argument, however, that there was a binding opinion; applying the rule that the narrowest ground of concurrence represents the holding of the Court, the Powell decision might be read as the basis of the decision upholding race consciousness.¹⁹⁴

The Brennan group, however, created a vulnerability by stating that a Harvard-style diversity plan is constitutional, "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."¹⁹⁵ Arguably, this is the narrowest ground of decision, because the Brennan group might not have upheld a diversity program where it was not necessary to remedy historical discrimination. If the Brennan group's view does in fact represent the holding, *Bakke* has already been completely undermined, and possibly overruled, because *Croson* eliminates remedying past general societal discrimination as a ground for race-based affirmative action.¹⁹⁶ It is possible, therefore, that the legal underpinning for *Bakke* no longer exists.¹⁹⁷ The ambiguity of the precise ground of decision puts *Bakke*'s life in question, for when the Supreme Court has had difficulty in identifying a specific holding, it occasionally has decided that there was no holding.¹⁹⁸

mis: A Preliminary Diagnosis of the Symptoms and the Causes, 26 WAYNE L. REV. 1337, 1346-47 (1980) (remarking that "none of the multiple opinions, including the highly acclaimed 'pivotal' opinion of Justice Powell, could elicit a majority. Consequently, *Bakke* is of little real precedential value . . .") (citation omitted); cf. David P. Bryden, *On Race and Diversity*, 6 CONST. COMMENTARY 383, 384 (1989).

¹⁹³ *Adarand Constructors v. Peña*, 115 S. Ct. 2097, 2108 (1995) (observing that "*Bakke* did not produce an opinion for the Court"); see also *Board of Regents v. Bakke*, 438 U.S. 265, 324-25 (1978) (Brennan, J., concurring in judgment in part and dissenting in part) (noting that "[t]he difficulty of the issue presented . . . and the mature consideration which each of our Brethren has brought to it have resulted in many different opinions, no single one speaking for the Court").

¹⁹⁴ See *supra* notes 16-17 and accompanying text (discussing *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.")).

¹⁹⁵ *Bakke*, 438 U.S. at 326 n.1.

¹⁹⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹⁹⁷ See *id.* at 493 (citing *Bakke* for the proposition that "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). Read absolutely, this passage could mean that *Bakke* is no longer good law. See *Milwaukee Co. Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.) ("The whole point of *Croson* is that disadvantage, diversity or other grounds for favoring minorities will not justify governmental discrimination . . ."), *cert. denied*, 500 U.S. 954 (1991).

¹⁹⁸ See, e.g., *Nichols v. United States*, 114 S. Ct. 1921 (1994), *overruling Baldasar v. Illinois*, 446 U.S. 222 (1980). In *Nichols*, the Court stated:

Nevertheless, *Bakke's* technical infirmities, by themselves, might well not be enough to convince five Justices to overrule it. *Croson* did not specifically overrule *Bakke*, and even the present Court might not do so. Although Justice Stevens voted against diversity in *Bakke* on statutory grounds,¹⁹⁹ he now believes that diversity is a compelling interest.²⁰⁰ Justices Souter, Ginsburg, and Breyer also have been sympathetic to affirmative action in other contexts.²⁰¹ Chief Justice Rehnquist and Justices Scalia and Thomas, on the other hand, are probably not going to find that diversity in education is a compelling interest.²⁰²

Of the remaining two members, Justice Kennedy's position is unclear, although he is obviously individualistic in his interpretation of the Fourteenth Amendment.²⁰³ Justice O'Connor has hinted that she might support

We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts which have considered it. This degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision.

Id. at 1927 (citations omitted).

¹⁹⁹ *Bakke*, 438 U.S. at 408 (Stevens, J., concurring in judgment in part and dissenting in part).

²⁰⁰ See, e.g., *Adarand Constructors v. Peña*, 115 S. Ct. 2097, 2127-28 (1995) (Stevens, J., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 315-16 (1986) (Stevens, J., dissenting).

²⁰¹ See *Adarand*, 115 S. Ct. at 2127-28 (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.) (noting that diversity might be a sufficient interest to warrant a race-based program); *id.* at 2131 (Souter, J., dissenting, joined by Ginsburg & Breyer, JJ.); *id.* at 2134 (Ginsburg, J., dissenting, joined by Breyer, J.).

²⁰² Justice Rehnquist, of course, voted against affirmative action in *Bakke* itself, and little since suggests that he has changed his mind. Justice Scalia's voice in affirmative action cases has also been clear. His insistence in *Adarand* that "[i]n the eyes of the government, we are just one race here. It is American" is wholly inconsistent with the diversity rationale. 115 S. Ct. at 2119 (Scalia, J., concurring in part and concurring in the judgment); see also *City of Richmond v. Croson*, 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring in the judgment) (rejecting race conscious programs for those who are not direct victims even as remedies for past discrimination); *Johnson v. Transp. Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting). Justice Thomas in *Adarand* also seemed to propose a strict colorblind standard which would preclude "benign" consideration of race. "As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged." 115 S. Ct. at 2119 (Thomas, J., concurring in part and concurring in the judgment). This reasoning would seem to apply to affirmative action to achieve diversity: "So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete without their patronizing indulgence." *Id.*

²⁰³ See, e.g., *J.E.B. v. Alabama*, 114 S. Ct. 1419 (1994). In *J.E.B.*, the majority held that intentional discrimination against male jurors in using peremptory strikes in jury se-

a diversity program,²⁰⁴ but she authored the *Croson* opinion. Both dissented in *Metro Broadcasting v. FCC* in ways suggesting disagreement with the idea that diversity is a compelling interest.²⁰⁵ Nevertheless, the potentially devastating decrease in the number of minority students on elite campuses²⁰⁶ that would be occasioned by overruling *Bakke* would probably make

lection violated the Equal Protection Clause. *Id.* at 1430. In a concurring opinion, Justice Kennedy asserted that "the neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concerns with individuals, not groups." *Id.* at 1434 (Kennedy, J., concurring).

²⁰⁴ See *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment) ("[A]lthough 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.") (citing *Board of Regents v. Bakke*, 438 U.S. 265, 311-15 (1995)); *id.* at 288 n.*.

²⁰⁵ The majority in *Metro Broadcasting* made an explicit connection between academic diversity and broadcast diversity. *Metro Broadcasting v. FCC*, 497 U.S. 547, 568 (1990), *overruled in part by* *Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995) (citing *Bakke*). Justice O'Connor, writing for herself and Justices Kennedy and Scalia, made arguments that seem inconsistent with accepting academic diversity as a compelling interest:

[T]he Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think. . . . Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection doctrine has recognized only one such interest: remedying the effects of past discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.

