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Law and Misdirection in the Debate over Affirmative Action

Samuel Issacharoff[†]

A few years back, in the throes of the *Hopwood* litigation, I wrote an article that simply asked, “Can Affirmative Action Be Defended?”¹ The article reflected the efforts I had undertaken, together with my Texas colleagues Douglas Laycock and Charles Alan Wright, to formulate a defense of a targeted program of affirmative action at a formerly segregated state university. That defense, as part of the protracted and now concluded *Hopwood* litigation, has drawn to a close. The result is a controversial and far-reaching decision of one Fifth Circuit panel,² open skepticism by a second Fifth Circuit panel,³ clear division on that court about the en banc merits of the case,⁴ an unfortunate procedural quagmire that frustrated repeated efforts to secure Supreme Court review,⁵ in the *Hopwood* litigation, but is now before the Supreme Court in the cases challenging affirmative action at the University of Michigan.⁶ At the time of the earlier article, *Hopwood* stood alone as a direct confrontation between modern affirmative action and the incomplete legacy of post-*Brown v Board of Educa-*

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¹ Samuel Issacharoff, *Can Affirmative Action be Defended?*, 59 Ohio St L J 669 (1998).

² See *Hopwood v Texas*, 78 F3d 932, 944–46 (5th Cir 1996) (invalidating the University of Texas Law School’s affirmative action program on equal protection grounds).

³ See *Hopwood v Texas*, 236 F3d 256, 273–74 (5th Cir 2000) (rejecting Texas’s argument that remedying the effects of past discrimination throughout the state’s public education system was constitutionally permissible).

⁴ See *Hopwood v Texas*, 84 F3d 720, 721 (5th Cir 1996) (denying rehearing en banc with seven judges dissenting).

⁵ See *Hopwood v Texas*, 518 US 1033 (1996) (Ginsburg and Souter concurring) (refusing to grant certiorari on the ground that petitioners challenged the rationale rather than the judgment of the lower court).

⁶ See *Grutter v Bollinger*, 288 F3d 732 (6th Cir 2002), cert granted at 2002 US LEXIS 8677 (challenging law school admissions process); *Gratz v Bollinger*, 277 F3d 803 (6th Cir 2001), cert granted at 2002 US LEXIS 8681 (challenging undergraduate admissions process).

tion⁷ equal protection law, most notably through the ambiguous legacy of *Bakke*.⁸ By now, *Hopwood* has an accompanying body of case law from Georgia,⁹ Michigan¹⁰ and Washington,¹¹ all of which has contributed much heat but little clarity to the ongoing debate over the future of affirmative action.

This Article steps beyond simply asking whether affirmative action is defensible under existing legal doctrine. The aim is to push the debate over affirmative action beyond the narrow categories inherited from the *Bakke*-informed debates of the case law. By looking more directly to the justifications for affirmative action outside the *Bakke* framework, I want to depart from the way much of the litigation and scholarship has addressed these issues. This includes my earlier writing, which was largely an examination of how a defense strategy could be fashioned at a public university that stood ambiguously as the inheritor of a tradition of state-imposed segregation at all levels of public education. That defense, and the article it engendered, focused on the incomplete elimination of the legacy of discrimination, reflected in specific court orders and ongoing consent decree obligations of the University of Texas and its law school.¹² Even then, it was clear that the defense of an ongoing legal obligation to take affirmative steps to integrate a particular university's student body was undoubtedly limited to a very small subset of the leading institutions that engage in affirmative action. Moreover, as reflected in the recent University of Georgia litigation, even the once-

⁷ 347 US 483 (1954).

⁸ *Regents of University of California v Bakke*, 438 US 265 (1978).

⁹ See *Johnson v Board of Regents of the University of Georgia*, 263 F3d 1234, 1244–45 (11th Cir 2001) (invalidating the University of Georgia's affirmative action program because it was not narrowly tailored, but not reaching the question of whether diversity may ever serve as a compelling interest).

¹⁰ See *Grutter v Bollinger*, 137 F Supp 2d 821, 853 (E D Mich 2001) (invalidating the University of Michigan Law School's affirmative action program and rejecting diversity as a compelling state interest), rev'd, 288 F3d 732 (6th Cir 2002) (reversing ruling of unconstitutionality of Law School admissions program), cert granted at 2002 US LEXIS 8677; *Gratz v Bollinger*, 122 F Supp 2d 811, 822 (E D Mich 2000) (upholding undergraduate admissions as operated from 1999 to 2001), initial hearing en banc granted, 277 F3d 803 (6th Cir 2001), cert granted at 2002 US LEXIS 8681.

¹¹ See *Smith v University of Washington Law School*, 233 F3d 1188, 1197 (9th Cir 2000) (holding that using race as one of several factors to attain a diverse student body is constitutionally permissible), cert denied, 532 US 1051 (2001).

¹² See *Hopwood v Texas*, 861 F Supp 551, 554, 573 (W D Tex 1994), rev'd, 78 F3d 932 (5th Cir 1996). See also Issacharoff, 59 Ohio St L J at 681 (cited in note 1) ("We were able to persuade the trial court that the vestiges of discrimination were not merely the lore of a bygone era.").

segregated institutions are increasingly removed from that formal discriminatory past.¹³

In the course of the earlier article, I expressed skepticism about the broader question of the ability to defend affirmative action under the equal protection standards inherited from *Bakke*.¹⁴ This skepticism was not primarily the result of the increasing distance between past formal discrimination and the highly institutionalized modern practice of affording preferences in admissions to minority applicants. Rather, my skepticism was based centrally upon the mismatch between the core function of affirmative action—the continued integration of black Americans into the mainstream of society—and the envelopment of legal defenses for such programs under the ill-formed but rhetorically-central diversity rationale. The key difficulty was that the leading institutions of higher education were continuing the societal mission of remedying the exclusion of those whose marginalization could be directly attributed to societal malevolence. But the language of justification was not expressed “externally” in the role these institutions play in preserving, enriching, and expanding the nation’s elites. Instead, the defense was almost exclusively along lines of the “internal”—the needs of the academic institutions for their educational purposes, narrowly defined.¹⁵ As I previously explained, I find this defense critically flawed. The diversity argument neither explains the overwhelming emphasis of affirmative action programs on the admission of black applicants, nor does it explain how affirmative action selection is actually undertaken in practice.

¹³ See *Johnson*, 263 F3d at 1240 (noting that, according to the Office of Civil Rights, the University of Georgia was in compliance with Title VI by 1989).

¹⁴ Justice Powell provided two possible justifications for race-conscious admissions: remedying historical discrimination and diversity. *Bakke*, 438 US at 307, 311–12. He indicated that absent a judicial, legislative, or administrative finding of constitutional or statutory violations and subsequent remedial oversight the remedial justification would not stand. See *id.* at 307. Thus, overcoming the effects of past discrimination will give rise to a compelling interest in limited contexts, primarily in the Southern states where the continuing effects of historical discrimination are often easier to prove. Powell’s second justification, diversity, is more widely available to institutions seeking to defend race-conscious admission schemes, but his conception of diversity as something much broader than racial diversity insures that it will provide little justification for programs that promote diversity merely by creating integrated student bodies. See *id.* at 315 (“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.”).

¹⁵ I borrow the terminology from Dean Kronman. See Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 Fla L Rev 861, 866 (2000) (discussing the difference between “internal” and “external” goals).

The developing case law addressing constitutional and statutory challenges to affirmative action has framed the problem with the diversity rationale in the classic formula of equal protection law.¹⁶ For the most aggressive of courts, and here the initial Fifth Circuit panel in *Hopwood* was undoubtedly the trailblazer, racial diversity can never rise to the level of a compelling state interest.¹⁷ Under this approach, which has found increasing echoes in other decisions,¹⁸ even the classic understanding of *Bakke* as an invitation to treat diversity as a compelling academic concern is rejected. These decisions stress that Justice Powell's opinion did not command the Court's divisions and has no binding precedential effect.¹⁹ For more cautious courts, diversity may well constitute a compelling governmental interest, but as an affirmative action rationale, it fails the narrow tailoring prong of equal protection strict scrutiny.²⁰ For those courts that have actually immersed themselves in the inner workings of affirmative action admissions practices, the defect is the circular definition of diversity as a predetermined commitment to a minimum level of minority representation.²¹ Under the operation of any preferential system capable of administrative implementation, the commit-

¹⁶ Thus far, the conservative public interest law firms that are orchestrating the legal challenge to affirmative action have directed their fire exclusively at public universities. Perhaps this reflects an ideological commitment, inspired by libertarianism, to the principle that private institutions should be able to contract free from government or judicial oversight. I find little appeal in this distinction for two reasons. First, it misstates the positive law under Title VI which statutorily imposes the commands of equal protection on all educational institutions that accept federal funding in any form, see 42 USC § 2000d (1994)—a command that clearly includes every research institution in the country. Second, and not simply as a function of the receipt of federal funding, the elite universities of the U.S. are a major national resource that heavily define the social, cultural, intellectual and political life of the country. The idea that such a major sector of the society could stand independent of the societal commitment to non-discrimination is a principle that holds no appeal, at least for me.

For a limited defense of the public/private distinction that would nonetheless impose a duty of transparency on private institutions engaging in affirmative action, see Peter Schuck, *Affirmative Action: Past, Present and Future*, 20 Yale L & Pol Rev 1, 86–92 (2002).

¹⁷ See *Hopwood*, 78 F3d at 948 (stating that “the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny”).

¹⁸ See *Grutter*, 137 F Supp 2d at 849 (“[D]iversity is not a compelling state interest because it is not a remedy for past discrimination.”).

