Can Affirmative Action Be Defended?

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In this Article, Samuel Issacharoff examines affirmative action and law school admissions from his perspective as a member of the University of Texas's defense team in the Hopwood *case. By moving beyond the predominant analytical framework and arguing that affirmative action programs justifiably operate to consider race in admissions decisions, Professor Issacharoff focuses on the compelling state interests furthered by racial considerations in the admissions decisions of elite public universities. The Article concludes that the tension created by the dual mission of public institutions of higher education—meritocracy and integration of new elites—can only be resolved by taking racial classifications into account in the application of modest, yet effective, affirmative action programs.*

I. INTRODUCTION

In October, 1992, I was summoned to the office of our then-Dean, Mark Yudof. A lawsuit had just been filed against the Law School's affirmative action program, and Dean Yudof wanted me to participate directly in the school's defense. Prior to joining the faculty, I had amassed significant trial experience as a civil rights lawyer, and these skills were deemed to be of value should we have to navigate the untested waters of post-*Bakke*[1] higher education affirmative action litigation. At the time, I was an assistant professor, only weeks away from a faculty vote on my tenure. It was, in keeping with the best tradition of Don Corleone, an offer that I could not refuse.

Before undertaking the defense of the Law School in the now famous

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* Joseph D. Jamail Centennial Chair in Law, The University of Texas School of Law. I am indebted to the individuals with whom I have spent a number of years working on these issues, most notably my colleagues and co-counsel Charles Alan Wright and Douglas Laycock, and the Vinson & Elkins lawyers leading the defense of the University of Texas [hereinafter "UT," "Texas," or "Law School"] in the *Hopwood* litigation, particularly Harry Reasoner, the firm's managing partner. I also received helpful comments from Chandler Davidson, Cynthia Estlund, Mark Gergen, Pamela Karlan, Richard Pildes, David Rabban, Michael Sharlot, and the participants in The Ohio State University College of Law's Symposium on the legacy of *Bakke*. More than ever, given ongoing litigation, it is important to stress that the views contained in this piece should not be attributed to anyone but myself, with the exception of the extensive section I have drawn from my collaborative efforts with Professors Wright and Laycock. I received valuable research assistance from Sasha Foster, Carrie Jacobsohn, and Amy Pritchard.

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[1] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

Hopwood[2] litigation, my contact with affirmative action in admissions was scant. Like most faculty members, I knew that we had such a program and, as a teacher of large first-year courses, I could readily discern when the program worked well and when it failed to ensure comparable skill levels across the incoming class. Also, like most faculty members, I was both aware of the general goals-but-not-quotas mantra from *Bakke* and deeply suspicious of the intellectual coherence of Justice Powell's opinion. In my prior writings on affirmative action in the employment arena, I tried to draw a sharp distinction between altering the unsecured aspirations of an entry-level pool and disrupting the settled expectations of the seniority-vested incumbents.[3] In so doing, I had tried to cabin race-conscious programs to allow for modest integration without needlessly stoking the flames of resentment among the non-preferred. The line I had drawn, paralleling that of the Supreme Court in the 1980s,[4] focused on the extent to which race preferences threatened positions to which affected whites could claim some form of entitlement. But I, like most academics, had never given serious consideration to the mechanisms by which race-based preferences are actually implemented, particularly in the context of higher education.

In the pages that follow, I will attempt to give an account of what it means to defend an affirmative action program as it is implemented in the real world. *Hopwood* remains the only case in which the mechanics of such a program have been taken to trial with an actual factual record and full discovery. As such, it provides to the field an examination of both the legacy of *Bakke* and the rationales for institutionalized affirmative action.

This will not be an exercise in the lawyer exposés that have emerged as the fashion of late. I remain deeply bound by attorney-client confidences in what is still ongoing litigation. Moreover, the law school and university officials whom I encountered during these years of litigation were people of good will who sought the uncertain path between the competing values of exclusivity in the commitment to a first-rate university and inclusivity in integrating the pathways to the elite strata of the legal profession. The path they charted mirrored that of most other comparable institutions and the tribulations of *Hopwood* unfortunately show the deep vulnerability of the affirmative action programs that came to root in the aftermath of *Bakke*.

