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ESSAYS

TAKING *BAKKE* SERIOUSLY: DISTINGUISHING DIVERSITY FROM AFFIRMATIVE ACTION IN THE LAW SCHOOL ADMISSIONS PROCESS

ARNOLD H. LOEWY*

INTRODUCTION

Diversity and affirmative action are not the same thing. How, you might ask, are they different and why does it matter? The answers to these two questions form the core principle upon which this essay is predicated.

First, how are they different? Affirmative action focuses on the group or groups that an entity, such as a governmental unit, would like to benefit. The rationale for its use may include such things as prior discrimination or underrepresentation. It is generally conceived as a stopgap measure designed to ameliorate the effects of past discrimination.

Diversity, on the other hand, focuses on an institution. For some kinds of positions, diversity simply is not relevant. For example, in the *Adarand*¹ and *Croson*² cases, diversity was not relevant. Each of those cases dealt with a special set-aside for construction contracts to minority-owned businesses. A construction company is either minority-owned or it is not.³ Diversity has nothing to do with it. Similarly, choosing the president of a university has nothing to do

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1. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

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

3. Although, theoretically, the stock of a construction company could be partially minority owned, that would not be the type of diversity relevant to the statutes at issue in *Adarand* or *Croson*.

with diversity. Only one person will be a president, and one person, whatever his race, religion, or gender, cannot be diverse.

Diversity is a relevant concept for entities with multiple members. Thus, for a university board of trustees, a student body, a faculty, or a group of factory workers, diversity is a meaningful concept. That is not to say that it is always important.⁴ But, it is meaningful.

Where diversity is desirable, it is because it makes the institution better. To the extent that a diverse institution is better than a homogeneous one, issues of diversity will always be relevant. Thus, unlike affirmative action, diversity is not something that should or will become less important with time.

In the following three illustrations, I will demonstrate the difference between an argument predicated on affirmative action and one predicated on diversity:

ILLUSTRATION I. The governor of a state that has never had an African-American on its supreme court, and currently has a supreme court vacancy, is discussing with his advisors the desirability of placing an African-American on the court:

AFFIRMATIVE ACTION: “There has never been an African-American on our supreme court, and no wonder. For years, they have been subjected to inferior schooling, housing, and everything else. It’s time that we level the playing field. I am appointing John Jones as our first African-American supreme court justice.”

DIVERSITY: “Different perspectives are vital to a meaningful collaborative process on our supreme court. Although not all African-Americans have had identical backgrounds, there are, in this country, certain experiences that seem to be common to them and not experienced by Caucasians.⁵ Consequently, I believe

4. Some entities are improved by diversity. One purpose of this Essay is to establish that a law school is such an entity. For other entities, diversity may be a neutral factor. Arguably, sports teams, which are concerned primarily with prowess in the particular sport, are in that category. Finally, it is theoretically possible that for some entities homogeneity is superior to diversity. Such an argument has been made in regard to assembly-line factory workers. See Dinesh D’Souza & Christopher Edley, Jr., *Affirmative Action Debate: Should Race-Based Affirmative Action Be Abandoned as a National Policy?*, 60 ALB. L. REV. 425, 449-50 (1996) (presenting D’Souza’s response to a question from the audience regarding diversity as a bona fide occupational or academic qualification). With the exception of law schools, I take no position in regard to the accuracy of these hypotheticals.

5. See, e.g., Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 333-34, 344-54 (1998) (discussing pretextual stops of black motorists by law enforcement

that the institution of the judiciary will be better served with an African-American on the court to share his views with those of the five Caucasians and one Asian-American currently sitting on the court. Thus, I am appointing John Jones as our first African-American supreme court justice.”

ILLUSTRATION II. A school board, for budgetary reasons, must lay off one of two teachers from a business faculty. They are tied for the most junior department members and, apart from race, equally qualified. One is white and the other is black.⁶

AFFIRMATIVE ACTION: “African-Americans have never been a part of this faculty from its inception until nine years ago when both Ms. Williams (black) and Ms. Taxman (white) were hired. This is unfair. Because of our not hiring any African-Americans in the past, we are going to lay off Ms. Taxman and continue to employ Ms. Williams.”

DIVERSITY: “Students in a business curriculum learn best when taught by people who speak with different voices and have different life experiences. Given the presence of African-Americans in our community, it is helpful that our students have some exposure to teachers of that race in the course of their major. Consequently, we believe that Ms. Williams has more to contribute to the well being of our students than has Ms. Taxman. Therefore, we have chosen to retain Ms. Williams.”

ILLUSTRATION III. A law school’s admissions committee has to fill a class of 200 students. The first 199 have already been chosen. The two leading candidates for the 200th position are Bill Smith, an African-American with a 3.1 average from Yale and a 152 LSAT score, and Ray Brown, a Caucasian with a 3.4 average from Yale and a 157 LSAT score.⁷

AFFIRMATIVE ACTION: “Minorities have always been underrepresented at this law school. Indeed, at one

officers).

6. By no coincidence, these were the facts of *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506, and *cert. dismissed*, 118 S. Ct. 595 (1997).

7. As one who has served on his own law school’s admissions committee, I am, of course, aware that Illustration III is a grossly oversimplified description of the admissions process. That truism, however, does not affect the principle.

time blacks were *de jure* excluded.⁸ We believe that past discrimination rather than merit differential accounts for this underrepresentation. In this year's class, that underrepresentation continues. Only nine of our first 199 admittees are African-American. Consequently, we choose to admit Bill Smith."

DIVERSITY: "Our classes are better with diverse people in them. All other things equal, we prefer a class with the highest numbered LSAT and GPA. When most of the class is chosen on that basis, however, we look to see what each additional student can add to the mix. With only nine black students in the class, an additional one has potentially a great deal to add to the quality of class discussion.⁹ We believe that Bill Smith, because of his ethnicity, has more to add to the education of his fellow students and hence is more worthy of our final spot than is Ray Brown, despite Mr. Brown's slightly higher numbers."