¹⁹ See *Johnson*, 263 F3d at 1245 (rejecting the assertion that Justice Powell's opinion is binding).

²⁰ See, for example, *id.* at 1244–1245 (declining to resolve whether diversity may ever be a compelling state interest, but finding that the program was not narrowly tailored).

²¹ See, for example, *Grutter*, 137 F Supp 2d at 842 (characterizing the University of Michigan affirmative action program as a commitment to a set level of minority enrollments).

ment to diversity appears simply as a predefined commitment to racial representation.

The most recent contribution to the case law comes with the Sixth Circuit's affirmance of the constitutional propriety of the University of Michigan Law School's affirmative action program.²² A substantial part of that court's 5-4 division turned on the extent to which Justice Powell's opinion in *Bakke* could be deemed a controlling ruling on the use of diversity as a compelling state interest.²³ Once having determined that diversity bore the constitutional imprimatur of the Supreme Court in *Bakke*, the Sixth Circuit then found that the avoidance of a fixed numerical set-aside provided constitutional protection, even if in practice the use of an affirmative action plan yielded rather predictable ranges of minority enrolled students.²⁴ Almost as if designed to bring the difficulties of *Bakke* into stark relief, the facts of the Michigan program showed that racial considerations raised the admission of minority students in 2000 from 4 percent of the entering class to 14.5 percent,²⁵ virtually the exact numbers that separated the Harvard plan approvingly mentioned by Justice Powell in *Bakke* (5 percent) from the Davis plan struck down in *Bakke* (16 percent).²⁶

Given the direct intercircuit conflict, some Supreme Court review appeared inevitable, and will now be forthcoming in the Michigan cases. Moreover, given that the courts of appeals have split on the extent to which *Bakke* in general, and its endorsement of diversity in particular, should be seen as governing law, it is also likely the case that the next period of affirmative action debates will continue to play out in the terms inherited from *Bakke*—until the Supreme Court speaks. But, stepping away for a minute from the conditions under which affirmative action is debated today, perhaps it is worth contemplating whether these should be the terms of engagement and further asking what role legal doctrine has played in forcing the debate into these terms.

²² *Grutter v Bollinger*, 288 F3d 732 (6th Cir 2002), cert granted at 2002 US LEXIS 8677.

²³ See *id* at 738–742. There is a direct conflict among the circuits over even the preliminary question of how to read *Bakke*. See *Smith*, 233 F3d 1188, 1201 (9th Cir 2000) (ruling for the Ninth Circuit that Powell's opinion commands the Court in *Bakke*).

²⁴ *Grutter*, 288 F3d at 748 (“[R]eliance on *Bakke* will always produce some percentage range on minority enrollment. . . . These results are the logical consequence of reliance on *Bakke* and establishment of an admission policy, like the Harvard plan, that attends to the numbers and distribution of under-represented minority students.”).

²⁵ *Id* at 737.

²⁶ See *Bakke*, 438 US at 279.

As Dean Anthony Kronman well formulates the law-inspired elevation of the concept of diversity, "It is striking that a word which a generation ago carried no particular moral weight and had, at most, a modestly benign connotation, should in this generation have become the most fiercely contested word in American higher education."²⁷

I suggest that diversity came to its current life²⁸ with the narrow window left open by Justice Powell's opinion in *Bakke*.²⁹ Assuming that swing opinion to have the force of the Court, the defenses of affirmative action were limited to either the internal claim of educational product enhancement or the retrospective claim of remedying institutional discrimination. In light of Justice Powell's later opinion in *Wygant v Jackson Board of Education*,³⁰ it was clear that no particular institution could claim the need to overcome societal discrimination or disadvantage as the basis for its affirmative action program.³¹ Once *Wygant* refused to allow particular institutions to assume the mantle of overcoming societal discrimination, universities had only two choices available: either they could claim to be remedying their own past dis-

²⁷ Kronman, 52 Fla L Rev at 861 (cited in note 15).

²⁸ The original invocation of diversity in the early part of the twentieth century has a decidedly mixed origin. With the rise of meritocratic admissions after World War I, the Ivy League world of the New England Brahmin elite found itself under siege by ambitious and talented immigrant groups, with a heavy representation of Jews. The search for geographic and other "diverse" admissions factors was part of the self-conscious effort to address what these schools termed "the Jewish problem." For a short, compelling account of this complicated history, focusing on the rise of standardized tests, see Malcolm Gladwell, *Examined Life*, New Yorker 86, 90–92 (Dec 17, 2001).

²⁹ This is, of course, not a unique observation. See, for example, Terrence Sandalow, *Minority Preferences Reconsidered*, 97 Mich L Rev 1874, 1905 (1999) ("[T]he importance of racial diversity in the educational process has become something of a mantra in higher education circles in the years since Justice Powell's pivotal opinion in *Bakke*."); Michael Selmi, *The Facts of Affirmative Action*, 85 Va L Rev 697, 729 (1999) (reviewing William G. Bowen and Derek Bok, *The Shape of the River: Long-term Consequences of Considering Race in College and University Admissions* (Princeton 1998)) ("[D]iversity has quite clearly become the most heralded of all justifications for affirmative action."). See also H. Sanford Levinson, *Diversity*, 2 U Pa J Const L 573, 578 (2000) (comparing the post-*Bakke* world to a child's game of "Simon Says," where the Supreme Court, as Simon, has said to recast claims of discrimination into claims of diversity enhancement).

³⁰ 476 US 267 (1986).

³¹ See *id.* at 276 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."). In *City of Richmond v J.A. Croson Co*, 488 US 469 (1989) (plurality opinion), Justice O'Connor mildly qualified this rule in the context of a state actor seeking to overcome well-established private market discrimination in its own jurisdiction: "[T]he city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment." *Id.* at 492. For elaboration of this point, see Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 Georgetown L J 1, 80 (2000).

crimination, or they could claim to be furthering the goals of diversity. As a practical matter, the first path was unlikely to bear fruit. Even once-segregated universities had supplanted that practice with two decades of racial *preferences*. In effect, the sole justification for affirmative action became diversity. The end result was to channel all discussion of the reasons for affirmative action into the now critical language of diversity. Despite the rhetorical force that diversity has come to have in providing a defense for affirmative action programs, it suffers two critical defects: (1) it defines neither the rationale for, nor operation of, affirmative action programs; and (2) it is proving remarkably vulnerable to exacting equal protection scrutiny, the recent Michigan decision notwithstanding.

After having been involved in the *Hopwood* litigation for nine years, I find a wearying quality to the debates over affirmative action. This feeling is due not so much to the toils of litigation, for my role in the case peaked years ago. The personal cost comes more from the political defense of a valiant and well-intentioned university program against claims that “we had it coming” or that the Texas plan was uniquely ill-crafted, or even that the university had no warrant to resist litigation.³² But the hollow tone of the debate over the commitment to diversity is just as wearying. My new home institution, Columbia Law School, is as abstractly dedicated to the concept of diversity as any in the country. Yet, among Columbia’s sixty-five or so faculty members, there are but a handful of Republicans, despite the fact that Republicans must constitute about half of the national population.³³ Similarly, I know few of my colleagues to be religiously devout despite the clear prevalence of such views in the population—and I know none of my colleagues to be fundamentalist Christians, the fastest growing religious minority in the country. Among my colleagues are many Jews but no Muslims, although the latter group may outnumber the former in America and is now likely to face the brunt of social opprobrium more directly than any other. I

³² For a dim recent rendition of this last argument, see Gabriel J. Chin, et al, *Symposium: Rethinking Racial Divides—Panel on Affirmative Action*, 4 Mich J Race & L 195, 201, 202 (1998) (describing the defense of the University of Texas’s affirmative action plan as “recreational litigation” that put “the lives of people of color on the line for no good reason”).

³³ This is consistent with the findings of Professor James Lindgren on the relative underrepresentation of Republicans on the faculties of American law schools, if somewhat more pronounced. See James Lindgren, *Measuring Diversity* (unpublished manuscript on file with author), cited in Michael C. Dorf and Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U Colo L Rev 924, 947 n 79 (2001).

have now spent the majority of my professional life in the academy and I have seen the concept of diversity enshrined at the highest levels of the academic pantheon. But in the endless discussions of diversity, I have never heard the term seriously engaged on behalf of a Republican, a fundamentalist Christian, or a Muslim.

The passage of time allows me to return to these issues with somewhat greater distance than when *Hopwood* was in the full bloom of litigation. In this Article, I cover three points. First, in Part I, I suggest that the concept of diversity ill explains the commitment to minority representation at elite institutions of higher education. Here I contrast the multicultural claim that diversity necessarily enriches and enhances the internal life of the institution with an integrationist claim.³⁴ In Part II, I examine whether the admissions programs at Georgia and Michigan best represent an effort to improve internal student education or whether they stand for a societal commitment to integration, primarily of blacks. Finally, in Part III, I analyze the governing equal protection case law to determine whether indeed a defense of affirmative action based on diversity would survive constitutional scrutiny, assuming diversity's ill-formed contours constitute a compelling interest.

I. THE DEBATE AS FRAMED

The debate over affirmative action has benefited from the painstaking empirical work of former college presidents William Bowen and Derek Bok. Together, Bowen and Bok undertook a broad-scale study of the effects and results of affirmative action at twenty-eight of the most selective colleges and universities around the country.³⁵ Looking at the practices of affirmative action from within these institutions, the study presents a strikingly positive picture of student and institutional satisfaction with increasingly diverse student bodies and demonstrates a marked degree of academic and post-graduation success among the recipients of affirmative action preferences.³⁶ By now there

³⁴ I borrow the direct juxtaposition of diversity and integration from Professor Estlund's application in the employment setting. See Estlund, 89 Georgetown L J at 79-85 (cited in note 31).