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

[3] *See, e.g.*, Samuel Issacharoff, *When Substance Mandates Procedure:* Martin v. Wilks *and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189 (1992).

[4] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283–84 (1986) (Powell, J., plurality opinion) (holding that a collectively-bargained lay-off provision that, during certain school years, caused non-minority teachers to be laid off while minority teachers with less seniority were retained, was violative of the Equal Protection Clause).

II. *BAKKE*'S UNCERTAIN LEGACY: THE SUPPLY SIDE

A. *Defining Affirmative Action*

For reasons I shall develop later in this section, the debate over affirmative action has been saddled with the analytic concepts inherited primarily from *Bakke*, and to a lesser extent from the employment affirmative action cases of the 1980s. These cases drew an analytic divide between what Justice Powell decried as impermissible quotas and the more elusive, but acceptable, goals and timetables pointing toward an integrative future. Critics of affirmative action programs tried to score quick victories by decrying all race-conscious programs as quota-driven and thereby triggering the constitutional prohibition inherited from *Bakke*. Supporters of affirmative action denied charges of positions or slots expressly set aside for minorities, and thereby sought the blessing conferred by Justice Powell's favorable invocation of the Harvard Plan attached as an appendix to the *Bakke* opinion.[5]

This battle of labels allowed the debate over affirmative action to take place at a highly abstract level of first constitutional principles, one that in turn cemented the role of *Bakke* in removing from the public eye the actual mechanisms by which a mild form of purposeful integration of higher education could proceed. Both sides in the debate had some interest in maintaining the curious abstractness of the arguments for and against. Conservative critics of affirmative action could claim to be nothing more than proponents of a color-blind ideal without responsibility for the consequences of the wholesale abandonment of affirmative action that their triumph would necessitate. Defenders of affirmative action, on the other hand, could cling to what Deborah Malamud has aptly characterized as "the polite silence that had for so long made it possible simultaneously to support affirmative action and deny how white our institutions would look without it."[6]

It is therefore useful to begin with some clarity on terminology and other preliminary matters. An affirmative action program in higher education is one that accords preferences on the basis of a characteristic desired in the incoming class, most notably on the basis of race or ethnicity. In some portion of cases, the preference accorded along the lines of race or ethnicity is outcome determinative.[7] Put simply, affirmative action alters the mix of applicants who

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[5] *See Bakke*, 438 U.S. at 316–18.

[6] Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668–69 (1997).

[7] Although this point is often obscured in the discussions of the complexities of admissions processes, even Justice Powell in *Bakke* acknowledged that, at the margins, preferences must be dispositive. *See Bakke*, 438 U.S. at 319–20.

are admitted. As a result of affirmative action, some minorities are admitted over some non-minorities who would have been admitted in the absence of an affirmative action program. If this were not the case, what possible reason would there be for academic institutions to engage in elaborate processes to assess the racial and ethnic impact of their admissions practices? In functioning affirmative action programs, these racial preferences exist independent of the fact that the actual admissions decision may consider multiple factors. Whatever the mix of factors to be considered in admissions, an affirmative action program takes the variable of race and treats it in a distinct and independent fashion.[8] Thus, while in a properly functioning affirmative action program no one is admitted exclusively on the basis of race, racial considerations are, nonetheless, a dichotomous variable in the admissions decision.

One of the first decisions made in defending UT was to be candid about what affirmative action meant.[9] As a state institution employing racial and ethnic classifications in awarding a state-conferred benefit, this immediately triggered exacting scrutiny.[10] Our decision to admit frankly the operation of the

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[8] This definition parallels that used by Deborah Malamud, a refreshingly candid writer in a field heavily wanting for candor: "Preferences are, and are perceived as, the use of a different set of selection criteria for whites than for minorities." Malamud, *supra* note 6, at 1694.