At this juncture, it is not critical that the reader accept the wisdom of the affirmative action or diversity rationale in any of the above situations; only that she understand them. It is especially important that she understand the difference between the argument from affirmative action and the argument from diversity.

In the pages that follow, I will argue that a prudent law school should consider notions of diversity in admitting at least a portion of its class.¹⁰ Thereafter, I will argue that such a policy is both fair and constitutional. In regard to the constitutional argument, I accept the notion that principles of affirmative action can be applied only when narrowly tailored to redress a prior state wrong.¹¹ Consequently, I assume that such a principle will rarely justify a race-conscious admissions policy.¹²

8. Obviously, this was not the case with all law schools.

9. See *infra* text accompanying notes 14-16 (reproducing the Harvard College Admissions Program).

10. A plausible argument can be made that much of my rationale would be equally applicable to institutions other than law schools. Undoubtedly this is so. For example, a liberal arts college would probably fall within my analysis at least as easily as would a law school. A medical school may or may not so easily fall within my analysis, although Justice Powell, in *Bakke*, certainly thought that it did. See *Regents of the Univ. v. Bakke*, 438 U.S. 265, 311-12 (1978) (opinion of Powell, J.). Because I know more about law schools than other institutions, my analysis is limited thereto. To the extent that my analysis would in fact support diversity in other situations, it should be employed. If the analysis fits, use it.

11. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228-29 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (plurality opinion).

12. "Rarely" is probably a more accurate term than "never." See *United States v.*

I. THE PRUDENCE OF HAVING A RACIALLY DIVERSE LAW SCHOOL STUDENT BODY

The appendix to Justice Powell's *Bakke* opinion,¹³ describing Harvard's undergraduate admissions policy, is so in accord with my proposal that it is worth repeating. To the extent that some nuances of my proposal suggest a difference for law school admissions vis-a-vis Harvard College admissions, I will describe them immediately thereafter.¹⁴

Harvard College Admissions Program

For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer.¹⁵ Consequently, after selecting those students

Fordice, 505 U.S. 717, 721-32 (1992) (tracing the history of segregation in Mississippi state universities and of lawsuits intended to redress it); cf. *Adarand*, 515 U.S. at 237 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact. . . .' When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment))).

13. See *Bakke*, 438 U.S. at 321-24 (appendix to opinion of Powell, J.).

14. If the reader is already familiar with the Harvard College admissions program, please go on to the text following it.

15. Professor Graglia reads this sentence as if Harvard thought scholarly and intellectual excellence were "not only different but incompatible." Lino A. Graglia, *Professor Loewy's "Diversity" Defense of Racial Preference: Defining Discrimination Away*, 77 N.C. L. REV. 1505, 1516 (1999). Of course, the statement says no such thing. It says that intellectual excellence consists of several elements, including, but not limited to, scholarly excellence.

whose intellectual potential will seem extraordinary to the faculty—perhaps 150 or so out of an entering class of over 1,100—the Committee seeks—

variety in making its choices. This has seemed important ... in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College]. . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 105-105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of

the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students would not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

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

talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.¹⁶

One could, and to some extent I do, quarrel with the percentage of students chosen for diversity vis-à-vis intellectual brilliance. At least in the absence of academic qualifications similar to that of Harvard applicants, I would be more inclined to pick something like three-fourths of an entering law school class primarily on the basis of intellectual acumen¹⁷ and the remainder primarily to achieve diversity.

Many people who support the concept of diversity oppose racial diversity because in their view race is an insufficient proxy for whatever characteristics constitute diversity. In my judgment, this perspective is clouded by the tendency of educational institutions to overuse race, that is, to make it the *only* relevant criterion for determining diversity. It is not true that race is the only, or even the most significant, feature marking diversity. On the other hand, neither is it the least significant. A black growing up in the inner city may have a different set of experiences than a similarly-situated white. And it is not clear which one would add greater diversity. It is possible that a white raised under those circumstances would actually add more diversity to a class than a similarly-raised black.¹⁸ But the fact that we don't have an *a priori* answer to that question does not mean that we shouldn't ask it.

There is an unfortunate dichotomy in the academy (and elsewhere) between those who believe that diversity involving race does not count as diversity and those who believe that racial diversity is the only diversity that counts. If this Essay has one central message, it is that both of these perspectives are wrong. Racial

16. *Bakke*, 438 U.S. at 321-24 (appendix to opinion of Powell, J.) (quoting Harvard College Admissions Program) (citation omitted). The Admissions Program appears in the brief that was submitted by Columbia University, Harvard University, Stanford University, and the University of Pennsylvania as *amici curiae*. See *id.* at 321 n.55 (appendix to opinion of Powell, J.).

17. Ordinarily, but not always, this quality is measured by numbers. A person with lower numbers might replace a person with higher numbers by, for example, having attended a much more difficult undergraduate school, or an undergraduate school that grades on a much lower grading scale. In such a case, the person with lower numbers might be expected to perform better on exams, contribute more to the analytical quality of classroom discussion, and ultimately become a better lawyer. The last of these points is, of course, speculative. See *infra* notes 32-34 and accompanying text.

18. For a discussion of this issue, see *infra* notes 67-70 and accompanying text.

diversity can and should count, but it is not the only, or necessarily the primary, thing that should count.¹⁹

Few people doubt the utility of race-neutral diversity.²⁰ I count among my former students a retired surgeon, the former deputy mayor of a major city, and a retired Indian General. All of these students added perspectives that could not be obtained from whoever happened to be next on the list of academic numbers.²¹ Similarly, a former policeman in criminal procedure, a former business executive in corporations, and a former bank examiner in commercial law are sure to enrich those classes in ways that mere numbers cannot.²²

On the other hand, the concept of a law school obtaining a better student body by choosing students that it believes will do less well academically is counter-intuitive. In my early academic years (more than twenty-five years ago), admissions committees considered things other than numbers, but primarily to obtain academic stars whose potential was not fairly measured by the numbers. Thus, a football player might have gotten special consideration, not because he would

19. Consequently, this Essay should offer no comfort to those law schools for which race is the only diversity that counts. For that reason, it is an inappropriate target for those like Professor Graglia, who object to racial diversity's being the only diversity that counts. See Graglia, *supra* note 15, at 1519-20.