Id. at 601, 612 (O'Connor, J., dissenting). Justice Kennedy's dissent was almost intemperate, accusing the majority of disinterring the Court's decision in *Plessy v. Ferguson*, and helpfully directing his colleagues to statutes of the South African apartheid regime and the Third Reich for solutions to the practical problems of race-conscious programs. *Id.* at 631-33 & n.1 (Kennedy, J., dissenting). Apropos of the diversity rationale, he wrote: "I cannot agree with this Court that the Constitution permits the Government to discriminate among its citizens on the basis of race in order to serve interests so trivial as 'broadcast diversity.'" *Id.* at 633 (Kennedy, J., dissenting). Nevertheless, I agree with Akhil Amar and Neil Katyal, who recognized that Kennedy and O'Connor are crucial votes, that there are indications that the two Justices' views on *Bakke* are unfavorable, and yet conclude that it is not inevitable that they will vote to overrule *Bakke*. See Akhil Amar & Neil Katyal, *School Colors: Affirmative Action in Education*, NEW REPUBLIC, July 17, 1995, at 24.

²⁰⁶ UCLA Law School Associate Dean Julian Eule, for example, said that without affirmative action his school would be virtually all white and Asian. See Jacobius, *supra* note 120, at 22. Representatives of Boalt Hall made a similar point. *Id.*; see also Theodore Cross, *Suppose There Was No Affirmative Action at the Most Prestigious Colleges*

O'Connor and Kennedy think long and hard before overruling the decision simply because of its imperfections.

If *Bakke* is shown to have been a failure, on the other hand, the case for overruling it becomes much stronger. Academics may applaud the idea of using *Bakke* to undermine the unpleasant implications of Justice O'Connor's opinion in *Croson*;²⁰⁷ Justice O'Connor may be less likely to see that as a good reason to preserve *Bakke*. A passage from *Planned Parenthood v. Casey*²⁰⁸ seems critical because it represents the views regarding stare decisis of Justices O'Connor, Kennedy, and Souter, at least two of whom must support *Bakke* if it is to survive:

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability; whether the rule is subject to a special kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification.²⁰⁹

and *Graduate Schools*, J. BLACKS IN HIGHER EDUC., Spring 1994, at 47 (noting that "affirmative action plays a huge, if not almost determinative, role in the admission of African Americans to professional schools"); Theodore Cross, *What If There Was No Affirmative Action in College Admissions? A Further Refinement of Our Earlier Calculations*, J. BLACKS IN HIGHER EDUC., Fall 1994, at 53-54 (estimating that if admissions were based on standardized test scores, black enrollment at top 25 colleges would drop from 1,000 to 150; at top 20 law schools from 500 to 100, and at medical schools from 4,000 to 1,000); Ronald J. Ostrow & Sonia Nazario, *UC Votes Places Money to State at Risk, Panetta Says*, L.A. TIMES, July 25, 1995, at A1 ("A study by university officials, commissioned by the regents, showed that dropping racial preference as an admissions criterion could reduce the number of black students in the nine-campus [University of California] system by up to 50 percent.").

²⁰⁷ See Reginald Alleyne, *Regents v. Bakke: Implementing Pre-Bakke Admissions Policies with post-Bakke Admissions Procedures*, 7 BLACK L.J. 290 (1981), for an article whose title, in retrospect, turned out to be regrettable.

²⁰⁸ 505 U.S. 833 (1992).

²⁰⁹ *Id.* at 854-55 (citations omitted); see also *United States v. Dixon*, 113 S. Ct. 2849, 2864 (1993) (denying that "when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent") (quoting *Payne v.*

If many academic decision-makers choose not to follow *Bakke*, it will be hard to insist that *Bakkean* diversity is "workable," is "more than a remnant of an abandoned doctrine," or has "significant application and justification." Accordingly, *Bakke* risks being overruled.²¹⁰

B. *If It Ain't Broke, Don't Fix It?*

Leaving aside for the moment these serious tactical problems, there is a fairly compelling defense of the status quo. *Bakke* is the only affirmative action rationale we have, and the Supreme Court is not likely to offer any new alternatives in the foreseeable future. For those who support affirmative action but cannot convince themselves that it is primarily justified by anything other than remedying past discrimination or distributive justice, the diversity fig leaf exists as a pretext. Because increasing the numbers of minority lawyers is a positive goal, though illegal, why is this wrong? Perhaps especially in the area of civil rights, it is difficult to argue that automatic obedience to the law is always the right course. So much progress was achieved through nonviolent resistance to unjust laws; Rosa Parks and the heroes and heroines of the lunchcounter sit-ins did the right thing, even though they may have transgressed laws.²¹¹

Tennessee, 501 U.S. 808, 809 (1991) (internal quotations omitted)).

²¹⁰ A number of articles discuss the stare decisis analysis of Justices Kennedy, O'Connor, and Souter in more detail. See, e.g., Carolyn D. Richmond, Note, *The Rehnquist Court: What Is in Store for Constitutional Law Precedent?*, 39 N.Y.L. SCH. L. REV. 511 (1994); see also Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119 (1995); Paul B. Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15 (1993); Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeastern Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11 (1992).

²¹¹ Cf. Leon Higginbotham, Jr., *Rosa Parks: Foremother and Heroine Teaching Civility & Offering a Vision for a Better Tomorrow*, 22 FLA. ST. U. L. REV. 899 (1995); Bruce Ledewitz, *Perspectives on the Law of the American Sit-In*, 16 WHITTIER L. REV. 499 (1995). Of course, lawyers and law schools may have a special obligation to obey the law. The comparison between academic disobedience to *Bakke* and Rosa Parks is imperfect because some academic institutions, rather than openly and proudly sharing what they are doing, obscure the details of the operation of their programs. In some well-publicized incidents, confidential admissions information about special admittees was stolen and disclosed. See Francis Robles, *UM Minorities' Admissions Records Stolen*, MIAMI HERALD, Sept. 28, 1995, at 1B (describing theft of records at University of Miami Law School and their delivery to student newspaper); Steve Hunter, *Confidential Admissions Data Revealed*, RES GESTAE, Oct. 22, 1986, at 1 (report in University of Michigan Law School student newspaper of comparative admissions statistics of Michigan residents, non-Michigan residents, and minority special admittees); Sandra Torrey,

One reason racial selectivity is wrong is that there are significant costs to non-preferred minority groups.²¹² Moreover, preferring some disadvantaged minorities but not others delegitimizes the entire diversity project and cannot help but promote distrust between all racial groups involved. Many of these costs are borne by disadvantaged minority groups.