[9] This was known colloquially as rejecting the "Georgetown defense." In 1991, a student hostile to affirmative action improperly obtained some incoming credentials of the Georgetown class. These data appeared to demonstrate a disparity in incoming credentials between minority and non-minority students. *See* Robin Wilson, *Article Critical of Black Students' Qualifications Roils Georgetown U. Law Center*, CHRON. OF HIGHER EDUC., Apr. 24, 1991, at A33; *Georgetown Law Student Disciplined, Will Graduate*, CHRON. OF HIGHER EDUC., May 29, 1991, at A2. This is exactly what would have been expected if indeed Georgetown operated an affirmative action program, as it was required to do by AALS and ABA guidelines, as well as by its own educational objectives. Rather than defend on the merits, Georgetown claimed that the data were incomplete (which they very well may have been) and that the data did not reflect the weight attributed to the essay portion of the application. If indeed blacks did so clearly outperform whites on the essay section of the exam, and if indeed this disparity yielded a continual representation of blacks at about twenty percent of the incoming class, then Georgetown should have been put to some burden of justifying the clear racial impact of each component of its admissions process. *See* Teal v. Connecticut, 457 U.S. 440, 442 (1982) (rejecting "bottom line" defense in disparate impact employment selection challenge). Under the bottom line defense, one argues that an employer's acts of racial discrimination in promotions—affected by a procedure, such as an examination, having a disparate impact—should "not render the employer liable for the racial discrimination suffered by employees barred from promotion if the 'bottom line' result was an appropriate racial balance." *Id.* I suspect that if this matter had been pressed in litigation, Georgetown's denial of the obvious fact that it operated an affirmative action program would not have survived the first deposition.

[10] At the time the litigation began, there was caselaw that would have provided for

program shifted the inquiry to the compelling interest that would justify such a program. While that decision would ultimately have been inescapable in the litigation context, it behooves any institution of higher education, particularly a public university, to account for how it confers this important societal benefit. At the very least, any program that seeks to survive litigation will eventually have to meet the same standards.[11]

B. *Implementing Affirmative Action*

The first question that must be asked in defending an operating affirmative action plan is what exactly *Bakke* means in operational terms. What is the real difference between the Davis Plan condemned in *Bakke* and the Harvard Plan that gained at least implicit approval from Justice Powell? As is well-known, the Davis Plan was presented to the Court as setting aside a percentage of seats in the incoming class for minority applicants. Harvard, by contrast, appeared to have no such set-aside. Rather, Harvard spoke more generally of its objectives

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intermediate levels of scrutiny for minority preference programs undertaken in conformity with federal requirements. In *Milwaukee County Pavers Ass'n. v. Fiedler*, 922 F.2d 419, 423-24 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991), for example, Judge Posner found that a highway set-aside program undertaken pursuant to conditioned federal funds would transfer the lower level of federal scrutiny of the federal government to the state entity. After *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), however, that distinction ceased to be meaningful because the same standards of strict scrutiny were applied to federal preference programs.

[11] There is an interesting and as yet unexplored tension in the application of constitutional standards to private schools. Under *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598-99 (1983) and other leading Title VI cases, courts have made relatively clear that the statutory prohibitions on racial considerations are intended to mirror those of the Equal Protection Clause. A separate body of law, however, has held that Spending Clause statutes must give potential recipients of federal funding unambiguous notice of the conditions they assume when such funds are accepted before liability under such a statute may be allowed. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1399 (11th Cir. 1997) (requiring Congress to give clear notice under Title IX for school liability); Floyd v. Waiters, 133 F.3d 786, 792 (11th Cir. 1998) (stating that the Spending Clause requires clear notice under Title IX as to which employees would have enforcement authority). At least in the Title IX context, this is now well-settled law. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1997-99 (1998). Since the implementing regulations of the Department of Education clearly allow for *Bakke*-style affirmative action, the status of Title VI is still unclear. It is also an issue whether the Spending Clause limitation applies to the capacity to bring suit under an implied right of action or whether it is a prohibition on money damages. A further unresolved question is whether Title VI is a Spending Clause statute—as was held in *Guardians Ass'n*. Some courts, however, including the district court in the remand of *Hopwood*, held that the 1986 and 1987 recodifications transferred the statute's constitutional authority to Section 5 of the Fourteenth Amendment.