20. Arguably, the textual statement overstates slightly. An argument against diversity in legal education does exist. The more different students are, the longer it might take to cover a substantive point. For example, I know of one instance where the following dialogue occurred in a classroom:

Prof: If someone points an unloaded gun at you that you know is unloaded, is there an assault?

Student: Yes.

Prof: The correct answer is "no." If you know that the gun is unloaded then you don't fear harm. Consequently no assault.

Student: I'm from the inner city. In my neighborhood when somebody points an unloaded gun at you, you know that he intends to bash you over the head with it.

Obviously, if the whole class consisted of white middle-class students, the principle could have been taught more efficiently. On the other hand, the depth of the learning experience is surely enhanced by the inner-city student's observation, and both the professor and the other students have obtained a perspective that they otherwise would not have obtained. If you believe that breadth of coverage rather than depth of understanding is what law school is about, I will probably not persuade you that diversity is a good idea. On the other hand, if depth of understanding more closely captures the function of legal education, the above dialogue is an argument for, not against, diversity.

21. I do not know what the entering credentials of any of these students were. It is possible that some or all of them would have been admitted at the top of any class chosen exclusively by the numbers. My point is that, apart from their brilliance, each contributed a perspective that would have been lost if he or she were not there. And that would be no less true if their numbers were less than others who were not admitted and who had no unusual perspective to share with their classmates.

22. Of course, there are those who, like Professor Graglia as a student at Columbia, fail to discern the benefit of even this type of diversity. See Graglia, *supra* note 15, at 1516.

add diversity, but because his football playing may have artificially depressed his numbers (particularly his GPA). When we started valuing racial and ethnic diversity, I thought that it was the socially correct thing to do, but that it would reduce the quality of the class. In fact, consideration of diversity has enhanced, rather than reduced, the quality of the class.

To some extent, one might quibble over what constitutes an enhanced class. I do not necessarily believe that diverse classes, ethnically or otherwise, perform better on exams. But I do believe that they learn more. Proving this point to the unpersuaded, I concede, is difficult. I do know that I have taught some (fortunately not too many) constitutional law classes with no African-American students therein. I can tell the reader that something was missing therefrom. Perhaps this problem is less true in corporations or commercial law,²³ but it is certainly true in the other courses that I teach (criminal law, criminal procedure, and First Amendment). Perhaps the proof will come from California, where because of a state constitutional amendment,²⁴ and Texas, where because of a federal court decision,²⁵ race cannot be relevant to the admissions process. The universities in those states, including their law schools, have become involuntary little "laboratories,"²⁶ by teaching classes in which racial diversity cannot be relevant in the admissions process.

My own experience suggests to me that these law schools will admit students with higher numbers and educate them less well. Indeed, I am more confident of the latter than the former. I am less sure that the numbers will actually rise because I fear that the absence of diversity may diminish the prestige of the affected schools, causing the brightest of the applicants (of all races) to choose to be

23. I underscore the word "perhaps." I strongly suspect that even in those courses, racial diversity makes a positive difference to the quality of everybody's learning.

24. See CAL. CONST. art. I, § 31(a), upheld in *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 702-03 (9th Cir. 1997).

25. See *Hopwood v. Texas*, 78 F.3d 932, 934-35 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

26. The phrase of course was coined by Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). See *id.* at 311 (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Justice Brandeis supported voluntary (not involuntary) state experimentation with different types of economic statutes so that the rest of the country could learn from the experimenting state's experience. California's experimentation is, of course, voluntary from the perspective of the State, though not from the perspective of the universities. Texas's experimentation was forced on both the State and the universities by the ill-conceived *Hopwood* decision. See *infra* note 49. Presumably, we will all learn a great deal from the experimentation forced on the universities in California and Texas.

educated in an institution that more highly values diversity.²⁷

I would underscore, however, that just as racial diversity matters, it is not the only diversity that matters. In a class of 200, I would tend to choose the first Iranian or the first Sikh over the twenty-third African-American. On the other hand, largely for the reasons suggested in the Harvard admissions policy,²⁸ a substantial minority group in the community will help the learning of all by being substantially represented. Whites can and should learn that black thinking is not monolithic. Students of all races should be exposed to future Clarence Thomases as well as future Thurgood Marshalls.

In thinking about how to choose a law school's student body, it might be helpful to think about how one would choose his own small seminar. I teach a ten-student seminar in constitutional adjudication,²⁹ and most assuredly cannot choose my students. If I could, however, I would begin by trying to find the smartest student available. Probably, I would do the same thing for the next couple of students. After that, I think that diversity makes a bigger difference in class than intellectual acuity. For example, a seminar consisting of the school's three top students, an Asian, a European, an African-American, a liberal, a conservative, an atheist, and a policewoman is likely to lead to better discussion (and hence better learning) than a class consisting of the top ten students based on entering numbers, all of whom may be white American moderates.

Of course, none of this suggests that students who are unlikely to help the law school should be admitted. Quite the contrary, the *raison d'être* of the proposed admissions policy is to enhance the quality of the law school. The theory is that in choosing among qualified applicants, the law school ought to admit those who will help the school the most with its educational mission.³⁰

To be sure, a law school implementing my suggestion is likely to

27. Of course, this fear is predicated on the assumption that the limitations in Texas and California remain indigenous to those states. If the rule adopted in those states were adopted nationwide (public and private), the relative prestige of the nation's universities would presumably remain the same. Then, if my analysis has been correct, only the quality of education would suffer.

28. See *supra* text accompanying notes 14-16 (quoting Harvard College Admissions Program).

29. Each week two students argue a case that could be before the Supreme Court that term. The other eight students and I serve as the Court. We resolve the case collaboratively, and I assign an opinion to somebody in the majority.