³⁵ See generally William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton 1998).

³⁶ See generally *id.*

are numerous favorable reviews³⁷ as well as a significant number of critical assessments³⁸ of the Bowen and Bok study. I want to leave aside the methodological issues concerning both the magnitude of the racial preferences afforded at the institutions under study³⁹ and the empirical validity of the conclusions drawn by the authors.⁴⁰ For purposes of this Article, I accept as true all of the empirical conclusions reached by Bowen and Bok in order to determine whether they provide a sufficiently compelling legal justification for institutionalized racial preferences.

The reason for this shortcut is that the Bowen and Bok study seeks not only to describe how affirmative action is lived and perceived in those elite institutions already committed to such programs, but also to develop a normative justification for the continued vitality of preferential admissions. Here, it is well worth noting how they ground their defense. The book begins with a historical description of the conditions faced by black Americans as the United States emerged kicking and screaming from the

³⁷ See note 39.

³⁸ See note 40.

³⁹ See Elizabeth Anderson, *From Normative to Empirical Sociology in the Affirmative Action Debate: Bowen and Bok's The Shape of the River*, 50 J Legal Educ 284, 287 (2000) (discussing the relative weight given to race at selected selective schools); Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in Christopher Jencks and Meredith. Phillips, eds, *The Black-White Test Score Gap*, 431 (Brookings Institution 1998). See also Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 Ohio St L J 971, 973–80 (1998) (analyzing the importance of race in college admission decisions in the early 1980s).

⁴⁰ Among the leading methodological critiques are Stephan and Abigail Thernstrom, *Racial Preferences: What We Now Know*, Commentary 44 (Feb 1999), and Stephan Thernstrom and Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L Rev 1583 (1999). The Thernstroms pursue four general arguments. First, they argue that even within the Bowen and Bok data is evidence that the magnitude of racial preferences belies claims of modest "tie-breaking" on behalf of affirmative action—a point that I do not think that Bowen and Bok really claim. See Thernstrom and Thernstrom, 46 UCLA L Rev at 1595–98. Second, somewhat consistent with the theme of this Article, they argue that Bowen and Bok use the word "diversity" without precision and without any justification of why, when translated into affirmative action programs, it should be limited to racial considerations, rather than class or particular educational background. See *id.* at 1623–26. Third, and perhaps most troubling, they argue that, as a consequence of the racial focus of affirmative action and the gap in preparation for elite universities, affirmative action does not ultimately cause integration but rather conspicuous self-segregation on campuses across the country. See *id.* at 1605–08. Finally, they raise a number of methodological objections to the Bowen and Bok study. Of these, the most interesting is that Bowen and Bok failed to consider the experience of the historically black colleges, which the Thernstroms argue may produce African-American graduates with levels of professional success and community engagement comparable to those of the elite schools Bowen and Bok did take into account. See *id.* at 1614–17. For an overview of the implications of the Bowen and Bok data, together with that of other studies, regarding the magnitude of preferences and the impact on admissions prospects under affirmative action, see Schuck, 20 Yale L & Pol Rev at 16–20 (cited in note 16).

ignominy of Jim Crow.⁴¹ It offers a stark depiction of the formal barriers confronting black Americans as the nation entered its modern era during World War II.⁴² The account then traces the struggle to integrate education at all levels through the civil rights period, culminating with the era of civil rights legislation.⁴³ Of particular significance is Bowen and Bok's treatment of the 1960s as the era when formal segregation was finally defeated and when the modern commitment to affirmative action took hold.

This historical backdrop is of undoubted importance, but its normative implications are not so easily discerned. It seems oddly ahistorical to situate a current practice in events that took place before any of the current generation's students were born, and indeed, before any of the parents of those students entered university life without rooting the contemporary institutional framework more securely in those past events. The authors' attempt to ground the affirmative action debate in history captures the difficulty that the current university community faces: it is increasingly detached from any period when the overt use of race was anything other than a *benefit* to those subject to classification. While I agree with Bowen and Bok that this historical account must be the beginning of the affirmative action debate, the attempt to jump from the historic past to the present reflects the difficulty with the debate as framed.

The difficulty is immediately apparent from the book's structure. Although the work begins with a strongly evocative history of the subjugation of black Americans,⁴⁴ the following chapters do not attempt to ground the need for affirmative action in the legacy of past discrimination, nor do they attempt to implicate current university policies in perpetuating prior institutional misconduct. Put simply, the study bears little direct relation to the history of injustice. Instead, it takes up the discourse left open by Justice Powell's opinion in *Bakke* and tries to demonstrate the benefits of diversity for the educational mission, for graduates once they leave the university, and for the recipients of the services that these graduates might provide. Here the data provide comfort that affirmative action has yielded some real benefits. Bowen and Bok make a very substantial case that affirmative

⁴¹ See Bowen and Bok, *The Shape of the River* at 1–10 (cited in note 35).

⁴² See *id.* at 1–3.

⁴³ See *id.* at 3–10.

⁴⁴ *Id.*

action has positive effects on its beneficiaries⁴⁶ and on other students, many of whom respond positively to the presence of a diverse student body.⁴⁶

But what exactly does all of this prove as a normative matter? Establishing the success of affirmative action beneficiaries derails only inflammatory arguments that affirmative action programs aim to help the unqualified.⁴⁷ Bowen and Bok conclude that admission to selective schools “pays off handsomely for individuals of all races, from all backgrounds.”⁴⁸ This alone hardly constitutes a compelling justification, as Bowen and Bok freely acknowledge:

But what about the other students (most of them presumably white) who would have taken the places of these retrospectively rejected black students in selective colleges and professional schools? There is every reason to believe that they, too, would have done well, in school and afterwards, though probably not as well as the regularly admitted white students (who were, after all, preferred to them in the admissions process).⁴⁹

The study ultimately cannot answer the normative question: “Would society have been better off if additional numbers of whites and Asian Americans had been substituted for minority students in this fashion? That is the central question, and it cannot be answered by data alone.”⁵⁰ At this final stage of the inquiry, Bowen and Bok, like so many defenders of affirmative action, have to turn away from the internal life of the university and from the benefits conferred on the recipients of preferences. The distinction between the manner in which they identify their

⁴⁵ This is also the finding of a study of graduates of the University of Michigan Law School undertaken in connection with litigation over that school's admissions policies. See Richard O. Lempert, David L. Chambers, and Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Social Inquiry 395 (2000); Richard O. Lempert, David L. Chambers, and Terry K. Adams, *Michigan's Minority Graduates in Practice: Answers to Methodological Queries*, 25 Law & Social Inquiry 585 (2000).

⁴⁶ Bowen and Bok, *The Shape of the River* at 220–55 (cited in note 35).

⁴⁷ A less inflammatory claim is that at many institutions the gap in entry qualifications creates almost a two tier educational setting. See Schuck, 20 Yale L & Pol Rev at 19 (cited in note 15) (reporting that at many institutions the gap “is very large—one might say *immense*—although its precise magnitude probably cannot be determined”). See also id at 45 (citing reports that the SAT gap at Berkeley created a “caste system”).

⁴⁸ Bowen and Bok, *The Shape of the River* at 276 (cited in note 34).

⁴⁹ Id at 282.

⁵⁰ Id at 282–83.

own view as educators and how they frame the ultimate justification for affirmative action is noteworthy. Bowen and Bok candidly state that, based on their remarkable experience as educators, they “believe that our students benefit significantly from education that takes place within a diverse setting” in which they “encounter and learn from others who have backgrounds and characteristics very different from their own.”⁵¹ They nonetheless acknowledge that this alone cannot sustain a defense of affirmative action. Rather, that defense must be based on broader values: “Fundamental judgments have to be made about societal needs, values, and objectives.”⁵²

It is not difficult to conjecture why Bowen and Bok must acknowledge the failure of their data to address the normative justification for affirmative action. If the book’s ultimate claim is that students learn best in a diverse environment, then the reader is left wondering what purpose is served by the long digression into the history of state-sponsored oppression of black Americans. Further, if diversity of the learning environment is the real objective behind affirmative action, one must wonder why preferential admission is limited to groups that are defined to some extent by histories of being subject to official discrimination. As the philosopher George Sher asks,

For even if diversity yields every one of the intellectual benefits that are claimed for it, why should we benefit most when the scholarly community contains substantial numbers of blacks, women, Hispanics, (American) Indians, Aleuts, and Chinese-Americans? Why not focus instead, or in addition, on Americans of Eastern European, Arabic, or (Asian) Indian extraction? For that matter, can’t we achieve even greater benefit by extending preference to *native* Africans, Asians, Arabs, and Europeans?⁵³

The point is not to claim that there can only be or that there must be a utilitarian rationale for affirmative action. Rather it is to inquire whether a claimed defense bounded by an instrumentalist or utilitarian calculus can rationally fit with affirmative action as practiced.

⁵¹ Id at 252.

⁵² Bowen and Bok, *The Shape of the River* at 283 (cited in note 35).

⁵³ George Sher, *Diversity*, 28 Philosophy & Pub Aff 85, 99 (2000).