C. *Non-Diversifying Races Are Disadvantaged by Racially Selective Programs*

Even if particular programs are not motivated entirely by a desire to achieve diversity, the rhetoric of diversity is still used as a justification. Non-preferred minorities are stigmatized by schools establishing, through official policy, that the minorities' presence does not promote diversity, unlike the presence of other minorities. A preference for some minorities over others could easily be taken as a judgment that some races are less culturally valuable or interesting or important than others. In this way, racial selectivity blurs the line between affirmative action and traditional invidious discrimination. Greenawalt argued, for example, that "one can draw a solid distinction, in terms of possible stigma, between [the] classifications affording preferential treatment to minority groups and those disadvantaging historically disfavored minorities."²¹³ A racially selective program simultaneously accomplishes both ends.²¹⁴

Black Law Students Assail Author of Article on GU Law Admissions, WASH. POST, Apr. 16, 1991, at C1 (describing appropriation of confidential information from student files which was reported in student newspaper). Although the breach of confidentiality fueled part of the concern, it seems clear that some also thought disclosure of accurate statistics would be, somehow, harmful or shameful. See Judith Areen, *Affirmative Action: The Benefits of Diversity*, WASH. POST, May 26, 1991, at D7 (quoting Georgetown law dean as noting that "[s]ome observers have wondered why the Law Center has a policy against publishing median LSAT scores by race"). As Professor Ellen Frankel Paul wrote, "Why is it that decisions to appoint faculty or select students on the basis of affirmative action criteria are kept from public scrutiny? . . . If a social policy has to be conducted with a certain measure of secretiveness, then that says something awfully damning about it, especially in a democratic society." Ellen Frankel Paul, *Careers Open to Talent*, in *AFFIRMATIVE ACTION AND THE UNIVERSITY*, *supra* note 79, at 256, 257.

²¹² In addition, it would be very unfortunate for law schools themselves to communicate the idea that evasion of the law, for a purpose one deems good, is acceptable, so long as there is a reasonable chance of getting away with it. Rosa Parks' protest was all the more courageous and poignant because she did it proudly.

²¹³ Greenawalt, *supra* note 79, at 112.

²¹⁴ See, e.g., Nicolaus Mills, *Introduction: To Look Like America*, in *DEBATING AFFIRMATIVE ACTION, RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 30 (Nicolaus Mills ed., 1994) ("Traditional discrimination, whether based on race or gender, was invidious. It assumed the inferiority of those it excluded. By contrast, the benign preferences of affirmative action carry with them no stigma. Their aim is

This stigma cannot be eliminated by whispering, as some law schools may try to do, that the real purpose is remedying past discrimination, and that no offense is intended. Because the overt policy is grounded in diversity, the non-preferred races may well feel maligned. Moreover, even the excuse that the covert purpose is to remedy disadvantage is not palliating; the argument that certain races need help to overcome past disadvantage implies that the discrimination non-preferred minorities have suffered is too trivial to notice and somehow unworthy of redress.²¹⁵

In addition, some of these programs are justified on the ground that it is important to help create members of the bench and bar who are members of particular minority groups. Although this is an illegal goal, again, it sends a signal of the valuation of the race in the eyes of the law school if the law school helps some races in these areas but not others.

Texas Law School provided an interesting example of this professional promotion. During the trial challenging his school's affirmative action program, Dean Yudof finessed a question regarding the place of Asian-Americans in the Texas program.

Q. . . . What about, for example, Asian-American[s] . . . their numbers in the state are so low that they can't elect anybody or—there's no Asian-Americans, as I understand . . . in the state legislature, serv[ing] in government in an elected capacity. . . . [S]ince they are not in those positions of power or their numbers are not great enough to elect somebody . . . are you not concerned about leadership of Asian-Americans in the bar or in our government?

. . . .
A. . . . [I]t appears to be the case due to our population trends in recent years that Asian-Americans are beginning to enter the law schools in significant numbers. . . .

Q. Well, if one of your goals is to train these leaders or to attract these leaders to your school, is there any particular number that you need to get in there to provide these leaders?

A. No, I don't think there is a particular number. . . .²¹⁶

inclusionary, rather than exclusionary . . .").

²¹⁵ In this connection, it may be worth mentioning *In re Hong Yen Chang*, 24 P. 156 (Cal. 1890) and *In re Yamashita*, 70 P. 482 (Wash. 1902), cases in which Asian graduates of American law schools were denied the right to practice because they were not United States citizens, a status which, by federal law, they could not obtain. Thus, Asian-Americans, the group most often excluded from affirmative action programs, have a history of de jure exclusion from the legal profession.

²¹⁶ 20 *Hopwood* Transcript, *supra* note 36, at 38-40.

In sum, the Texas program did not undertake to ensure that Asian-Americans or Native Americans or non-Mexican-American Latinos and Latinas had a well-trained body of lawyers ready to lead the bench and bar; if it happened through market forces, fine, but if not, that seemed fine, too. Native Americans and Asian-Americans would be foolish if they did not recognize that this policy sends a message about their relative importance in, and to, the State of Texas.²¹⁷

Excluded minorities are directly harmed by racially selective programs because they compete for a reduced set of spots. If five or fifteen percent of the places in a class are awarded on the basis of preferences to persons who otherwise would not have obtained the places, there will be five or fifteen percent fewer members of the non-preferred minority groups in the class.²¹⁸ In this sense, "preferential admissions policies actually disadvantage nonpreferred minorities as well as whites" ²¹⁹ It is one thing for whites²²⁰ to make other whites pay for discrimination committed by whites for the benefit of whites, even though the particular individuals who pay may not have perpetuated or directly benefitted from that discrimination. It is far less appetizing for whites to say minorities should suffer to compensate other minorities for those wrongful acts.²²¹

²¹⁷ Arguably, a small minority group needs lawyers to protect its members from discrimination and abuse even more than a larger group, which may have protection through the political process.

²¹⁸ This assumes a proportional distribution at each level of the group of students who would have been accepted in the absence of an affirmative action program.

²¹⁹ Greenawalt, *supra* note 53, at 599.

²²⁰ In 1989-90, 90.9% of law school faculty and administrators at ABA-approved schools were non-Latino or Latina whites. MINORITY DATABOOK, *supra* note 6, ch. 8, tbl. VIII-1. Some argue that whites are privileged simply because of their whiteness, and thus, perpetrators or not, conscious racists or not, benefit from past discrimination. See, e.g., Thomas Ross, *Innocence and Affirmative Action*, 48 VAND. L. REV. 297 (1990). This argument does not seem to support the idea that *minority groups* must be considered the beneficiaries of, and therefore culpable for, discrimination against other minority groups.