30. Of course, enhancing the quality of the law school is not just for the sake of the law school as an institution. It is primarily for the education of the other students who have already been admitted.

have lower numbers than one that admits exclusively on the numbers. Consequently, it risks dropping in such polls as the *U.S. News and World Report* rankings. While not irrelevant, I do not believe that such considerations ought to be determinative. I am employed by a state law school in a state whose motto is: "To be rather than to seem."³¹ Even at law schools that do not formally invoke that motto, its substance is salutary. Thus, if the proposals contained herein really do make a law school better, they should be adopted if, in addition thereto, they are fair and constitutional. I now turn to an analysis of these issues.

II. IS IT FAIR?

In assessing fairness, refer back to Illustration III at the beginning of this essay for a paradigm. You will recall that a law school seeking to fill its 200th and last spot in the entering class has to choose between Bill Smith, an African-American with a GPA of 3.1 from Yale and a 152 LSAT, and Ray Brown, a Caucasian with a 3.4 average from Yale and a 157 LSAT. Assuming that the school chooses Bill, who would be its tenth black in a class of 200, has Ray been treated unfairly?

Ray's claim is that although he is a better candidate than Bill, he has been rejected because of his race. But in what sense is he a better candidate? His numbers indicate that he will probably perform better in his first year of law school.³² But how sure are we that he will perform better? According to Law School Admission Council figures, if two students with Bill's and Ray's numbers each entered the same law school at the same time, there is approximately a 60% probability that Ray will have a higher average in his first year.³³

31. See N.C. GEN. STAT. § 144-2 (1983) ("The words 'esse quam videri' are hereby adopted as the motto of this State . . .").

32. The LSAT only purports to be a predictor for first-year law school performance. See Philip D. Shelton, *The LSAT: Good—But Not That Good*, LAW SERVICES REP., September/October 1997, at 2, 2 ("While the LSAT is a test of a person's acquired skills on a particular day under circumstances as comparable as possible to those of everyone else taking the test, its primary use is to predict or forecast academic performance in the first year of law school."). Even when GPA is added, there is no claim that the composite number is designed to predict any thing other than first-year performance. See *id.*

33. The 60% probability is predicated on a report from Philip Shelton, President and Executive Director of Law School Admissions Council. See *id.* President Shelton's analysis shows that a 10-point LSAT differential indicates that there is approximately a 60% likelihood that the higher-scoring student will perform better in the first year of law school than the lower-scoring student (assuming that their GPAs are equal and that the school's correlation coefficient is .5, which is about average). See *id.* In my hypothetical, the LSAT differential is only five points, but there is also a GPA differential. In a telephone

While not irrelevant, that is a somewhat slender reed upon which to predicate the accolade of better candidate. Nevertheless, if there were no other relevant data, Ray would legitimately be deemed the better candidate.³⁴

But there is other relevant data. If what I have said thus far is correct, Bill probably will add to the quality of everybody's education in a way that Ray will not. Of course, you might say: "We don't know that." True enough. But we also don't know that Ray will have a higher average or make a better lawyer; we just know that it is more likely than not.³⁵ Similarly, it is more likely than not that Bill will enhance the education of his classmates and hence the quality of the learning process in a way that Ray will not. Although other factors might swing the balance in Ray's favor³⁶ (just as other information might make us believe that Bill would do better than Ray academically),³⁷ in the absence of such other factors, we are justified in thinking that Bill probably will do more than Ray to enhance the education of his fellow students.

One issue in assessing merit is whether it should be assessed in the abstract or in relation to institutional needs. If abstract merit is the primary criterion, Ray probably wins. If institutional needs are the primary criterion, Bill probably wins.³⁸ Merit, I suggest, is

conversation with President Shelton, my belief that the approximate 60% figure is accurate was confirmed. Telephone Interview with President Philip Shelton (approximately June 15, 1998). On the other hand, nothing turns on precision. If someone could massage the figures and establish that Ray actually had a 68% or 72% chance of a higher GPA in his first year of law school, none of the positions taken in this Essay would be altered.

34. I suppose that as between two students, the one ranked higher after his first year generally continues to rank higher. I suppose also, although this assumption is considerably less clear, that ordinarily the higher-ranking student becomes a better lawyer. However, the amount of discounting necessary to reach this latter conclusion renders the reed even more slender. For this reason, Professor Graglia's assertion of great gaps in qualifications is wide of the mark. See Graglia, *supra* note 15, at 1513. I suppose that he would consider a 10-point LSAT gap to be a large disparity. Yet the data show that the higher-scoring student has only a 60% chance of outperforming the lower-scoring student. See Shelton, *supra* note 32, at 2; *supra* note 33.

35. At least it is more likely that he will have a higher average. I'm not sure that we know that it is more likely than not that he will make a better lawyer.

36. Ray may have an extraordinary background working with inner-city children and may have far more insight into that culture than Bill, who was raised in suburbia, went to all private schools, and never suffered any form of racial discrimination.

37. Bill may have spent 60 hours a week on athletics and never took course work or the LSAT seriously. He claims, and the law school believes, that he plans to take law school very seriously.

38. The reason for the use of the term "probably" is that it is possible that there will be additional circumstances such as those suggested in the preceding two footnotes. But, if you know nothing about Bill and Ray except their respective GPAs, LSATs, and races, the probabilistic predictions in the text are sound.

ordinarily determined by institutional needs. For example, consider the following three illustrations:

ILLUSTRATION I. The general manager of an NFL football team that won last year's Super Bowl has, because of a trade, this year's top draft choice. The team is superbly fortified at all positions except place kicker, where it desperately needs help. The general manager is firmly convinced that no other team is willing to trade with it. Consequently, whom it takes in the draft will determine its roster. The general manager checks the scouting report and determines that the best available place kicker is only the 182nd best overall player. Yet the general manager chooses the place kicker because that player will help the team more than the 181 better players who were passed over.

ILLUSTRATION II. A law school is hiring one professor. It has a serious need to find a commercial law teacher in order to fill a glaring gap in its curriculum. Two professors apply for the position. One is a superb constitutional law professor, who has no experience teaching commercial law. The other is an average, but professionally competent, commercial law teacher. The faculty hires the commercial law teacher, rejecting the application of the superior constitutional law teacher.