The quandary extends beyond the problem with the fit of the diversity rationale, a point I shall return to in the next section. There is also the problem that diversity—institutionalized through commitments to multiculturalism—has moved increasingly afield from its initial expression as a rationale, if a subordinate one, for the integration of blacks into mainstream institutions. The early rationale for affirmative action, whether in the initial Philadelphia Plan formulation⁶⁴ or in its academic counterparts,⁶⁵ was clearly integrationist. Society was taking responsibility for minorities' past subordination.⁶⁶ Based on this moral authority, a forward-looking claim emerged about the necessity to improve the status of minorities, with blacks as the overwhelming case in chief, so as to promote their integration into mainstream American society. No one seriously claimed that the prime benefit would come from the improvement of the internal life of the affected institutions. In fact, there was specific repudiation of claims grounded in such internal institutional needs, which were often, as with the case of customer preference, articulated as a defense of the discriminatory status quo.⁶⁷

Diversity, as articulated by Justice Powell in *Bakke*,⁶⁸ poorly captures this integrationist spirit. In this regard, it is worth noting the significant difference between the arguments put forward by Derek Bok in *The Shape of the River*, and those advanced by Bok nearly two decades ago.⁶⁹ The early defense sought to redress

⁶⁴ See Exec Order No 11246, 3 CFR 339 (1964–65), amended by Exec Order No 11375, 3 CFR 684 (1966–70), superseded in part by Exec Order No 11478, 3 CFR 803 (1966–70) (executive orders accompanying Philadelphia Plan).

⁶⁵ See, for example, Jack Citrin, *Affirmative Action in the People's Court*, 122 Pub Interest 39, 48 (Winter 1996) (noting that "group preferences may have been envisaged as temporary measures to help disadvantaged minorities 'catch up'").

⁶⁶ An alternative formulation is to think of the targeted groups as having been "created by the original unjust practice." Paul W. Taylor, *Reverse Discrimination and Compensatory Justice*, in Steven M. Cahn, ed, *The Affirmative Action Debate* 14 (New York 1995).

⁶⁷ See, for example, 42 USC § 2000e-2(e) (1994) outlining the rule that a disparate treatment challenge under Title VII would not allow the employer to raise any claim that race was a bona fide occupational qualification for any reason, including that of customer preference.

⁶⁸ "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." *Bakke*, 438 US at 315. By invoking broad discretion in a university's choice of applicants, Justice Powell implied that universities are certainly under no obligation to integrate their campuses: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Id* at 312.

⁶⁹ Derek Bok, *Beyond the Ivory Tower: Social Responsibilities of the Modern University* (Cambridge 1982). I am indebted to my Columbia colleague Andrew Delbanco for directing my attention to the earlier formulation by President Bok.

historic injustice and allow corrective justice to apply to individuals. The claim was that underprivileged minority students had been denied the conditions necessary to blossom, that they were, in effect and under a different metaphor, diamonds in the rough. Bok's defense was that these students could still emerge as academic stars if given access to a top university setting.⁶⁰ This defense did not primarily invoke any enhancement to be gained by the university. Indeed, Bok's firm distinction between student admission and faculty hiring considerations seems like a direct repudiation of the multiculturalist claim that divergent viewpoints bring internal benefits almost regardless of the traditional indicia of achievement.⁶¹ By the time of *The Shape of the River*, by contrast, the inquiry had become internal to the university, defined by the inputs of enhancements to the university setting and the outputs of graduate performance. To the credit of the tremendous integrity of Bowen and Bok, they acknowledge that these terms are inadequate for a full evaluation of affirmative action.

Hence the issue remains whether the diversity rationale explains either the origins of affirmative action or the institutional commitments to these programs. It is noteworthy that leading early proponents (and present-day supporters) of affirmative action clearly staked their cases on the need "to include blacks in the institutional framework that constitutes America's economic, political, educational and social life."⁶² The same commitment to black integration has swung erstwhile proponents of color-blindness as a principle to defend affirmative action for black Americans.⁶³ I would further submit that, at the end of the day, it is the overriding commitment to integration that resonates through even the most sophisticated effort to examine empirically the effects of affirmative action.

⁶⁰ "In today's society, blacks, Hispanics, and American Indians have tended to come from inferior schools and have had to cope with the obvious burdens and difficulties in adjusting to predominantly white institutions. Thus the failure of many minority students to perform according to expectations may well result from inadequate preparation or from pressures and problems in the university environment that have little to do with grades and test scores. If this is true, the proper solution is to improve the environment for minority students or provide them with effective remedial help, not to exclude them from the university." Id at 102-03.

⁶¹ Id at 110-15

⁶² Nicholas deB. Katzenbach and Burke Marshall, *Not Just Color Blind: Just Blind*, NY Times Magazine 42, 45 (Feb 22, 1998).

⁶³ Compare Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (Cambridge 1975), with Nathan Glazer, *In Defense of Preference*, New Republic 18 (Apr 6, 1998).

II. AFFIRMATIVE ACTION AS PRACTICED

Let me now shift focus to the problems of the diversity justification for affirmative action in the litigation setting. Because courts reviewing affirmative action programs under either the Equal Protection Clause of the Fourteenth Amendment or Title VI begin with a presumption against the permissibility of racial considerations in the awarding of educational benefits,⁶⁴ the burden of justification rests with the program's defenders. An immediate problem arises because of the poor fit between affirmative action as practiced and the premises of the diversity rationale. As I discussed in connection with the *Hopwood* litigation:

[D]iversity has very little to say about how an admissions process works. If a school wants to target ten percent black enrollment, to pick an arbitrary number, how would it go about getting there in the absence of fixed objectives? Clearly it cannot do so on the diversity rationale, unless diversity is defined in a predetermined fashion along percentage lines. Each additional black enrollee brings diminishing marginal returns in terms of racial diversity. The first black admitted under affirmative action may bring significant diversity, and perhaps this is true even of the black admittee who brings the size of the class to Harvard's minimum of five percent required so as to overcome the negative effects of isolation. But how much diversity is added beyond that point, and how is it measured against the first Alaskan resident, or Christian fundamentalist, or Vietnamese immigrant, or former soap opera star, etc.?

The simple fact is that no admissions program operates in this fashion. Rather, these programs operate along three tracks. First, they admit applicants who have the most reliable indicators of past performance from whom one can hope, per Shakespeare, that "the past is prologue." Second, they admit targets that would not be generated in sufficient numbers by the first track. Finally, they apply looser, more subjective standards of "interestingness" or non-traditional achievement to a range of applicants deemed desirable, but not indispensable. The diversity ra-

⁶⁴ See, for example, *Hopwood*, 78 F3d at 940 ("[D]iscrimination based upon race is highly suspect.").

tionale helps explain the third set of admissions decisions—in the real world of affirmative action, the bulk of targeted minority admittees comes from the second tier. To admit desired minorities from the third tier alone would require an institutional willingness to accept that in any given year the numbers may fluctuate wildly, including down to zero. Given the centrality of the institutional commitment to maintaining black enrollment at elite institutions, this is not generally seen as an acceptable outcome—and institutional policies, most specifically targeted admissions, are the result.⁶⁵

While this issue remained in the background in *Hopwood* due to the subordinate role of the diversity claim in the litigation strategy pursued there, it has now come to the fore in the Georgia⁶⁶ and Michigan⁶⁷ cases.

Although the mechanics of the programs vary, and although some findings by lower courts remain to be tested on appeal, there are certain features of affirmative action programs that confirm my earlier observations. In the first instance, reviewing courts must confront the fact that the affirmative action programs in question do not look or operate as if they were testing for “diversity.” Instead, they appear to be aimed at enriching the pool of minority applicants or simply seeking to boost minority enrollments.⁶⁸ For example, the University of Georgia used a rather mechanical “bonus” system as part of a three-phase admissions scheme to raise minority admission offers.⁶⁹ In the first phase, the highest achieving students—those with the highest grades and test scores—were automatically admitted without

⁶⁵ Issacharoff, 59 Ohio St L J at 679 (cited in note 1).

⁶⁶ *Johnson v Board of Regents of the University of Georgia*, 263 F3d 1234, 1253 (11th Cir 2001) (stating that “[i]f the goal in creating a diverse student body is to develop a university community where students are exposed to persons of different cultures, outlooks, and experiences, a white applicant in some circumstances may make a greater contribution than a non-white applicant”).

⁶⁷ *Grutter v Bollinger*, 137 F Supp 2d 821, 849 (E D Mich 2001) (“[A] distinction should be drawn between viewpoint and racial diversity. While the educational benefits of the former are clear, those of the latter are less so.”), revd, 288 F3d 732 (6th Cir 2002).

⁶⁸ This is compounded by the hardening of affirmative action programs over time into increasingly bureaucratized practices. Professor Schuck concludes that the more contemplative, soft initial programs “ossify into programs resembling hard quotas.” Schuck, 20 Yale L & Pol Rev at 59 (cited in note 16).

⁶⁹ See *Johnson*, 263 F3d at 1240–42 (describing the admission process).

reference to anything else.⁷⁰ In the second phase, the Total Student Index (TSI) stage, admissions officers examined remaining applications for any number of twelve traits considered valuable in an incoming freshman. These ranged from purely academic qualities to those that might be thought to contribute to the diversification of the student body.⁷¹ Admissions officers gave each of these traits a specific weight or “bonus” which was added to the applicant’s admissions score.⁷² Other than the academic factors, race was afforded the most weight.⁷³ By the very nature of the admissions process—so many applicants and so little time—it would have been impossible for admissions officers to look beyond race and assess the nuanced contribution to diversity that any particular applicant might add. The Eleventh Circuit focused its disapproval on the plan’s rigidity:

By mechanically and inexorably awarding an arbitrary “diversity” bonus to each and every non-white applicant at the TSI stage, and severely limiting the range of other factors that may be considered at that stage, the policy contemplates that non-white applicants will be admitted or advance further in the process at the expense of white applicants with greater potential to contribute to a diverse student body.⁷⁴

The overwhelming administrative burden of quickly reviewing applicants meant that at the TSI stage, students were either admitted outright, rejected outright, or sent to the third and final stage, the Edge Read (ER) stage.⁷⁵ Only at this final stage did

⁷⁰ See *id.* at 1240 (stating that “UGA selects the majority of its freshman class at an initial stage which applies objective criteria without regard to the applicant’s race”).