²²¹ This is particularly so because it is difficult to imagine that any racial group with the power to refuse to pay for white misconduct against another minority group would voluntarily agree to do so; instead, they would insist that the whites pay the full freight. Accordingly, the minority groups that are forced to bear the costs of white discrimination will be those that are politically weak. With regard to Asian-Americans in particular, Frank Wu perceives a different danger: "The real risk to Asian Americans is that they will be squeezed out to provide proportionate representation to whites, not due to the marginal impact of setting aside a few spaces for African Americans." Frank Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 226 (1995). "If they are hurt at all by affirmative action," he argues, "Asian Americans are harmed no differently from whites." *Id.* Wu's trenchant analysis seems to envision a remedial program, where various members of non-white groups might be differently situated—discrimination against Native Americans would not nec-

D. A Closed Unrepresentative Group Is Making a Decision of Solomonic Difficulty

If racial minorities were reluctant to rely on a largely white class of law school faculty and administrators to determine their level of historical injury and its present effects, and thus their appropriate share of this and other social goods, it would be hard to insist that their concern was unjustified. Few deny that conscious and unconscious racial prejudice continues to exist; accordingly, it is possible that the racial minorities with which law school faculties are consciously or unconsciously unsympathetic will have their claims for redress of past discrimination treated less favorably than other groups. As Richard Delgado explained, such a system "place[s] the operation of [affirmative action] in the hands of the very people who brought about the situation that made it necessary in the first place."²²²

Then-Professor Guido Calabresi recognized that delegation of this kind of decision-making authority to university admissions committees was problematic because the committees were wholly unrepresentative and accountable to no one:

I am far more willing to trust juries to reflect the unspoken, and often unspeakable, compromises that the society must make than I am to trust university admissions committees to make such decisions. Juries are, after all, popular bodies. No one jury lasts that long and only a whole series of juries can shape the unspoken compromise. As such they are relatively incorruptible (there are too many of them) and relatively representative of the society whose values they seek to accommodate. None of this is true of university admissions committees. They are, to put it mildly, utterly unrepresentative of anything and their value-compromises need have no relation whatsoever to those of the society at large. Hiding the choice by leaving it to the university is therefore far more dangerous than is the analogous delegation to the jury in euthanasia cases.²²³

essarily warrant preferences for Mexican-Americans. Nevertheless, he does not explain why minorities who are both non-victims and non-beneficiaries should bear any of the cost of the remedy. Moreover, Wu's reasoning would seem not to apply to a program driven by diversity, where members of non-white groups that are not preferred might be similarly situated to those that are.

²²² Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1225 (1991).

²²³ Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 431-32

In addition, Professor Calabresi perceived that the covert nature of the process opened the door to political, even discriminatory, results:

Moreover, the standard universities are to apply—diversity—has been sufficiently used by them in the past to *disfavor* disadvantaged groups that it should give one pause as the basis for the “acceptable,” if unspoken and unreviewable, decisions of today. When we must avert the eyes, we should try to do it in a way which gives us some confidence that what happens where we do not look will reflect the conflict of societal values at stake instead of other, perhaps self-serving interests.²²⁴

An example from the University of Texas suggests that the problem may be genuine. In 1990, a committee at the University of Texas Law School voted to increase the coverage of the program to include more Latino and Latina groups, such as Puerto Ricans and Central Americans, as well as disadvantaged groups such as “American Indians, Vietnamese boat-people and Appalachians.”²²⁵ Dean Yudof, however, opposed the change on the ground that “in the aggregate . . . a more compelling case could be made for Mexican-Americans and African-Americans.”²²⁶

Recent immigrants such as Central Americans and Vietnamese may stand on a different footing when it comes to their entitlement to redress for past discrimination by the United States. In addition, the Appalachians are white, and are arguably a privileged group based on that circumstance alone. Nevertheless, the judgment that Native Americans and Puerto Ricans *unquestionably* have a distinctly better history in the United States than Mexican-Americans and African-Americans seems fairly difficult to defend; namely, it is difficult to choose between the forcible expulsion and genocide Native Americans experienced and the kidnapping and slavery imposed on African-Americans. In short, if there is such a thing as racism, or even a lack of complete empathy and understanding between members of different races, minority groups are entitled to be wary of allowing their just share of societal resources to be determined by a closed and unrepresentative process dominated by members of other races.

(1979) (footnotes omitted).

²²⁴ *Id.* at 432.

²²⁵ 20 *Hopwood* Transcript, *supra* note 36, at 45-46.

²²⁶ 20 *id.* at 47.

E. *Racial Selectivity Puts Disfavored Minorities in an Untenable Position*

Finally, a racially selective affirmative action program puts disfavored minorities in an impossible and unfair dilemma. Law school administrators discriminate against certain minorities through a program allegedly grounded in diversity, but which is really designed to increase the representation of other minorities. Accordingly, non-favored minority groups are actually worse off than they would have been without any affirmative action program. The disfavored minorities must either accept being discriminated against, or, in effect, sue other persons of color. Neither choice is good; it is unfair for minorities to be put in that untenable position.

CONCLUSION

Bakkean diversity cannot quite do the job that many university administrators wish it could: *Bakkean* diversity cannot justify representation of various groups proportionate to their population, cannot justify remedying past discrimination, and it cannot help some minorities while leaving others unaided. A few schools use diversity as Justice Powell seemed to envision it, offering admissions advantages to all non-whites, even though that may result in helping people who are merely interesting, not disadvantaged. Many others cannot bring themselves to go that far, and instead select the groups to favor with preferences, based on rationales that are different from *Bakkean* diversity per se. This task is nearly impossible to accomplish in a way that can leave the disadvantaged groups feeling fairly treated. We know that it is bad for a Mexican-American to be discriminated against because a predominantly white school prefers to admit whites; it has yet to be demonstrated that it is morally or legally acceptable for a Mexican-American to lose a law school slot because a predominantly white school prefers to admit African-Americans or vice-versa.

The experience of implementing *Bakke* in the law schools has shown that the power to discriminate on the basis of race is hard to confine. Allowing people to make distinctions on the basis of race invites creation of a racial hierarchy based on the beliefs of the decision-makers or on political considerations. This phenomenon is no less true for "benign" programs than it is for ones that are invidiously motivated. It is a power that is difficult not to abuse, and, equally importantly, it is virtually impossible to avoid the appearance of abuse, for all groups of non-white Americans perceive that they have been discriminated against in the past and understandably resist the suggestion that the wrongs done to them are not significant compared to those experienced by others.