ILLUSTRATION III. A law school is planning to admit 200 students. It has admitted the first 180 students exclusively by GPA and LSAT. Of those 180 students, 170 are women. The next 20 potential students are also women. Student candidates 201-300 contain 50 women and 50 men. The law school decides not to fill its class with candidates 181-200. Instead it considers maleness as a relevant positive factor and winds up filling the last 20 spots with 15 men and 5 women, ending up with a class of 175 women and 25 men.

Few would seriously question Illustrations I and II. The argument would be that what are sought in those instances are the best place kicker and commercial law teacher, respectively. Consequently, the 181 better football players and the one better constitutional law professor are not discriminated against—they simply do not meet the job description. In the third illustration, however, the law school is looking for the best students. Consequently, it could be argued that the women between 181 and 200 who were not admitted were discriminated against because of their gender (which is nearly as serious a constitutional sin as racial

discrimination).³⁹

I believe that this view of these situations is shortsighted. In Illustration I, the team is looking for the player it needs the most. Indeed, some teams in that situation might choose the best athlete (perhaps a quarterback) and eschew the kicker in the hopes that somehow they will develop somebody for this less important (but still important) position. The fact that in Illustration I, the team chose the place kicker is not because only place kickers need apply. Rather, it is because being a place kicker was enough of a plus for the team's needs that it outweighed the kicker's relatively limited overall football skills. Similarly, the law school could have chosen the superb constitutional law professor and could have finessed commercial law with adjuncts until another position opened. Indeed, if the law school is typical, there were probably some faculty who would have opted for that solution. Nevertheless, the majority thought that the overall institutional needs were better served by the average commercial law professor.

The third illustration is right in line with the first two. The law school is looking for the best students it can get to complete its class. Just as being a place kicker or a commercial law professor were big plusses in the first two illustrations, being a man is a big plus in this illustration. In none of the cases is the plus absolutely determinative, but in all of them it is a major factor in assessing the merit that the respective institutions are seeking. But, you might say, there is nothing suspect about favoring place kickers or commercial law professors. There is, however, something suspect about a gender classification, especially a male-favoring gender classification.⁴⁰

The answer is that the admissions process is not male-favoring, but institution-favoring. Although it is true that in this unusual class, maleness is a positive factor, that is not universally nor even usually true. The reason that maleness is a positive factor in this case is that it enhances the educational value for the remainder of the class.⁴¹

39. See *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) ("To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' " (emphasis added)).

40. See Arnold H. Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N.C. L. REV. 1, 11-13 (1978); Jed Rubinfeld, *Affirmative Action*, 107 YALE L.J. 427, 442 (1997). Discrimination against women ought to be more suspect than discrimination against men. But see *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994) (holding discrimination against men to be as constitutionally offensive as discrimination against women).

41. Perhaps this hypothetical, better than any other, illustrates the difference between

Consequently, one could argue that the primary beneficiaries of this admissions decision are the already chosen 180 students, 170 of whom are women.⁴²

If the institutions correctly assessed merit in accord with their own needs in the three illustrations (as I believe they have), it is hard to see how the choice of Bill Smith over Ray Brown is any different. If Bill can do more for the institution than Ray, he should be admitted. Indeed, if the rule were that generally one who can do more for the institution would be admitted—but Bill, even though he can do more, is not admitted because race can never be a criterion—the irony would be that it is only because of race that Bill could not be admitted. To illustrate, if Bill with his numbers were thought to add to diversity because he had traveled around the world whereas Ray had not, we would have no problem with the choice. But, when Bill is admitted because his blackness adds the necessary diversity, we would say that can't count.⁴³

diversity and affirmative action. It is obvious that no case can be made for affirmative action for men. To the extent that either gender is entitled to affirmative action, it would, of course, be women. Nevertheless, to achieve the very different value of diversity, maleness, in this hypothetical, helps admit the last of the applicants.

42. One of the benefits of integrated education (sexually or racially) is that it gives the less empowered group (women, African-Americans) the opportunity to study with members of the group (white males) that currently controls the power structure. As the Court noted in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982):

Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society . . ."

Id. at 472-73 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., dissenting)); *cf.* *Sweatt v. Painter*, 339 U.S. 629, 634-35 (1950) (adopting a similar rationale for integrating law schools). Of course, this is not to say that there are not those who contend that sex-segregated education is just fine for women. *See* Brief of Twenty-Six Women's Colleges as *Amici Curiae* in Support of Petitioner at 2, *United States v. Virginia*, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107) ("Single gender education for women greatly increases the chances that a woman will succeed academically, pursue a career in a field traditionally associated with men, or assume a leadership role in society."). Obviously, I believe that the argument for integration is more powerful. *Cf. supra* note 20 (discussing the benefits of racial diversity). In view of the result in *Virginia*, apparently so does the Supreme Court. *See Virginia*, 518 U.S. at 519 (holding that Virginia could not constitutionally prevent women from enrolling at Virginia Military Institute).

43. A student with a 3.1 average and a 152 LSAT score may be better-qualified than a student with a 3.4 average and a 157 LSAT score, either because the lesser-numbered student has traveled around the world or because he is black. If Professor Graglia's

Because I do not think that it is unfair to count race for the purpose of creating an institution that better educates its students, I have no problem with the fairness of choosing Bill over Ray.

III. IS IT CONSTITUTIONAL?⁴⁴

The argument against constitutionality goes something like this: A racial classification was employed. Racial classifications are justified only when there is a compelling governmental interest. Diversity is not a compelling governmental interest. Therefore, the admission of Bill over Ray denies Ray the equal protection of the law. For support, Ray might invoke the following analogies: (1) If Ray's construction company had submitted a bid of \$1,000,000 to build a road and Bill's company had submitted a bid of \$1,100,000 to build the road, and the Government had hired Bill's company because of Bill's race, Ray would have been denied equal protection of the law;⁴⁵ (2) similarly, if Ray were a public school teacher hired six years ago and Bill were a public school teacher hired three years ago, and, when layoffs were necessitated, the school board chose to ignore its seniority policy and lay off Ray rather than Bill because of Bill's race, Ray would be denied equal protection.⁴⁶

As the reader undoubtedly suspects by now, I do not believe that these illustrations support Ray's contention. Although the question is not free from doubt, I assume that diversity does not constitute a "compelling" governmental interest.⁴⁷ Rather, I believe that the

constitutional jurisprudence is correct, the law school may not be permitted to admit the better-qualified student if he is better-qualified because of race, but that does not mean that, from an institutional perspective, he is not better-qualified. At bottom, Professor Graglia may prefer to let the LSAT score, rather than an admissions committee, "play God." Graglia, *supra* note 15, at 1520. If so, I recommend that he stay off of his school's admissions committee.