in attaining diversity and the representation of minority viewpoints in the incoming class. This is the wellspring for the oft-repeated differences between quotas and goals in admissions. A more careful look at the Harvard Plan, however, calls into question the easy distinction offered in *Bakke*. Harvard acknowledged that a certain level of black admissions was necessary to overcome the effects of isolation and to achieve the real benefits of diversity, a position with which I take no issue. What Harvard left unstated was how that minimum level of necessary black representation was to be secured. If the figure was five percent, as indicated in the Harvard appendix, then something had to be done to achieve that figure—unless we are willing to engage in the naive belief that this figure would be self-executing. The central difference between Harvard and Davis, therefore, appears to be that Davis had a fixed number of guaranteed minority admissions and used a separate waiting list of contingent admittees, whereas Harvard provided for a guaranteed floor from which black admissions would rise. In practice, however, the Harvard five-percent floor would look very much like a set-aside that operates until that figure is reached.

In assessing such programs, let me dispense with some objections that I consider to be largely irrelevant to a realistic discussion of how affirmative action programs operate. First, there is the objection that it is hard to identify the operation of an affirmative action program because of the nuances of individual considerations in selective admissions processes. It is certainly true that the top tier of selective institutions weigh a wide range of factors in admissions. Some of these reflect more nuanced understandings of the predictive power of index scores derived from the LSAT and the undergraduate GPA. (I will use law school admissions as the model because it is the world I know best and is not uncharacteristic of affirmative action programs in higher education.) So, for example, it is relevant to understanding the predictive power of the LSAT whether the test taker took the LSAT once or multiple times; similarly, it is relevant to understanding the achievement represented by a GPA whether the applicant was an education major or a physics major and whether the applicant went to MIT or a local community college. Moreover, selective institutions routinely examine individual files to assess whether an applicant has overcome personal adversity, has shown extraordinary achievement in some interesting walk of life, or has in some other fashion demonstrated a capacity for success not typically reflected in the standard incoming predictors. All that being said, it remains the case that the Index scores generated by the LSAT and GPA are a prime predictor of the likelihood of admission of any particular applicant. At any selective institution, I would be astounded if it were not true that as Index scores rise, so does the likelihood of admission. This may not hold as true within the very narrow range from which the elite schools draw their

applicants, but, if we can extrapolate from across the range of potential applicants, it is indisputable that Index scores do serve their intended purposes—to sort out applicants for admission as the crucial threshold variable. Moreover, I would venture that this is no less true in the operation of an affirmative action program. Although I have seen no data on this point, my guess would be that the predictive power of the Index score on the likelihood of a minority candidate's admission would be no less than the predictive power of the Index score in an Anglo candidate's admission. The difference would be in where on the Index scale the admissions fell; my strong hunch is that the minority candidate with higher Index scores would be every bit as likely as the white candidate with higher Index scores to be a statistical favorite for admission relative to the minority or non-minority candidates with respectively lower Index scores.

Second, there is no basis for believing that the high representation of minorities is operating independent of the conscious design of affirmative action programs. This is the clear message of the pivotal study by Linda Wightman based on the historic records of the Law School Admission Service.[12] This is consistent with the trial record in *Hopwood*, which showed that "[h]ad the law school based its 1992 admissions solely on the applicants' [Index credentials] without regard to race or ethnicity, the entering class would have included, at most, nine blacks and eighteen Mexican Americans."[13] This is further confirmed by the experience at UCLA, Boalt Hall, and Texas, the three top-tier law schools that were forced to abandon race-conscious admissions practices in the wake of *Hopwood* and Proposition 209. Each faced an immediate and calamitous drop in black admissions.[14]

The foregoing calls into question *Bakke*'s assumption that a fluid admissions

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[12] *See* Linda Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997) (finding that an admissions policy that relied solely on LSAT scores and undergraduate grade point averages would result in a sharp increase in the number of minority applicants denied admission).

[13] Hopwood v. Texas, 861 F. Supp. 551, 571 (W.D. Tex. 1994).