Yet the alternative of having little or no representation of the various American races in law schools is unacceptable. Even if "diversity" is not an

entirely coherent or logical doctrine, it is the only available tool, and, where representation is impossible without it, "diversity" has to be used. Schools should follow rules that *Bakke* laid down, and seek a *diverse* diversity rather than one transparently designed to achieve other goals. If schools do not begin to treat *Bakke* with respect, it will be taken away.

* * *

POSTSCRIPT

While this Article was in page proofs, the United States Court of Appeals for the Fifth Circuit issued its opinion in *Hopwood v. Texas*.²²⁶ Although there was not sufficient time to substantially revise the Article, I am grateful to the editors of the *Journal* for giving me the opportunity to add what is out of necessity a hurried discussion of this decision.

* * *

One aim of this Article was to encourage schools to comply with *Bakke*, lest their open rejection of the decision convince the Supreme Court that *Bakke* was not commanding precedent, and should be overruled on that ground. The decision in *Hopwood* suggests that the time for implementing that strategy is rapidly running out.

In a split decision, two judges of the Fifth Circuit held that *Bakke* was no longer good law, and therefore concluded that race could not be taken into account in admissions decisions in order to achieve diversity.²²⁷ The third judge said that the court need not reach the question of *Bakke*'s vitality because the case could be decided based on other flaws in the Texas program.²²⁸

Although, as discussed below, the Fifth Circuit's opinion was procedurally questionable in several ways,²²⁹ the reasoning of the majority could plausibly come out of the mouths of members of the conservative wing of the United States Supreme Court. Texas has announced plans to appeal the Fifth Circuit's decision to the Supreme Court.²³⁰ Texas might avoid a deci-

²²⁶ Nos. 94-50569 & 94-50664, 1996 WL 120235 (5th Cir. Mar. 18, 1996).

²²⁷ See *infra* notes 256-59 and accompanying text. *Hopwood* also addressed the issue of affirmative action as a remedial measure, which was another ground of justification for the Texas program. This issue is beyond the scope of this Article and will not be addressed here.

²²⁸ See *infra* notes 260-64 and accompanying text.

²²⁹ See *infra* notes 267-76 and accompanying text.

²³⁰ See *Texas to Press Issue of Admissions Policy*, N.Y. TIMES, Mar. 27, 1996, at B9 (quoting Texas Attorney General as stating that Texas will petition for certiorari in the

sion on the merits of *Bakke*'s validity, if, for example, the Supreme Court decides that the Fifth Circuit decided more than it had to in order to grant complete relief. Now that *Bakke* has been bloodied, however, it seems unlikely that the Supreme Court can avoid the issue for long. If the Supreme Court uses *Hopwood* to revisit the merits of *Bakke*, the unfavorable record makes it more likely that *Bakke* will be overruled.

What follows is a summary of the litigation, and thoughts on the implications for the arguments made earlier in this Article.

A. *Hopwood in the District Court*

*Hopwood v. Texas*²³¹ began when four white law school applicants sued the University of Texas Law School, complaining that they had been denied admission while African-Americans and Mexican-Americans with lower LSAT scores and GPAs had been offered admission.²³² In 1992, the year the plaintiffs were denied admission, the law school had one admissions committee for African-Americans and Mexican-Americans and a separate committee for Native Americans, Asian-Americans, non-Mexican-American Latinos and Latinas, and whites.²³³ Texas also set distinct numerical cut-offs for African-American, Mexican-Americans, and others.²³⁴

Texas advanced several rationales for its affirmative action program, including promoting diversity, providing increased opportunities for the largest minority groups in Texas, and remedying past discrimination by the University of Texas and the Texas educational system.²³⁵ The district court agreed that diversity and remedying past discrimination were compelling interests. Nevertheless, relying on Justice Powell's decision in *Bakke*, the district court held that the law school's use of separate committees was unconstitutional.²³⁶

The district court then dealt Texas a joker on the issue of which party carries the burden of proof on the issue of remedy. Concretely, did the plaintiffs have to prove that they would have been admitted, or did Texas have to prove that they would not? The court acknowledged that in *Carey v. Phiphus*²³⁷ and *Mt. Healthy City School Board of Education v. Doyle*,²³⁸ the Supreme Court held that "[g]enerally, in cases where a plaintiff estab-

Supreme Court).

²³¹ 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, Nos. 94-50569 & 94-50664, 1996 WL 120235 (5th Cir. Mar. 18, 1996).

²³² *Id.* at 553.

²³³ *Id.* at 558.

²³⁴ *Id.* at 561-62.

²³⁵ *Id.* at 569-70.

²³⁶ *Id.* at 578-79.

²³⁷ 435 U.S. 247 (1978).

²³⁸ 429 U.S. 274 (1977).

lishes a constitutional deprivation, the burden shifts to the defendant" to justify adverse treatment of the plaintiff.²³⁹ One might have assumed that a litigant or judge to whom *Bakke* was important might eschew arguments that lines of Supreme Court authority had been overruled by implication. Nevertheless, at the urging of the University of Texas, the trial court declined to follow *Mt. Healthy* and *Carey* based on a recent Supreme Court case which held that the burden of proof lay with the plaintiffs.²⁴⁰

The recent case, *St. Mary's Honor Center v. Hicks*,²⁴¹ was a Title VII decision that dealt not with the burden of proof for establishing a remedy for a proven violation, but with the distinct question of how a legal violation is to be proved in the first instance.²⁴² *St. Mary's* was a controversial refinement of the prima facie case and rebuttal system set up in Title VII employment discrimination cases by *McDonnell Douglas Corp. v. Green*.²⁴³ Under *McDonnell Douglas*, a plaintiff must prove membership in a protected group and that they applied for an available job they were qualified to perform.²⁴⁴ Once this prima facie case is made out, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the action.²⁴⁵ The plaintiff then has the opportunity to show that the reason proffered by the defendant was pretextual.²⁴⁶

The Court in *St. Mary's* held that a factfinder's disbelief of the defendant's non-discriminatory reason did not necessarily mean that the plaintiff had proved discrimination. In addition to proving that the allegedly

²³⁹ *Hopwood*, 861 F. Supp. at 579 (citing *Carey*, 435 U.S. at 263; *Mt. Healthy*, 429 U.S. at 287); see also *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (holding that proof of partial discriminatory motive would shift to the defendant "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered").