⁷¹ See *id.* at 1241. The twelve factors were divided into three categories: academic, leadership/activity, and demographic. Four of the factors were academic: the applicant’s admissions index score, SAT score, grade point average, and curriculum quality. Five fell into the catch-all leadership/activity category: parent or sibling ties to UGA, hours spent on extracurricular activities, hours spent on summer work, hours spent on school-year work, and first-generation college. The three demographic factors considered were race/ethnicity, gender, and Georgia residency. *Id.*

⁷² See *id.* at 1241 (describing the relative weight that the UGA admissions process gave to certain factors).

⁷³ See *Johnson*, 263 F3d at 1241 (stating that “only one factor in the TSI equation—SAT score or ACT equivalent between 1200-1660 . . . was worth more than the race factor”).

⁷⁴ *Id.* at 1254.

⁷⁵ See *id.* at 1240–41 (“Applicants whose TSI scores meet a pre-set threshold are admitted automatically, while applicants whose scores fall below a pre-set minimum are rejected. Applicants whose TSI scores fall between those guideposts are then passed on to a third stage, where they are evaluated on an individual basis by admissions officers.”).

admissions officers read a student's entire application and consider the so-called "soft" factors such as recommendations and essays.⁷⁶ According to the court, "[r]ace, and race alone, may determine not only whether an applicant is foreclosed from a spot in UGA's freshman class, but also whether an applicant's true potential to contribute to diversity is ever fully and fairly assessed."⁷⁷

It is one of the vagaries of litigation that, at the trial court level, the University of Michigan undergraduate admissions program survived, despite the fact that it uses a mechanical race bonus much like that of the Georgia admissions program. On the other hand, the absence of a mechanical bonus point system did not protect the University of Michigan Law School's affirmative action program, which was more open to nuanced evaluations of applicants.⁷⁸ But a closer examination of the Michigan Law School program reveals that its vulnerability lay not so much in its mechanics, but in its objective of enhancing the admission of minority applicants.⁷⁹ As administered, the Michigan Law School system had to operate with a predefined commitment to minority enrollment that made it equally vulnerable to equal protection challenges. The law school's application materials plainly stated a commitment to racial diversity and a special commitment to enrolling "students who are African American, Mexican American, Native American, or Puerto Rican and raised on the U.S. mainland."⁸⁰ Thus, despite the emphasis on diversity, the law school had to acknowledge that its goal was the enrollment of targeted racial and ethnic minorities. Once that was before the court, the question then shifted to whether, in operation, this was significantly different from the more mechanical bonus systems used by the Georgia and Michigan undergraduate admissions processes.⁸¹ In striking down the program, the district court relied on statistical testimony to find that law school admissions officers placed a heavy emphasis on race, despite the law school's efforts

⁷⁶ See *id.* at 1241 (noting that "the ER stage is the *only* stage in the freshman admissions process where an applicant's file is actually read and qualitatively evaluated").

⁷⁷ *Johnson*, 263 F3d at 1256.

⁷⁸ See *Grutter*, 137 F Supp 2d at 826-27 (describing the University of Michigan Law School's policy of non-mechanically weighing "soft" variables, including membership in a minority group).

⁷⁹ See *id.* at 842 (finding that "the written and unwritten policy" was to admit a freshman class with 10 to 17 percent African American, Native American, and Hispanic students).

⁸⁰ *Id.* at 829.

⁸¹ See *Johnson*, 263 F3d at 1240-41.

to characterize the racial preferences as no more important than any other “diversity” factor.⁸² Of particular significance, the court concluded that the law school tried to ensure that 10 to 17 percent of any incoming class was comprised of minority students.⁸³ The court also relied on the admission office’s use of daily reports that classified applicants by race to conclude that the school was actively seeking to meet target numbers of minority enrollees.⁸⁴ According to the court, the raw numbers, based on LSAT scores and undergraduate grade point averages of admitted applicants, confirmed that minority applicants were admitted with lower academic indexes than their white counterparts and thus, that race was an important factor in determining whether a student would be offered admission.⁸⁵ Since the very purpose of an affirmative action program must be to raise the admissions prospects of a group that would otherwise not achieve admission, the “aha” quality of this finding is bizarre. It is only the mismatch between the objective of increasing representation of designated minorities and the misplaced reliance on diversity that creates such means/ends problems.

This mismatch between the objective of minority representation and the claim of diversity is brought into stark relief in the Sixth Circuit’s approval of the Michigan Law School affirmative action program. The Circuit opinion focused initially and primarily on the question whether *Bakke* could be read to consider diversity a compelling state interest. Once that question was answered in the affirmative,⁸⁶ the majority opinion relied on the absence of a fixed set-aside and the failure to insulate minority candidates from all competition from non-minority applicants as being dispositive.⁸⁷ In formal equal protection terms, the absence of a quota sufficed to establish that the Law School admissions policy was narrowly tailored. Perhaps most striking about the decision in *Grutter v Bollinger*⁸⁸ is the absence of any further examination of diversity as applied, beyond the reliance on *Bakke* to

⁸² See *Grutter*, 137 F Supp 2d at 840–43 (discussing the statistical evidence).

⁸³ See *id* at 843 (finding that “the law school wants 10% to 17% of each entering class to consist of African American, Native American, and Hispanic students”).

⁸⁴ See *id* at 842 (finding that the law school administration reviewed data daily in order to “ensure that the target percentage [of minority students] is achieved”).

⁸⁵ See *id* at 840–42 (reviewing admissions data and finding it to suggest that “the law school places a very heavy emphasis on an applicant’s race in deciding whether to accept or reject”).

⁸⁶ *Grutter v Bollinger*, 288 F3d 732, 741–42 (6th Cir 2002), cert granted at 2002 US LEXIS 8677.

⁸⁷ *Id* at 747–48.

⁸⁸ 288 F3d 732 (6th Cir 2002).

settle the constitutional question. Even the apparent conflict between the open-ended duration of affirmative action under the Michigan plan and the general temporal limitation on race-based preferences,⁸⁹ is distinguished as not “neatly transfer[ing] to an institution of higher education’s non-remedial consideration of race and ethnicity.”⁹⁰ The exact nature of diversity and its relation to a specific race-targeted admissions policy remains as undeveloped as it had been in *Bakke*, a quarter-century earlier.

It is of course possible that purely race-neutral programs that are intended to provide racial representation⁹¹ would survive equal protection scrutiny.⁹² Nonetheless, it is unlikely that such programs could either satisfy the perceived needs of elite universities to maintain a level of black presence on their campuses, or ensure that the quality of admittees did not suffer from the diminution of selective criteria.⁹³ And in the absence of other acceptable mechanisms to achieve minority representation, the central problem with the programs under review is that they do not operate as if they were really intended to promote diversity at all. Thus, for example, the Fifth Circuit in the original *Hopwood* panel opinion could wax on about the unique aspects of Cheryl Hopwood’s life and how she might contribute to the true diversity of the law school class.⁹⁴ Similarly, the *Grutter v Bollinger*⁹⁵ district court questioned the value of racial as opposed to viewpoint diversity: “[A] distinction should be drawn between viewpoint diversity and racial diversity. While the educational benefits of

⁸⁹ See, for example, *City of Richmond v J.A. Croson & Co*, 488 US 498 (requiring a “logical stopping point” for permissible affirmative action programs).

⁹⁰ *Grutter*, 288 F3d at 752.

⁹¹ By now there are a number of such programs, with the lead being taken by the Texas program guaranteeing university admission to the top 10 percent of the students in any high school graduating class. See Kathleen M. Sullivan, *After Affirmative Action*, 59 Ohio St L J 1039, 1047 (1998) (discussing “Texas’s ten percent solution” and class-based preferences at UCLA’s law school as race-neutral affirmative action alternatives).

⁹² See *id.* at 1045–54 (arguing that a facially-neutral program with the purpose of increasing minority representation might not run afoul of the Equal Protection Clause).

⁹³ This point is well addressed by Bowen and Bok, *The Shape of the River* at 46–52 (cited in note 35), and by Thomas Kane. Kane in particular has examined the likely incoming college credentials in Texas if the incoming pool were drawn from the top 10 percent of all the high schools in the state. See Kane, 59 Ohio St L J at 987–93 (cited in note 39). For an argument that the Texas undergraduate program has successfully addressed these two concerns, see William E. Forbath and Gerald Torres, *Merit and Diversity after Hopwood*, 10 Stanford L & Pol Rev 185, 187–88 (1999).

⁹⁴ See *Hopwood*, 78 F3d at 946–47 (stating that Cheryl Hopwood “is a fair example of an applicant with a unique background” whose “circumstance would bring a different perspective to the law school”).

⁹⁵ 137 F Supp 2d at 821.

the former are clear, those of the latter are less so.”⁹⁶ So long as the universities could respond only in the language of diversity, the defense of affirmative action will continue to be vulnerable.