[14] Thus I remain embarrassed by the claim, not of my authoring but with my name attached nonetheless, that appeared in our reply brief in support of certiorari in *Hopwood*. In an act of abdication, the brief senselessly retreated from our trial strategy of admitting the role of racial preferences in the UT affirmative action program but defended on the basis of the compelling interest behind those programs. Instead the brief argued that race operated as simply one of many criteria that went into a selection process—a claim that could not be substantiated by the record and did not comport with the reality of how affirmative action works. Not without reason did Justice Ginsberg quote from our reply brief to question whether the State had any interest in actually defending its program. *See* Texas v. Hopwood, 518 U.S. 1033 (1996) (Ginsberg, J., denying certiorari).

process could yield a significant minority (or more specifically black) level of representation under a system in which race operated only at the margin and was not part of a systematized form of selection. *Bakke* failed to account for how dramatic and how persistent the pool problem is. It also failed to take into account the realities of institutionalized practices. Thus, on the supply side of the equation, *Bakke* had an unrealistic sense of the extent to which race-consciousness is required, even to achieve the Harvard minimum floor of minority representation. This is the most difficult factual issue for the defenders of affirmative action. Conservative critics of affirmative action, such as my colleague Lino Graglia, routinely score points in debates by bringing forth the comparable statistics reflecting the disparity in credentials that emerge from some of the more aggressive affirmative action programs. When they do not shoot themselves in the foot with reckless musings on the cultural attributes of the various racial and ethnic groups, these critics play on the obvious discomfort of affirmative action supporters in confronting the credentials gap.[15] As evident in the experience of UT, Boalt Hall, and UCLA, the credentials gap indicates the need for continued affirmative action if minority (and most specifically black) enrollment at the elite schools is to be maintained.[16] Unfortunately, the experience at these schools also demonstrates how central racial considerations must be for an affirmative action program to bear fruit.

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[15] *See, e.g.*, ANDREW HACKER, TWO NATIONS (1992) (documenting the gaps between white and black college applicants and frankly discussing his discomfort with the persistence of this problem). *But see* Christopher Jencks & Meredith Phillips, *America's Next Achievement Test: Closing the Black-White Test Score Gap*, THE AM. PROSPECT, Sept.–Oct. 1998, at 44 (accepting the challenge of persistent testing disparities and evaluating successful mechanisms for closing the gulf).

[16] I leave aside the more radical critiques of any reliance upon predictors of law school performance. *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968 (1996) (arguing that standardized testing is not only culturally biased, but also of questionable validity). In the first instance, I think the historical critique against such objective measures disregards the real impact of such criteria in opening up the elite institutions to a non-inherited class of occupants. *See* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON (1997) (documenting radical transformation in composition of elite institutions over the course of the twentieth century as admission by bloodline gave way to admission by objective criteria). Second, there is ample evidence of the usefulness of the Index scores in law school admissions in terms of predicting at least first-year performance. *See* Wightman, *supra* note 12, at 31–34. Finally, my experience in education confirms what a colleague with many years in undergraduate admissions aptly and colloquially expressed: "These scores don't tell you everything; but they certainly don't tell you nothing."

III. *BAKKE*'S UNCERTAIN LEGACY: THE DEMAND SIDE

If institutions of higher education routinely rely on affirmative action to sustain minority enrollments, and if such programs require express racial considerations, what legal justifications can protect such programs from the equal treatment mandates of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964? This is the problem of what I will term the demand side of the affirmative action equation. If affirmative action is necessary to enhance the supply-side pool of minority potential enrollees, what justifies institutions of higher education in drawing from this pool? While *Bakke* struck down the use of set-asides to guarantee predetermined minority slots, Justice Powell was careful not to prohibit all use of race-consciousness in an admissions program. Instead, *Bakke* held out the prospect that the needs of vaguely-defined diversity and an ongoing obligation to remedy the present effects of past discrimination might provide the compelling justifications for a race-conscious admissions process. But, it is important to emphasize that *Bakke*, or more precisely, Justice Powell, addressed these concerns only in the abstract since each justification was either absent or not presented in Davis's defense of its medical school set-asides. The issue left untested until *Hopwood* was how these justifications would fare in the litigation context when their actual implementation was under challenge.