²⁴⁰ The district court opinion attributed this argument to the defendants. *Id.* at 579 ("The defendants argue that the burden is on the plaintiffs to prove they would have been admitted.").

²⁴¹ 113 S. Ct. 2742 (1992).

²⁴² The argument that *St. Mary's* undermined *Mt. Healthy* and *Carey* was also problematic for a party purportedly concerned about civil rights because if the argument succeeded, it would ultimately impair judicial enforcement of civil rights. Future discrimination victims would be much less likely to get relief from those who mistreated them. That is to say, Texas advanced an *anti-civil rights* argument. In this particular case it might be advantageous, but in most cases, it would hurt women and people of color victimized by discrimination. If the burden had been on the plaintiff to prove that the result would have been different, Linda Brown, the plaintiff in *Brown v. Board of Education*, might still be litigating the question of whether she was "qualified" to go to public school in Topeka.

²⁴³ 411 U.S. 792 (1973).

²⁴⁴ *Id.* at 802.

²⁴⁵ *Id.* at 802-03.

²⁴⁶ *Id.* at 804-05.

legitimate reason was pretextual, the plaintiff had to prove that the real reason was discrimination. Thus, the Supreme Court said, a jury could disbelieve a defendant's claim that an employee was fired for a particular legitimate reason and yet find for the defendant if it concluded that the real reason was a legitimate reason other than race.²⁴⁷

In *Hopwood*, the district court's holding that *St. Mary's* impaired *Mt. Healthy* was more than a stretch. There is not even a logical inconsistency between the cases. The court could have easily applied *St. Mary's* to the issue of proving a legal violation, and then applied *Mt. Healthy* to the distinct issue of determining a remedy.

Even if some tension existed between the cases, it was by no means inevitable that *Mt. Healthy* would have to bend for consistency's sake. *Mt. Healthy* and *Hopwood* were constitutional cases; *St. Mary's* was a Title VII case. The concept of having special protection for constitutional rights should be familiar to every lawyer and judge.²⁴⁸ In addition, the *McDonnell Douglas* regime that *St. Mary's* refined is used in cases of discrimination inferred from conduct; it does not apply at all "where the plaintiff presents direct evidence of discrimination."²⁴⁹ In *Hopwood*, the University of Texas Law School employed an express racial classification.

Finally, the Court in *St. Mary's* said nothing about overruling cases. Indeed, after *St. Mary's* was decided, and before the district court issued its opinion in *Hopwood*, the Supreme Court cited *Carey* with apparent approval.²⁵⁰ At best, a district court might ruminate that a Supreme Court which would issue an opinion like that of *St. Mary's* might do many unpredictable and undesirable things, such as overrule or limit any number of cases supportive of civil rights. The district court, however, made no plausible argument that the Court had actually done so.²⁵¹ Nevertheless, the district court gave the plaintiffs only dollar damages and an opportunity to reapply for admission without charge.²⁵²

Texas, then, was in a funny position. It had a total victory. The law school was free to reform the details of its admissions program to comply with *Bakke*, and thus discourage copycat litigation. Although it was nice that the law school did not have to admit the plaintiffs, that part of the judg-

²⁴⁷ *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2749 (1992).

²⁴⁸ See, e.g., *Chapman v. California*, 386 U.S. 18 (1967) (holding that prosecution must prove that constitutional errors are harmless beyond a reasonable doubt).

²⁴⁹ *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

²⁵⁰ See *Heck v. Humphrey*, 114 S. Ct. 2364, 2370 (1994).

²⁵¹ Even if there were an argument that the *Mt. Healthy* line of cases had been undermined by the reasoning of subsequent cases, Supreme Court doctrine required the lower court to follow the precedents until overruled by the Supreme Court. See *infra* notes 267-72 and accompanying text.

²⁵² *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, Nos. 94-50569 & 94-50664, 1996 WL 120235 (5th Cir. Mar. 18, 1996).

ment—the least important issue in the case by a wide margin—was entirely unsustainable on appeal, based on the rationale of the district court. One of the great mysteries of *Hopwood* is why Texas did not accept its victory and go home: confess error on the question of which party bears the burden of proof in establishing a remedy, or even settle the case by admitting the plaintiffs and paying them to go away. This course would have protected the district court decision from possibly hostile scrutiny by the Fifth Circuit or the Supreme Court.

B. *Hopwood in the Fifth Circuit*

Hopwood in the Fifth Circuit was a clash of titans. For the plaintiffs, Theodore Olson weighed in from the Washington office of Los Angeles powerhouse Gibson, Dunn & Crutcher; Olson had been in charge of the Justice Department's Office of Legal Counsel during President Reagan's first term. A platoon of lawyers from the hometown favorite Vinson & Elkins represented Texas, joined by, among others, the legendary Charles Alan Wright of the Texas Law School faculty. As expected, the plaintiffs attacked *Bakke*. Ironically, these critics of racial diversity pointed out that minorities excluded from the special admissions program suffered as a result.²⁵³ Texas continued to defend its racially selective program, insisting that building the African-American and Mexican-American bar was a compelling interest.²⁵⁴

More than a year and a half after the district court decision, a panel of the Fifth Circuit decided the plaintiffs' appeal. On the bench were Judges Jerry E. Smith, Jacques Wiener, and Harold DeMoss. No judge questioned the determination by the trial judge that separate admissions committees were unconstitutional. In addition, all agreed that the decision on which party bears the burden of proving the remedy was wrong; the Fifth Circuit

²⁵³ Counsel for Plaintiffs *Hopwood* and Carvell argued:

The preferences for two and only two racial or ethnic groups at the expense of all others, demonstrates that defendants' real interest is in something other than "diversity" as Justice Powell used that term in *Bakke*. The contribution to "diversity" that may be made by non-Mexican Hispanic Americans, Asian Americans, Native Americans, or other minorities are trivialized by the process.

Brief for Plaintiffs-Appellants *Hopwood* and Carvell at 21, *Hopwood v. Texas*, Nos. 94-50569 & 94-50664, 1996 WL 120235 (5th Cir. Mar. 18, 1996); see also Reply Brief for Plaintiffs-Appellants *Hopwood* and Carvell at 12, *Hopwood* (Nos. 94-50569 & 94-50664).