44. The constitutional issue is primarily a problem for state schools. To the extent that private schools are subject to anti-discrimination laws somewhat similar in scope to the Equal Protection Clause, or subject to the Equal Protection Clause because of having received sufficient state aid to be deemed a state actor, the following analysis should also be applicable to them.

45. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235-36 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989).

46. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion).

47. In *Bakke*, only Justice Powell found diversity to be a compelling interest. See *Regents of the Univ. v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of Powell, J.). In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court found diversity in broadcasting to be sufficient to justify a racial classification, without finding it to be compelling. See *id.* at 569. The dissent in *Metro Broadcasting*, which probably represents the current state of the law, see *Adarand*, 515 U.S. at 227, found that diversity of ownership in broadcasting was not compelling. See *Metro*

question at issue differs from the above situations in that there is no racially-inspired deviation from a race-neutral paradigm. In the construction case, the paradigm is low bid. When a higher bid is awarded the contract because it was submitted by a racial minority, there is a race-conscious deviation from a race-neutral standard. Similarly, when a senior teacher is dismissed over a junior one because of his race, the race-neutral seniority paradigm is discarded in favor of a race-based preference.⁴⁸

If a law school's admissions policy were based strictly on the numbers, but a special set-aside was carved out for the highest scoring African-Americans, the analogy to the above hypotheticals would be complete.⁴⁹ But that is not the paradigm. Rather, the spot for which Ray and Bill are competing is not chosen by the numbers, but by one's potential contribution to the betterment of the institution. That is not to say that the process is necessarily constitutional, but only to say that it cannot be resolved by a citation of cases predicated on a racial deviation from a race-neutral standard.

Ray might argue that skewing a standard for racial purposes is itself unconstitutional. If, for example, a particular faculty member

Broadcasting, 497 U.S. at 612 (O'Connor, J., dissenting). On the other hand, racial diversity in legal education is surely more compelling than racial diversity on the airwaves, where the race of the station's owners might not even be known to the audience or relevant to the station's programming. See Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1761 & n.86 (1996).

Indeed, if compelling interest means no more to Justice O'Connor than it meant in *Employment Division v. Smith*, 494 U.S. 872 (1990), it is hard to see how she would not find racial diversity in education to be compelling. See *id.* at 904-06 (O'Connor, J., concurring in the judgment) (stating that a state's interest in controlling drugs is sufficiently compelling to justify the lack of an exemption to its criminal law for Native Americans for the highly controlled, religiously motivated ingestion of peyote).

Nevertheless, this Essay proceeds on the assumption that diversity in legal education is not a compelling interest. I have chosen that route, not because I believe that the interest is not compelling, but because I do not believe that diversity involves the type of racial discrimination necessary to trigger strict scrutiny.

48. I believe that these are the paradigms to which Justice O'Connor refers in *Adarand* when she speaks of race-based preferences as always triggering strict scrutiny. See *Adarand*, 515 U.S. at 227.

49. Alan Bakke was admitted to Davis Medical School because Davis had a specific number of seats set aside for minorities. See *Bakke*, 438 U.S. at 270-71 (opinion of Powell, J.). Cheryl Hopwood should have been admitted to the University of Texas Law School for the same reason. See *Hopwood v. Texas*, 78 F.3d 932, 962-68 (5th Cir.), cert. denied, 518 U.S. 1033 (1996) (Wiener, J., specially concurring). Unfortunately, the Fifth Circuit, with little understanding of a process different from the one at bar (and similar to that suggested in this Essay) chose, quite wrongly, to declare *Bakke* overruled and to declare Hopwood entitled to admission because, in the Fifth Circuit's view, race can't count. Fortunately, despite its delusion of grandeur, the Fifth Circuit is still an inferior federal court.

believed that homogeneity, rather than diversity, makes for better learning,⁵⁰ it seems clear that skewing admission to maximize segregation would be forbidden.⁵¹ For this reason, I reject Justice Powell's reliance on First Amendment academic freedom principles as a piece of his *Bakke* reasoning.⁵² Rather, the issue seems to be whether skewing to maximize integration is subject to the same strictness as skewing to maximize segregation. For the reasons that follow, it is not.

One reason for protecting diversity is the very nature of the kind of nation we are. The concept of our national motto, *e pluribus unum*, "from the many, one," suggests both the irrelevance and the relevance of our differences. Certainly, the color of a person's skin cannot be a measure of her rights.⁵³ On the other hand, the *pluribus* part of the equation is not irrelevant either.⁵⁴ This nation celebrates diversity in ways that few others do. And, we learn from each other.⁵⁵ The Clinton cabinet illustrates this point. So far as we know, no racial, ethnic, or gender litmus test was applied to any cabinet post. That is, so far as we know, no white male was told: "Sorry, but people like you need not apply." But seeking something of a balance

50. See *supra* note 20.

51. Cf. *United States v. Fordice*, 505 U.S. 717 (1992) (forbidding apparently neutral tests that had the effect of maximizing segregation); *infra* text accompanying notes 61-64.

52. See *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) ("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."). If the First Amendment has one absolute core principle, it is viewpoint neutrality. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 408-09, 414 (1989). Consequently, if the First Amendment were to be our guide, a faculty decision to maximize homogeneity or segregation would have to be treated with the same respect as one supporting diversity or integration. Because admission to law schools is conduct (and state conduct at that, at least in regard to state law schools), the First Amendment should have no role to play in the analysis.

53. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality opinion); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) ("[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race.").