III. THE LIFE-CYCLE OF EQUAL PROTECTION

A. The Stages of the Law

A look back across the same historic landscape invoked by Bowen and Bok from the vantage point of equal protection law reveals yet another set of difficulties for the diversity-based defense of affirmative action. In retrospect, it is possible to define three stages of equal protection jurisprudence in post-World War II America. The first, captured in the *Brown*-era cases, focused on the use of constitutional authority to dismantle state-sponsored segregation and the corresponding use of legislative power to reach parallel private conduct.⁹⁷ This period’s reforms were undoubtedly the most far-ranging and had the most immediate impact on black Americans’ lives.⁹⁸ Nonetheless, these cases left many of their normative principles relatively unexplored no doubt because, once the courts were free to address formal institutional segregation, the moral condemnation of those practices under review came so easily. If segregation was constitutionally suspect because of its role in locking in the second-class status of black Americans, the most direct approach to dismantling forced segregation was a straightforward prohibition on the use of race as a basis for governmental decision making. The Court’s adoption of the language of strict scrutiny to address the mechanism for striking down Jim Crow laws was essentially an afterthought. Once the Court accepted both the justiciability of the equal protection claims and the impropriety of the use of state power to

⁹⁶ Id at 849. This appears consistent with Powell’s admonition in *Bakke* that an admissions program “focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.” *Bakke*, 438 US at 315 (Powell concurring).

⁹⁷ This was the period of the most far-ranging reforms, but it was paradoxically the most institutionally troubling for courts and the least doctrinally challenging. The focus was on removing the institutional power reinforcing racial separation—the Truman Executive Order, *Sweatt v Painter*, 339 US 629 (1950), *Brown*, the 1964 Civil Rights Act, and the 1965 Voting Rights Act are all examples. This was the “good” kind of reform, the kind everyone applauds now (though some like Bork described it as a vision of unimaginable ugliness in years past). The moral force was clear, and these were indispensable first steps. For an overview of the history of affirmative action during this period, see Schuck, 20 Yale L & Pol Rev at 43–46 (cited in note 16).

⁹⁸ See, for example, John Donohue and James Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 Georgetown L J 1713, 1715–22 (1991) (discussing the impact of Title VII on employment and wages of African Americans).

enforce segregation, the remaining race codes could have been handled under virtually any standard of constitutional scrutiny.⁹⁹

The unanswered question of this first phase of equal protection was whether this approach would suffice. Was it possible to remove the legal imprimatur of subjugation without addressing the second-class status that inevitably accompanied it? As many have argued, the failure to address this question doomed the first Reconstruction and threatened the second.¹⁰⁰ During the second stage of equal protection jurisprudence the line of constitutional authority became decidedly more fractured. A significant body of legislative and executive action reflected the judgment that the end of formal discrimination alone, while necessary, was insufficient. This argument received some support in the courts.¹⁰¹ The constitutional corollary was whether judicial equal protection law could reach conduct or practices that enforced second-class status, but drew no facial distinctions based on race. As reflected in cases such as *Washington v Davis*¹⁰² and *City of Mobile v Bolden*,¹⁰³ the Court recoiled from such an expansive view.

Finally, equal protection reached a third stage when the antidiscrimination mandate of the first stage was reinvoked to strike down the use of racial classifications benefiting minorities. In some sense these cases, beginning with the *Bakke* plurality¹⁰⁴ and continuing more notably with the *Shaw* line of cases, signaled a trend: the return of manifest racial considerations in offi-

⁹⁹ The concept of tiers of scrutiny begins in *McLaughlin v Florida*, 379 US 184 (1964). As Professor Karlan points out, by the time strict scrutiny emerged, the Court was prepared to strike down overtly discriminatory laws as not being reasonably related to a legitimate state purpose, regardless of the level of scrutiny applied. Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 Wm & Mary L Rev 1569, 1570 (2002). Professor Karlan observes, "As for the results of strict scrutiny, its late arrival has had an ironic consequence. Strict scrutiny has been rather useless to the groups whose mistreatment prompted its adoption." *Id.*

¹⁰⁰ See generally J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (UNC 1999).

¹⁰¹ The classic formulation comes from Justice Blackmun in *Bakke*: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." 438 US at 407. That understanding was reflected in the clear racial preferences granted by the first formal affirmative action undertaking known as the Philadelphia Plan. See Schuck, 20 Yale L & Pol Rev at 48 (cited in note 16), citing John David Skrentny, *Minority Rights* (forthcoming). In *Griggs v Duke Power Co*, 401 US 424 (1971), the Court gave its imprimatur to an expansive reading of Congress's statutory power to address discrimination, by holding that, as a matter of statutory design, disparate impact on racial minorities in job selection practices would violate Title VII, even if unaccompanied by discriminatory animus. See *id.* at 432.

¹⁰² 426 US 229 (1976).

¹⁰³ 446 US 55 (1980).

¹⁰⁴ 438 US at 272-324.

cial decision making.¹⁰⁵ This time, however, as is most evident in the 1990s redistricting cases, overt racial considerations took place under the watchful eye of increasingly vigilant minorities in political office or in the administrative side of private power.¹⁰⁶ The passage of time also robbed the color-blind constitutional command of its clear normative force. The equal protection jurisprudence of the 1990s invoked the color blind command of the first stage of post-War equal protection law,¹⁰⁷ but the invocation of a formal prohibition on the use of racial considerations was devoid of its earlier mooring in the attempt to eradicate the caste-like subjugation of blacks in the Jim Crow South.

Viewed in this light, it is possible to think of the first stage of post-War equal protection as aggressively addressing ongoing discrimination by attacking its institutional sponsor, most notably state and local governments, but also private actors. The second stage declined to judicially address the continued effects of the past, but left legislators and administrators relatively free rein to continue the process of dismantling the perceived inherited injustices. The irony of the third stage of equal protection law is that the tools of the first stage are increasingly being used to dismantle the legislative and administrative discretion that was the hallmark of the second stage of equal protection law.¹⁰⁸

Looking back with the benefit of watching equal protection law unfold over time, is there any reason to believe that the same doctrinal approach should have been used in each of these stages? We need not import to legal doctrine alone a historical weight that it cannot bear. Clearly, the re-emergence of race-based resource allocation would raise constitutional issues and would require its own justification. Nonetheless, in hindsight, it is relatively clear that the equal protection mandates that emerged

¹⁰⁵ See *Shaw v Reno*, 509 US 630 (1993) (finding that racial gerrymandering of North Carolina congressional district was subject to strict scrutiny). See also *Shaw v Hunt*, 517 US 899 (1996) (finding that a North Carolina congressional district shaped to insure the election of a black representative did not withstand strict scrutiny analysis).

¹⁰⁶ See, for example, *City of Richmond v J.A. Croson Co*, 488 US 469, 495–96 (1989) (O'Connor invoking specifically the majority black composition of the Richmond City Council in striking down minority set-asides in municipal contracting).

¹⁰⁷ See, for example, *Shaw v Reno*, 509 US at 647 (O'Connor using the phrase "political apartheid" in condemning excessive racial considerations in redistricting).

¹⁰⁸ I am appreciative of Doug Laycock's help in this formulation, although, as elsewhere, responsibility for its faults is mine alone. For examples of cases invoking the commands of formal equality to limit the scope of claims for either disparate impact liability or affirmative benefits for minorities, see, for example, *Washington*, 426 US 229; *Bolden*, 446 US 55; *Croson*, 488 US 469; *Shaw v Reno*, 509 US 630.

from the first, and perhaps even the second, stage of development were ill-suited for the affirmative directives of the third. Thus, Robert Post expresses the logic of antidiscrimination law as focused on the need to “neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities.”¹⁰⁹ This limited principle dovetails with the equally limited argument for affirmative action put forward by Derek Bok nearly twenty years ago.¹¹⁰ But these arguments fare poorly in the second stage of equal protection law, and collapse altogether in the third stage.

Once the formalist apparatus of the third stage of equal protection was invoked, the integrationist and remedial goals of the prior two stages of equal protection were placed at great risk. The formal doctrinal structure inherited from the first stage of post-War equal protection law proved remarkably adept at attacking all racial considerations, regardless of purpose or aim. Diversity emerged in *Bakke* as an alternative theory that might forestall some of the most extreme implications of equal protection formalism. Unfortunately, to the extent that *Bakke* pushed the defense of affirmative action to rest on the notion of diversity as an independent positive good, it compelled a departure from a central theme of pre-existing antidiscrimination law. Until *Bakke*, the leading defense of the antidiscrimination norm was precisely that it compelled an extra measure of judicial scrutiny to overcome the misappreciation of ability due to prejudice, crude assumptions, or cultural bias. Now, the defense of affirmative action had to rest on the alternative ground of diversity.

B. Diversity Amid Equal Protection Formalism

One might argue that there really is no harm in the miscast reliance on diversity because, with a wink and a nod, everyone understands that diversity is really a proxy for integration. There are two answers to this objection. First, there is the unfortunate problem that as the diversity nomenclature took on a life of its

¹⁰⁹ Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 Cal L Rev 1, 8 (2000).

¹¹⁰ Bok, *Beyond the Ivory Tower* at 279–86 (cited in note 59). This argument is also consistent with attacks on the selection criteria in higher education by affirmative action proponents as being unfairly or irrationally structured, particularly insofar as selection is based on standardized testing. See generally Susan Sturm and Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Model*, 84 Cal L Rev 953 (1996); Nicholas Lemann, *The Big Test: The Secret History of The American Meritocracy* (Farrar, Straus, and Giroux 1999).

own, the capacity to address forthrightly the reasons for the distinct treatment of minorities who had been subject to formal barriers of exclusion diminished. I do not doubt for a second that there are complicated issues to be confronted in the claims of historic redress or societal obligation for integration. But the diversity discussion as framed foreclosed that inquiry.