²⁵⁴ Brief of Appellees at 23-24, *Hopwood* (Nos. 94-50569 & 94-50664) [hereinafter Appellees' Brief]; see also *id.* at 25-26 (arguing that "seeking more than trivial representation of blacks and Mexican Americans at the Law School furthers the diversity objective of preparing future lawyers, judges, and legislators of all races to deal effectively with Texas' two largest minority communities.")

held that Texas, the proven discriminator, was required to bear the burden of proving that it would have denied these students admission under a lawful system.²⁵⁵ No member of the court found the question of remedy, the only issue that had made it worthwhile for Texas to suffer an appeal rather than concede outright, to be close. The judges split, though, on the issue of what should happen next.

A majority consisting of Judges Smith and DeMoss concluded that the question of diversity as a compelling interest for equal protection analysis was at issue in the appeal, and to them the issue was not difficult. "Justice Powell's view in *Bakke* is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale."²⁵⁶ The court of appeals thus considered itself free to determine the issue unconstrained by *Bakke*.

The majority concluded that the reasoning of *Bakke* had been undermined by subsequent Supreme Court cases. "We agree with the plaintiffs," the court said, "that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."²⁵⁷ They observed that the only other Supreme Court case treating diversity as a compelling or important interest, *Metro Broadcasting*, had been undercut by *Adarand Constructors v. Pena*.²⁵⁸ Under *Croson*, and the dissents in *Metro Broadcasting*, diversity was not a compelling interest, and Justice Powell's opinion in *Bakke*, the court concluded, was no longer supportable.²⁵⁹

Judge Wiener agreed that the 1992 Texas admissions program was unconstitutional, but based that determination on different grounds. He insisted that the court need not decide the validity of *Bakke* to decide the case, and that thus the majority violated the principle that constitutional issues would be reached only when necessary.²⁶⁰ Although the wholesale rejection of *Bakke* by the majority made consideration of the fine points of the Texas program unnecessary, Judges Moss and Smith did not overlook the racially

²⁵⁵ *Hopwood*, 1996 WL 120235, at *20-21; *id.* at *30 (Wiener, J., specially concurring).

²⁵⁶ *Id.* at *10.

²⁵⁷ *Id.*

²⁵⁸ *Id.* (citing *Adarand*, 115 S. Ct. 2097 (1995), *overruling in part*, *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990)).

²⁵⁹ *Id.* at *11 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989); *Metro Broadcasting*, 497 U.S. at 612).

²⁶⁰ *Id.* at *28 & n.14 (Wiener, J., specially concurring) (citing *Rust v. Sullivan*, 500 U.S. 172, 224 (1991) (O'Connor, J., dissenting) (noting that "[i]t is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them") (citing *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984))).

selective nature of the program.²⁶¹ The invalidity of this feature of the program was the basis for Judge Wiener's concurrence:

[B]lack and Mexican Americans are but two among any number of racial or ethnic groups that could and presumably should contribute to genuine diversity. By singling out only those two ethnic groups, the initial stage of the law school's 1992 admissions process ignored altogether non-Mexican Hispanic Americans, Asian Americans, and Native Americans, to name but a few.

In this light, the limited racial effects of the law school's preferential admissions process, targeting exclusively blacks and Mexican Americans, more closely resembles a set aside or quota system for those two disadvantaged minorities than it does an academic admissions program narrowly tailored to achieve true diversity. . . . Accordingly, I would find that the law school's race-based 1992 admissions process was not narrowly tailored to achieve diversity and hold it constitutionally invalid on that basis. By so doing I would avoid the largely uncharted waters of a compelling interest analysis.²⁶²

Judge Wiener's conclusion that the majority did not have to determine the validity of *Bakke* to afford the plaintiffs complete relief is plausible; as he said, the case "is not a class action."²⁶³ Wiener would have granted the plaintiffs a hearing on whether they would have been admitted under a constitutional program under the correct standard, that is, with the burden of proof on the defendants.²⁶⁴

It is true that based on the relief Judge Wiener would have granted, a more searching reexamination of *Bakke* would have been unwarranted. Nevertheless, the majority granted broader relief. In addition to a hearing on monetary damages, the majority awarded plaintiffs an opportunity "to reapply under an admissions system that invokes none of these serious constitutional infirmities."²⁶⁵ Given this relief, it arguably was defensible for the

²⁶¹ *Id.* at *1 ("The beneficiaries of this system are blacks and Mexican Americans, to the detriment of whites and non-preferred minorities."); *id.* at *30, n.4 ("As blacks and Mexican Americans were the only two minority categories granted preferential treatment in admissions, it is inaccurate to say that the law school conducted separate admissions programs for 'minorities' and 'non-minorities.'").

²⁶² *Id.* at *29 (Wiener, J., specially concurring).

²⁶³ *Id.* at *30 (Wiener, J., specially concurring).

²⁶⁴ *Id.* (Wiener, J., specially concurring).

²⁶⁵ *Id.* at *26.

appeals court to have examined the validity of any admissions program under which the plaintiffs would reapply. Reapplication relief will be redundant if Texas cannot prove that the plaintiffs would have been denied admission under a constitutional program—if admitted after that procedure, there will be no need to apply again. Nevertheless, it is hard to contend that the majority awarded unnecessary relief to give itself the opportunity to decide the broader issue when the relief that justified the analysis—an opportunity to reapply to the law school—had been ordered by the district court as well.²⁶⁶

There are other procedural reasons, however, that the decision was questionable. The rule laid down by the Supreme Court in *Rodriguez de Quijas v. Shearson/American Express, Inc.*²⁶⁷ is that the Court reserves the prerogative of overruling its own cases, even if a decision appears to have been undermined by subsequent authority of the Court.²⁶⁸ “If 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.”²⁶⁹ Thus, even if a decision seems “wobbly, an inferior court cannot disregard it.”²⁷⁰ This rule is well-known in the Fifth Circuit; indeed, it was cited in *Wilkerson v. Whitley*,²⁷¹ an *en banc* decision written in 1994 by *Hopwood* majority author Jerry Smith himself.²⁷²

Educational affirmative action seems the kind of issue for which this doctrine was designed. The majority was right to conclude that in recent years, the Supreme Court has been increasingly suspicious of affirmative action. Yet, it is also true that none of their holdings inescapably compel the conclusion that *Bakke* is dead. As Judge Wiener pointed out, the Supreme Court might well find that in the special context of education, racial diversi-

²⁶⁶ *Hopwood v. Texas*, 861 F. Supp. 551, 585 (W.D. Tex. 1994), *rev'd*, Nos. 94-50569 & 94-50664, 1996 WL 120235 (5th Cir. Mar. 18, 1996). Moreover, the defendants' brief seems to agree that whether diversity is a compelling interest is at issue; issue 1 of the statement of issues is “Did the district court properly find that Defendants had a strong basis in fact to conclude that affirmative action was needed to meet compelling state interests.” Appellees' Brief, *supra* note 254, at 1.