54. In commenting on my paper at Florida Coastal School of Law in Jacksonville, Florida, on February 5, 1999, Professor Ufot Inamete of Florida A & M University observed that countries that celebrate pluralism (e.g., Switzerland) survive better than countries that do not (e.g., Bosnia).

55. See Amar & Katyal, *supra* note 47, at 1779 ("There is a proud American tradition of treating education differently from other spheres: Education is different—special—because it teaches Americans how to become full citizens in a heterogeneous, pluralistic scheme of democratic self-government.").

of race, ethnicity, and gender in the overall cabinet was and is reasonable.⁵⁶

We need not rely on speculation, however; the cases are replete with endorsement of racial classification for purposes of integration. For example, in *Washington v. Seattle School District No. 1*,⁵⁷ the Court held that a school district could bus students for the purpose of achieving integration, notwithstanding the lack of a constitutional duty to do so.⁵⁸ The Court's theory was that because integration was a positive value, the race-based busing necessary to achieve it was constitutionally permissible.⁵⁹

But, you might say, that case did not involve discrimination. Everybody was educated, presumably in equal schools. Even so, the white (or, for that matter, black) child who has to spend hours on a bus to attend a school that she would rather not attend has been hurt because of race (if one assumes that but for her color she would not have been bused). Conversely, in our law school hypothetical, Ray presumably can be educated elsewhere, just not at the school that would have educated him if he were black.⁶⁰ In both cases (the bused white student and the disappointed white law school applicant), the white who would have had what he wanted had he been black is disadvantaged for being white. But it is not an inherent or systemic disadvantage. Rather, it is an incidental disadvantage designed to take the *pluribus in e pluribus unum* seriously.

56. See D'Souza & Edley, *supra* note 4, at 436 (presenting the remarks of Professor Edley). Of course, diversity is not relevant to each position. There can only be one Attorney General, Secretary of Agriculture, or Secretary of Commerce. But all of the cabinet officers working together form what is essentially a board of advisors. As such, the concept of diversity is quite relevant.

57. 458 U.S. 457 (1982).

58. See *id.* at 471-74. The question of whether Seattle had ever practiced *de jure* segregation was explicitly separated (segregated if you will) from the case by the district court. See *id.* at 464 n.8. The case at bar was predicated on the assumption that Seattle had not practiced *de jure* segregation. The Court explicitly held that "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process." *Id.* at 474.

59. Although a 5-4 decision, the split was primarily over whether the state as a whole could forbid voluntary local busing. The majority held that the state could not so forbid localities from acting. The dissent was not prepared to hold that busing for purpose of integration could not be authorized by anybody, although in one footnote, the dissent did suggest that that was an open question. See *id.* at 491 n.6 (Powell, J., dissenting). Clearly, the Court, as an entity, held that voluntary race-based busing, for the purpose of maximizing integration, was, at least, permissible. See *id.* at 474.

60. Indeed, Ray might not even be disadvantaged as much as the involuntarily bused white student. While our hypothetical law school turned him down, he may well be able to enter a comparable or nearly comparable law school, do extremely well there, and have a superb career at the bar. We are all familiar with such instances.

Furthermore, in *United States v. Fordice*,⁶¹ the Court held that sometimes universities *must* take account of the racial impact of admissions standards.⁶² In *Fordice*, the Court considered the propriety of a state university using American College Testing Program scores (“ACT scores”) alone as the basis for admission.⁶³ The Court invalidated this reliance on ACT scores in part because “the disparity between black and white students’ high school grade averages was much narrower than the gap between their average ACT scores, thereby suggesting that an admissions formula which included grades would increase the number of black students eligible for automatic admission to all of Mississippi’s public universities.”⁶⁴

To be sure, *Fordice*, which involved one time *de jure* segregation, and arguably some institutional foot-dragging in its attempt to eliminate it, does not directly resolve the issue raised in this Essay. Nevertheless, it is hard to read *Fordice* without a sense that the Court would be pleased with an institution that adopted an objectively neutral admissions policy that maximized integration. Thus, if, for the purpose of maximizing integration, a state university were to adopt an objectively neutral admissions criterion such as: “The top 10% of every graduating class in this State shall be admitted,” it is hard to believe that the Court would question it. Indeed, in response to *Hopwood*,⁶⁵ the University of Texas undergraduate schools adopted just such a rule.⁶⁶

If such a rule is constitutional even when enacted for the purpose of maximizing racial diversity, would it not be more sensible to allow states to obtain the best racially-integrated class by considering all of the factors that go into making such a class? A black student with a very low SAT score who finished in the top 10% of a very poor Texas high school may not be in a position to compete at the University of Texas. Thus, she may be out of school after a year, doing neither herself nor the university’s diversity any good. On the other hand, a much more promising black student from a much better high school may not be included in the mix because there may be no objective basis other than race for admitting him. Thus, if something similar to my proposal is not constitutional, universities may be able to integrate only at the cost of choosing less than the best minority

61. 505 U.S. 717 (1992).

62. *See id.* at 737-38.

63. *See id.* at 733-38.

64. *Id.* at 737.

65. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

66. *See* TEX. EDUC. CODE ANN. § 51.803 (West 1997).

student in order to satisfy somebody's idea of objectivity.

Returning to our law school hypothetical for a moment, assume that the admissions committee, which was prepared to admit Bill Smith over Ray Brown for the last spot in the class, has received a last-minute application from Judy Jones. Judy is a white woman who was raised in an otherwise all-black ghetto. She has a 2.9 average from Yale⁶⁷ and a 148 LSAT. Assume that the admissions committee decides to admit her over both Bill and Ray and makes the following statement in doing so: "Judy Jones has one of the most unique backgrounds that we have ever seen at this law school. Her perspectives are bound to be different from any other student in this class. Although choosing her over Bill Smith will both lower the class average and make the class marginally whiter, we believe that the added diversity of her presence is worth both of these costs. Consequently, she is admitted as the 200th and last student in this class."