Second, there is the inevitable confrontation between the formal strictures of equal protection law and the diversity-based defense of affirmative action. In the hands of an increasingly suspicious federal judiciary, the robust equal protection tools of the first stage of post-War doctrine showed the deep vulnerability of the *Bakke*-inspired defense of affirmative action. Even assuming that diversity may serve as a compelling interest, and even assuming that universities are able to craft their programs to aim for diversity in some more refined form, a further problem exists in the actual implementation of affirmative action. There is a long-standing protocol in equal protection and employment discrimination law that imposes certain preconditions on any beneficial use of racial preferences. This approach, commonly referred to as the *United States v Paradise*¹¹¹ factors, looks to the tightness of the means/ends fit and the projected duration of the use of racial preferences as an integral part of the equal protection inquiry.¹¹² Under *Paradise* and other leading desegregation cases,

¹¹¹ 480 US 149 (1987).

¹¹² As set forth in *Paradise*, the preconditions for the acceptable remedial use of racial classifications are the following:

the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id at 171. The Eleventh Circuit in *Johnson v Board of Regents of the University of Georgia*, 263 F3d 1234 (11th Cir 2001), more or less adapted these factors to the university admissions setting when it considered the following questions:

(1) [W]hether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity.

Id at 1253. Although the *Paradise* factors were articulated in the context of an actual remedial order in a case of proven discrimination, the same inquiry as to the scope of the program, its necessity, and its duration emerges even outside the formal remedial setting. See, for example,

there must therefore be both a direct link between the harm to be remedied and the remedial program implemented, and a strict time limitation to the awarding of race-based preferences. Further, the timing is presumably to be tied to the lingering effects of the discriminatory conduct at issue.

As soon as the inquiry is posed in this equal protection fashion, the problem becomes apparent. Because diversity is untethered to any concept of a wrong, either societal or institutional, it is difficult to fit within the *Paradise* framework. If the multicultural presence is an object in itself, then it matters not what educational disadvantage may have been inflicted, it matters not whether there is a sufficient improvement in the applicant pool that vitiates the conception of a lasting societal wrong, and it matters not whether there is sufficient evidence of societal benefit from the workings of an affirmative action program—as most systematically pursued in the Bok and Bowen study. Rather, the claim is that the university cannot function as an educational institution without the presence of a set amount of representation from among a preferred group of students—and, by extension, faculty, administrators and the like. If the diverse composition of the student body is tied inextricably to the quality of the academic product, then it must possess “a durability independent of our peculiar historical, political and social circumstances. It is, in this sense, a timeless connection.”¹¹³ As well captured by Deborah Malamud, transforming the normative defense of affirmative action into diversity “makes it unnecessary to answer the hardest question about . . . affirmative action: the question of when it is time to stop.”¹¹⁴

Pursuing this argument to its ultimate end, of necessity it matters not whether the course of study is math or physics or criminal justice or literature.¹¹⁵ Multiculturalism is its own end. It

United Steelworkers of America v Weber, 443 US 193, 208 (1979) (articulating the same concerns in the Title VII context).

¹¹³ Kronman, 52 Fla L Rev at 885 (cited in note 15). This is effectively the position of the Sixth Circuit which concluded that the fact that the “Law School’s consideration of race and ethnicity lacks a definite stopping point also does not render the admissions policy unconstitutional.” *Grutter*, 288 F3d at 751.

¹¹⁴ Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U Colo L Rev 939, 953 (1997).

¹¹⁵ This is a point that gives supporters of affirmative action great trouble. In trying to explain how the broad claim for diversity plays into the general objectives of the university, Sanford Levinson notes quite wonderfully:

I begin with the most obvious tasks of educational institutions: disciplinary education and the encouragement of disciplined scholarship. What

is difficult to believe that an argument structured on these principles could satisfy *Paradise's* temporal requirement for equal protection scrutiny, were it to get past the other compelling interest and narrow tailoring signposts.

It is also difficult to believe that such an argument could ultimately survive any exacting concept of means/ends fit. At the level of application, most undergraduate institutions have university-wide admissions. Affirmative action admissions are therefore as readily geared toward mathematics as humanities, with little prospect that a diverse student body will enhance the educational offering in the former, even if it could be established that there is real appreciable difference in the educational experience in fields such as law.¹¹⁶ Although there are by now mythic attributions of the benefits of diversity in all settings, the evidence from the workplace, for example, reveals that diversity is as likely to prompt dissension and disagreement as not, particularly at the early stages of integration.¹¹⁷ Moreover, there is a strong argument, as advanced by Professor Estlund, that it is precisely the presence of friction in having to work together toward common objectives that promotes the social capital necessary for civic life in an integrated society.¹¹⁸ That is, there may be just as strong a claim for broad integrationist gains from the fact that there will be some difficulty in learning how to get along in a racially mixed setting, even if there is some cost in terms of narrow efficiency concerns.

Beyond the level of application, it is unclear just how compelling the empirical claim on behalf of diversity could or should be.

does "diversity" contribute to these goals? My answer is vigorous and unequivocal: "It depends."

... I am far more confident that certain courses in the humanities and social sciences benefit from a "diverse" student body than do courses in the so-called "hard" sciences or mathematics. To the extent that I support the use of racial or gender preferences in regard, say, to admitting students to a graduate program in mathematics, the reasons are necessarily other than a belief that the quality of the disciplinary education itself depends on classroom demographics.

Levinson, 2 U Pa J Const L at 592-93 (citation omitted) (cited in note 29).

¹¹⁶ See Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 Cal L Rev 2241, 2331-42 (2000) (arguing that the teaching style in large law school classes minimizes the claimed benefits from the diverse classroom setting).

¹¹⁷ See, for example, Katherine Y. Williams and Charles A. O'Reilly, III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 Rsrch Organizational Behav 77, 120 (1998) (reviewing evidence and concluding that "by itself, diversity is more likely to have negative than positive effects on group performance").

¹¹⁸ Estlund, 89 Georgetown L J at 1 (cited in note 31).

Suppose, per hypothesis, that students actually learned more effectively in homogeneous environments because such environs provided fewer distractions or allowed for a more reassuring setting. Would any serious constitutional scholar claim that such reasoning would justify the use of racial classifications to reinforce segregation? Certainly after *United States v Virginia*,¹¹⁹ the expected half-life of such an argument should be very short indeed. As a matter of normative constitutional principle, is there any reason to credit the claim that the internal institutional life “feels better” is sufficient to overcome the constitutional presumption against race-dependent state decisions? The empirical claim about the benefits of diversity, a claim that is almost as difficult to explain coherently¹²⁰ as to demonstrate, rests on an odd one-way utilitarian justification. Once again, this is not to say that the sole defense that may be levied must rest on utilitarian grounds. But, were the utilitarian defenders of affirmative action truly committed to this claim, which is doubtful, they would have extraordinary difficulty if the empirical evidence were to run in the opposite direction:

[A] utilitarian must explain why, if we are obligated or permitted to discriminate in favor of minorities and women when doing so would maximize utility, we are not similarly obligated or permitted to discriminate *against* the members of these groups when doing *that* would maximize utility.¹²¹

One could make a similar point about another line of defense: the accomplishments of graduates who have benefited from affirmative action admission.¹²² This defense can be seen in the anecdotal or autobiographical invocation of success stories,¹²³ or in

¹¹⁹ 518 US 515 (1996) (holding that exclusion of women from government funded military college violated equal protection).

¹²⁰ A fairly typical example may be found in the following rendition by former Harvard University President Neil Rudenstine, “A diverse educational environment challenges [students] to explore ideas and arguments at a deeper level—to see issues from various sides, to rethink their own premises, to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with other views.” Neil L. Rudenstine, *Why a Diverse Student Body is So Important*, Chronicle Higher Educ B1 (Apr 19, 1996).

¹²¹ Sher, 28 Philosophy & Pub Aff at 87 (cited in note 53).

¹²² This line of defense is further compromised by the fact that the recipients of affirmative action preferences are themselves likely to be from relatively privileged positions. See Schuck, 20 Yale L & Pol Rev at 66 (cited in note 16).

¹²³ See, for example, Charles Lawrence, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 Colum L Rev 928, 930 (2001) (“Affirmative action has changed

the more detailed statistical work of the Michigan social scientists. The difficulty is what exactly this proves. There is an inevitable post hoc quality to this defense, as if one could justify the selective awarding of a pot of money to a designated group by showing that, after the fact, the recipients were well off. As an empirical matter, it is as likely as not that those denied admission as a result of minority preferences would also have benefited, and would no doubt have contributed to the ranks of distinguished and successful graduates of the elite educational institutions. But, again, the more critical normative question cannot be evaded. Would we allow segregated institutions to claim their successful graduates as a defense against constitutional scrutiny? Clearly not.

Further confirmation of the doctrinal rough sledding to be faced by a diversity-based defense of affirmative action may be gleaned from recent court treatment of preferential student assignments outside the higher education context. A striking example is the dismantlement of the ongoing racial assignments used in Charlotte-Mecklenburg, North Carolina, the home of the longest standing judicial desegregation decree and one of the most successful at actually promoting integration.¹²⁴ There, school administrators sought to maintain a strict sixty-forty ratio of white to black students in the district's magnet school program.¹²⁵ To achieve this goal, the school board initiated a dual lottery system with separate lotteries for black and non-black students.¹²⁶ If a sufficient number of children of a given race did not enter the lottery and fill their allotted seats, the seats went empty despite the existence of waiting lists made up of children of the other race.¹²⁷ In striking down the program the court relied heavily on its inability to survive the narrow tailoring test set out in *Paradise*: "The policy is not necessary to dismantle the de jure system, is for an unlimited duration, provides virtually no flexibility and bur-

my life. It has opened doors for me. . . . I have watched students and colleagues walk through those same opened doors. . . .").