²⁶⁷ 490 U.S. 477 (1989).

²⁶⁸ Thanks to Izhak Englard, James Gardner, George Martinez, Margaret Taylor, and Mark Tushnet for providing helpful cases on this issue.

²⁶⁹ *Rodriguez de Quijas*, 490 U.S. at 484; *accord.* *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 180 (1990) (plurality opinion).

²⁷⁰ *United States v. Six Hundred Thirty Nine Thousand Five Hundred & Fifty Eight Dollars (\$639,558) in United States Currency*, 955 F.2d 712, 718 (D.C. Cir. 1992); *see also Butts v. City of N.Y. Dep't of Hous. Preservation & Dev.*, 990 F.2d 1397 (2d Cir. 1993).

²⁷¹ 28 F.3d 498 (5th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 740 (1995).

²⁷² *Id.* at 503-04 & n.8.

ty is a legitimate criterion, even if that consideration might be impermissible in the context of employment or contracting.²⁷³

Invocation of *Rodriguez*, of course, assumes that *Bakke* is an authoritative decision of the Supreme Court. The *Hopwood* majority found to the contrary, but surprisingly they made no mention of the *Marks* test, the standard that the Supreme Court uses to analyze the question.²⁷⁴ Several Fifth Circuit cases applied *Marks*,²⁷⁵ so this omission is peculiar. Although the Fifth Circuit could arguably reach one of several interpretations of *Bakke* under *Marks*,²⁷⁶ they were not free to ignore it entirely. It may be that they were unaware of *Marks*; it is mentioned nowhere in the briefs of the plaintiffs or the defendants, or in the opinions of the court.

That the Supreme Court should frown on the Fifth Circuit's violation of procedural customs does not mean they will disagree with the bottom line. *Rodriguez*, after all, was an affirmance; if the Court concludes that the Fifth Circuit usurped its authority but was right, it also will affirm *Hopwood*. Regardless of whether the Supreme Court finds a holding in *Bakke* through application of the *Marks* test, it can overrule itself even if the Fifth Circuit cannot. The result in *Hopwood*, hostile to affirmative action, is a perfectly dreadful and perfectly plausible concatenation of a decade of anti-affirmative action rulings of the Supreme Court.

* * *

Whatever the ultimate outcome, the *Hopwood* litigation supports the thesis of this Article in several respects. First, *Bakke* is law.²⁷⁷ Schools that do not follow *Bakke* and are sued can expect to lose. By openly refusing to follow *Bakke*, Texas simultaneously invited a lawsuit challenging it and ensured that the suit would succeed.

The separate admissions committees were a relatively minor transgression. Though unwise, realistically they do not make affirmative action either more or less problematic than it already is. But through that small vulnerability, they gave the enemies of affirmative action the opportunity for wide-ranging judicial scrutiny of the Texas program, including the practice of

²⁷³ See *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, Nos. 94-50569 & 94-50664, 1996 WL 120235, at *28 & nn.18-21 (5th Cir. Mar. 18, 1996) (Wiener, J., specially concurring).

²⁷⁴ See *supra* notes 16-17 and accompanying text.

²⁷⁵ See, e.g., *Campbell v. St. Tamany Parish Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995); *Islamic Ctr. v. City of Starkville*, 876 F.2d 465, 471 (5th Cir. 1989); *Stegmaier v. Trammell*, 597 F.2d 1027, 1033 (5th Cir. 1979).

²⁷⁶ See *supra* notes 195-98 and accompanying text.

²⁷⁷ That is, the best case scenario is that *Bakke* is law. With Justices Brennan, Marshall, Blackmun, and White off the Court, it seems unlikely that *Bakke* will be expanded any time soon.

picking and choosing among historically disfavored minorities. This litigation shows that every program vulnerable to suit on the ground that it violates even a minor feature of *Bakke* is also an opportunity for affirmative action opponents to argue that *Bakke* has been or should be overruled.

From the point of view of those who want to save *Bakke*, litigation should be avoided or settled, not pursued aggressively. The decision to defend racial selectivity—on the ground of diversity—put Texas in a position where it had to get the Fifth Circuit, and now the Supreme Court, to swallow a lot to sustain *Bakke*. Texas seems to be trying to stand *Carolene Products*²⁷⁸ on its head. Instead of justifying a classification because it *protected* “discrete and insular minorities”²⁷⁹—the smallest and least powerful—it asked for deference to its decision because it helped the “two largest minority communities in Texas.” The Fifth Circuit and the Supreme Court are apparently being asked to support an interpretation of *Bakke* that permits race-based discrimination against tiny groups of Vietnamese-Americans and Native Americans in Texas in part *because* they are small and politically powerless. *Bakke* cannot bear this much pressure without breaking.

To the extent that it justifies its program on diversity, Texas also has to convince the courts that *Bakke* was intended to consecrate university admissions committees as race-judges with authority far beyond, for example, the comparatively puny powers granted to Congress under Section V of the Fourteenth Amendment. If Texas was within its rights here, then *Bakke* gave admissions committees plenary discretion to help or hurt minorities based on whatever view of diversity they happen to hold; one school can say every minority group *but* Native Americans gets a preference, another in the next county can say *only* Native Americans are to be helped, and both schools are wholly within their rights if they can articulate some reason for their choices. Judge Wiener, consistent with this Article, agreed that this just is not diversity.

Maybe Texas can dodge the bullet in the Supreme Court. Perhaps the Court will conclude that the Fifth Circuit reached a constitutional issue when it did not have to, and dispose of the case without revisiting *Bakke*. Perhaps the appeal will become moot. Or, although it seems improbable, maybe the Supreme Court will wait for another case before taking one similar to *Hopwood*.

Clearly, though, for those who wish to save *Bakke*, *Hopwood* is not the case to test *Bakke* on the merits. The Texas program apparently violated *Bakke* both because of the separate admission committees, and because of its racial selectivity. Texas, which has seemingly refused to follow *Bakke*, is not the party to insist that the Supreme Court should. What will be the an-

²⁷⁸ United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

²⁷⁹ *Id.* at 153 n. 4.

swer to the plaintiffs' assertion that because the best legal minds in the country cannot understand and apply *Bakke*, it is, *ipso facto*, an unworkable standard?

If fortune smiles, *Hopwood* will be just a scare. Beginning now, American universities and professional schools should get right with *Bakke*. If *Bakke* is to survive, the case that goes to the Supreme Court must be on a record demonstrating that it can work.