Assuming that both Ray and Bill file suit challenging the admissions committee's action, how should the cases be resolved? Unless Ray can establish both that there is a constitutional right to a meritocracy and that GPA and LSAT are the sole measure of merit, it is hard to see how he can win vis-a-vis Judy. They are both white, and Judy has more to add to diversity. Consequently, Ray's claim is actually weaker against Judy than it is against Bill. And it is weaker only because of the respective races of Bill and Judy.⁶⁸ Bill would like to claim that Judy can't be chosen over him because that would be a racial choice, and race can't count. But, if he is correct on that premise, Ray, and not Bill, should be admitted. Thus, either way, Bill loses. If race can count, Judy is admitted. If race can't count, Ray is admitted.

It seems to me that the simple solution to all of this is to say that race can count when its purpose is to maximize diversity, so long as

67. I have hypothesized the same undergraduate school for all of the applicants to avoid complicating the problem by speculation as to the relative quality of different undergraduate institutions.

68. Unless something like my proposal is adopted, a white student such as Ray would be able to preclude a black student such as Bill from being admitted ahead of him. (Racial classifications are forbidden absent a compelling interest, and diversity is not a compelling interest. See *supra* note 47 and accompanying text.) Perversely, however, he could not preclude an even less-credentialed white student, Judy, from taking his spot because there would be no racial classification. (Diversity is rational, which is enough because of the absence of a racial classification.) Professor Graglia's scheme, for example, would allow Judy to replace Ray, but would not allow Bill, with higher numbers than Judy, to replace Ray. See Graglia, *supra* note 15, at 1522-24.

there are no hard and fast rules as to which race will be benefited.⁶⁹ That is, so long as diversity always wins, it does not matter which race loses in the particular situation. Thus, the admissions committee should be free to choose among Ray, Bill, and Judy.⁷⁰ In the absence of invidious racial discrimination, neither of the losers should be able to challenge the admissions committee's choice.

But, you might say, however much you argue that this racial classification need not be analyzed under strict scrutiny, you must come to grips with *Adarand*, which held "that *all* racial classifications, imposed by whatever federal, state, or local governmental actor, *must* be analyzed by a reviewing court under strict scrutiny."⁷¹ The answer is that *this is not a racial classification* within the meaning of *Adarand*. And how, you ask, can something that makes race relevant not be a racial classification? The answer comes directly from *Adarand* itself. There we are told that the Fourteenth Amendment

protect[s] *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as "in most circumstances irrelevant and therefore prohibited"—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.⁷²

The admissions standard proposed in this Essay follows this proposal to the letter. Each student not presumptively admitted or rejected on the basis of apparent intellectual acumen is analyzed as an individual, not as a member of a racial group. In each case, all of his or her relevant demographic attributes are weighed in accordance with institutional needs.⁷³ No race has an automatic admit or even a

69. Professor Graglia is quite wrong in suggesting that with "perfect illogic" I argue that whiteness as an admissions criterion is necessarily discrimination. Graglia, *supra* note 15, at 1522-23. I contend that neither favoring Bill because of his blackness nor Judy because of her whiteness is racial discrimination so long as there are no hard and fast rules as to which race will benefit.

70. The committee could legitimately choose Ray by deciding that his probable intellectual firepower will give the class what it needs most. Diversity is, after all, a permissible, not mandatory goal. Furthermore, the committee could decide that the class is already sufficiently diverse. The fact that some of us would disagree with this choice does not render it unconstitutional.

The committee could legitimately choose Bill over Ray for the reasons presented throughout this Essay. It could choose Bill over Judy either because it believed that Judy's numbers were sufficiently marginal to render her an at-risk student, or because it believed that the racial diversity added by Bill was more significant than the cultural diversity added by Judy. Finally, it could choose Judy to further cultural diversity.

71. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis added).

72. *Id.* (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) (citation omitted).

73. Compare Justice O'Connor's opinion for the Court in *Shaw v. Reno*, 509 U.S. 630

presumptive leg up. Rather, each person is assessed in accordance with institutional needs. In the contest between Bill and Ray, Bill did, to be sure, have an advantage by being black. On the other hand, in the contest between Judy and Bill, Judy had an advantage by being white.⁷⁴

Of course, as the Court has so eloquently said: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."⁷⁵ But the admissions criteria do not impose inequalities. Rather, as previously noted,⁷⁶ they provide the most relevant individual bases upon which to determine which students can do most to improve the quality of education offered at the institution. This is precisely the kind of individual—as opposed to group—analysis that *Adarand* demands.⁷⁷

CONCLUSION

This essay has supported three propositions. First, from an educational perspective, diversity in legal education, including (but not limited to) racial diversity, is a prudent aim for law school admissions committees to seek. Second, such an admissions policy is fair to all because it measures merit appropriately; that is, in accord with institutional needs. And third, such a policy is constitutional.

In regard to constitutionality, I have contended that such an admissions policy should not be deemed racial discrimination that must be justified by a compelling governmental interest. My reasons

(1993), where she stated:

Moreover, redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. *That sort of race consciousness does not lead inevitably to impermissible race discrimination.*

Id. at 646 (second emphasis added). Surely the race consciousness involved in diversity admissions is closer to the permissible race consciousness in redistricting than the suspect race classifications of *Adarand*.

74. And, as indicated earlier, I would favor the first Iranian or the first Sikh over the twenty-third African-American. *See supra* text accompanying note 28.

75. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

76. *See supra* text accompanying notes 32-38.

77. Justice O'Connor underscored the need for such individualized analysis in her dissent in *Metro Broadcasting* (vindicated by *Adarand*), where she approvingly described Justice Powell's *Bakke* opinion as follows: "[R]ace-conscious measures might be employed to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 621 (1990) (O'Connor, J., dissenting) (citing *Regents of the Univ. v. Bakke*, 438 U.S. 265, 314 (1978) (opinion of Powell, J.)), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

are essentially the same as those that justify busing to *voluntarily* maximize racial integration. Maximizing diversity in law schools and integration in public schools are both legitimate government functions that are in no sense suspect. Strict scrutiny is only required when the government acts in a suspect manner. Creating diversity in legal education is not suspect.