¹²⁴ See Davison M. Douglas, *Reading, Writing and Race: The Desegregation of the Charlotte Schools* 2, 3 (UNC 1995) (outlining reasons why Charlotte is a good city to choose for studying integration).

¹²⁵ See *Belk v Charlotte Mecklenburg Board of Education*, 269 F3d 305, 345 (4th Cir 2001) (en banc) (discussing the magnet school integration plan).

¹²⁶ See *id* at 316-17 (stating that "CMS had instituted a black and non-black lottery to achieve racial balance").

¹²⁷ See *id* at 317 (stating that "[i]f the recruitment drive failed, CMS usually left the available slots vacant").

dens innocent children and their families.”¹²⁸ Key to the court’s finding was the indefinite duration of the program: “[t]he use of racial preferences must be limited so that they do not outlast their need; they may not take on a life of their own.”¹²⁹ Perhaps even more striking is another Fourth Circuit case which struck down a racially-weighted lottery system in Arlington, Virginia.¹³⁰ There the school board’s stated objective was to obtain a student body “in proportions that approximate distribution of students from those groups in the district’s overall student population,” in order to both prepare students to live in a global society and also to serve the diverse groups of students in the district.¹³¹ The court bluntly noted that “because a racial classification cannot continue in perpetuity but must have a ‘logical stopping point,’ the Policy is not narrowly tailored,” and invalidated the scheme.¹³²

The fate of the diversity-based arguments in Charlotte and Arlington contrast with a recent district court opinion upholding the use of a weighted lottery system for admission to the most popular high schools in Seattle.¹³³ At issue were not magnet or special schools but rather high schools in the district that for whatever reason—be it location or reputation—were more popular and were thus highly demanded in the district’s “open choice” program.¹³⁴ In upholding the lottery scheme the court described it as a “deck-shuffle” that does not preference one race over any other since “all children” are subject to the plan, and children of all races may attend at least one of the popular schools.”¹³⁵ The program withstood the *Paradise* test because this “deck-shuffle” was effective for reaching one of the goals proffered by the school board—overcoming the effects of residential segregation.¹³⁶ The court found that this policy would lead to measurable results and

¹²⁸ Id at 345.

¹²⁹ *Belk*, 269 F3d at 344, quoting *Hayes v Northstate Law Enforcement Association*, 10 F3d 207, 216 (4th Cir 1993) (internal quotation marks omitted).

¹³⁰ See *Tuttle v Arlington County School Board*, 195 F3d 698, 700–01 (4th Cir 1999) (affirming the lower court’s holding that the policy was unconstitutional).

¹³¹ Id at 701.

¹³² Id at 706.

¹³³ See *Parents Involved in Community Schools v Seattle School District No 1*, 137 F Supp 2d 1224, 1239 (W D Wash 2001), revd 285 F3d 1236 (9th Cir 2002).

¹³⁴ See *Parents Involved in Community Schools*, 137 F Supp 2d at 1225–26 (stating that “schools located in the Northern end of the city continue to be the most popular and prestigious, and competition for those schools is keen”).

¹³⁵ Id at 1239.

¹³⁶ See id (stating that “[d]efendants have presented sufficient evidence that a less burdensome plan would not, at this time, produce the degree of integration necessary to achieve their goals”).

would not be at risk of continuing indefinitely but rather would gradually be phased out as the effects of this residential segregation subsided and when certain numerical goals were met.¹³⁷ According to the court, the weighted lottery, combined with a numerical tie to population, was a narrowly tailored policy designed to defeat the effects of residential segregation.¹³⁸ Although the district court was ultimately reversed by the Ninth Circuit on the basis of a state law that prohibited racial considerations in educational remedies, the district court's constitutional interpretation under *Paradise* remained standing, for the time being at least.¹³⁹

While the Seattle case failed to survive as a result of a referendum-created statute that denied any racial considerations in education, its constitutional mooring in overcoming an identified result of segregation gives it what defeated educational affirmative action cases lack: a tangible goal that can be measured and definitively achieved. Schools and universities that initiate affirmative action programs with no aim other than to insure a diverse and multicultural student body have no such tangible hook and thus face difficulty overcoming the duration and fit requirements of *Paradise*. Diversity and its cousin, multiculturalism, fit uncomfortably within the framework of current equal protection doctrine, *Bakke* unfortunately notwithstanding.

CONCLUSION

The point of this exercise in constitutional scrutiny is to show how precarious the world of affirmative action is under existing constitutional doctrine, even accepting the continued vitality of Justice Powell's opinion in *Bakke*. Essentially this is a problem of historical transposition. Who would have imagined as the *Brown* Court struggled to bring to life the Constitution to confront the oppression of black people that those same doctrines would have to bear the weight of examining the extent to which state actors may use racial considerations to advantage black prospects for admission to select institutions? Or, who would have imagined

¹³⁷ See *id.* at 1238 (stating that "[o]nce a school is considered in balance . . . the board will abandon the use of race in its assignments to that school").

¹³⁸ See *Parents Involved in Community Schools*, 137 F Supp 2d at 1239 (noting that the plan at issue "does not mandate a specific racial quota" and that the plan is sufficiently narrowly tailored to "further the compelling interests asserted in this case").

¹³⁹ *Parents Involved in Community Schools v Seattle School Dist No 1*, 285 F3d 1236, 1252 (9th Cir 2002).

that the equal protection wars of the 1990s would be fought over the extent to which states could gerrymander to *enhance* prospects for minority representation? Who would imagine that the Court would repeatedly invoke the constitutional commitment to federalism to restrict congressional power under Section 5 of the Fourteenth Amendment?¹⁴⁰ But that is the world we now occupy and the challenge is to see how well an analytic structure designed to facilitate court dismantlement of formal discrimination can survive in such a radically transformed era.

Two possible resolutions of the equal protection quandary present themselves if some form of preferential treatment of black applicants is to survive. The first would be some modification to the *Bakke* compromise that would blur the extent to which racial considerations are present in admissions decisions. The result would be to dampen the express use of racial categories that reigned in the post-*Bakke* era in favor of a more procedural approach which would police the actual practices utilized in awarding admissions to guarantee that there is not an excessive reliance placed on race.¹⁴¹

Alternatively, there is an intellectual and analytic tradition that may provide solace for a substantive defense of affirmative action. This view finds in the equal protection clause a commitment to the eradication of the legacies of group-based disadvantage.¹⁴² This is a difficult argument to make because it derives a commitment to an integrated future from the fact of past disadvantage.¹⁴³ Its normative force comes from neither the improvement of contemporary institutional life nor a narrowly drawn concept of compensation to the identifiable victims of past injustice. Rather the focus of this integrationist approach is an attempt to look forward by asking what affirmative steps are necessary for the society to move decidedly away from the legacies of a discriminatory past. Under such a view, the defense of affirmative action must rest on the ability of society to mend the legacies of its past and to provide a difficult path to integration for those

¹⁴⁰ See Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 Yale L.J. 441 (2000).

¹⁴¹ For an attempt to frame this argument in terms used by the Court in its redistricting jurisprudence, see Karlan, *Easing the Spring* (cited in note 99).

¹⁴² See generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Philosophy & Pub Aff 107 (1976).

¹⁴³ This also harkens to an older line of desegregation cases. See, for example, *Swann v Charlotte-Mecklenberg Board of Education*, 402 US 1, 16 (1971) (recognizing interest in the needs of schools "to prepare students to live in a pluralistic society").

groups that have been effectively left behind. This is undoubtedly a morally-freighted enterprise. The necessary remedial component of this argument invites an identification with past victimization as an essential part of the claim for present-day preferential consideration. It invites challenges of a lack of fit between the likely beneficiaries of preferential admissions, the children of the most successful beneficiaries of the first successes of the civil rights revolution, and the continued despair of those minority communities that have been left behind—and are unlikely to reap any direct benefit from the preferential admissions programs in elite institutions. But if such considerations continue to lay claim to being an important national objective, then the heavy focus of affirmative action on the elite universities is hardly surprising. Rather it is a recognition of the centrality of those institutions and of higher education in shaping the society. This is not a case where an isolated department in a high school seeks to enshrine its own vision of diversity.¹⁴⁴ Rather, taken together, the elite institutions of higher education are charged with molding the positive vision of what the society should look like.

But we should not ignore the significance of the move toward this older, integrationist tradition. It is difficult to reconcile this approach with the multicultural, diversity-based defense of affirmative action. Under an integrationist perspective, the black experience in America provides the paradigm for understanding equal protection as a constitutionally-compelled commitment to meet our society's ongoing historic responsibility. Oddly, that legacy now compels defenders of affirmative action to explain what it is about black Americans that requires continued legal protection. Neither the inward focus on diversity nor the multiculturalist championing of divergence-based distribution of educational resources advances that goal.

¹⁴⁴ See *Taxman v Bd of Education of Township of Piscataway*, 91 F3d 1547, 1550 (3d Cir 1996) (holding that high school violated Title VII where its decision to lay off one of two equally-senior teachers was based on race even though the school's motive was to promote diversity).