A. *Diversity*

The Supreme Court has repeatedly said that affirmative action cannot be designed to achieve racial balance for its own sake.[17] Rather, the pursuit of greater racial diversity must be designed directly to enhance the product or mission of the institution in important ways. A clear example is in the use of racial preferences for boot-camp officers supervising young criminals undergoing shock incarceration.[18] Product enhancement is also clear in higher education since it adds otherwise unrepresented or underrepresented views and experiences to the intellectual mix. In fact, one of the clear legacies of *Bakke* has been to enshrine the term "diversity" within the legal lexicon to cover

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[17] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496, 503–06 (1989) (plurality opinion); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283–84 (1986) (plurality opinion); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 309 (1978).

[18] *See* Wittmer v. Peters, 87 F.3d 916, 918–20 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997) (examining racial composition of inmates and staff and holding that preference given to black male applicants for lieutenant's job over white males did not violate equal protection because black inmates were believed unlikely to play "correctional game of brutal drill sergeant and brutalized recruit" unless some of the blacks held positions of authority).

everything from curricular enrichments to thinly-veiled set-asides.

The problem with diversity as a justification for a challenged affirmative action program is that it is an almost incoherent concept to operationalize, unless diversity means a predetermined number of admittees from a desired group. How would one go about putting into place an admissions system that effectively sought to create diversity within the final incoming class? Taking as an example the institution that I know best, the difficulties quickly emerge. Thus, at the University of Texas School of Law, somewhere between 3,000 and 5,000 applications are received each year. These have to be processed in essentially a one-month period. To get at the most attractive applicants, an admissions office must be able to mobilize to contact prospective enrollees in a fiercely competitive market. Even without the additional fact of top minority students being among the most highly sought after applicants, there is simply no way that an admissions process can realistically evaluate each applicant against the entire pool to determine that applicant's contribution to diversity. Instead, selective institutions must approach the applicant pool with predetermined notions of what an appropriately balanced incoming class should look like.

This is not a matter of laziness or bureaucratic indifference, but rather reflects a fundamental tenet of organizational theory that institutions cannot proceed without clear objectives. By its terms, the *Bakke* conception of diversity seems to indulge precisely this unrealistic expectation that each applicant file will be considered against all the others in the pool. Justice Powell's opinion reads as if the process of selecting applicants was endlessly fluid and that institutional actors could reconsider each file against the entire pool so as to make incremental judgments about a particular applicant's contribution to the overall objective of diversity. Even assuming that diversity has a meaning that all would agree to, and that it could be applied across the different fields of academia, no competitive admissions system could be guided by this imprecise a course of action.

The most obvious, and relatively secondary, problem with this account is that no school has a 100% yield rate. So, even if a school were inclined to follow Justice Powell's invitation, there is no realistic prospect that the pool of admittees would translate into the diverse class come enrollment time. Moreover, given the extraordinary competition for the relatively few minorities in the competitive applicant pool, this diversity of the pool strategy is unlikely to translate into real diversity in the incoming class. To be successful, a minority recruitment strategy must over-admit relative to diversity demands lest it be shut out at enrollment time.[19]

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[19] A small indication of this problem is provided by the incoming statistics at Boalt Hall and UT law schools for the 1997 incoming class. Without race conscious admissions, UT admitted eleven blacks and managed to enroll four. Boalt Hall admitted nine and enrolled

But the more significant problem is that diversity 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 rationale 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.

B. *Overcoming Past Discrimination*

While the affirmative action caselaw condemns the use of racial preferences as an abstract compensatory cure for societal discrimination, there is nonetheless a clear role for race consciousness in the remedial setting where

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none; its only black enrollee was a student who had deferred admission from the prior year. This fact received extensive media coverage. *See* Amy Wallace, *Fallout From UC Preferences Ban,* L.A. TIMES, June 28, 1997, at A1; Amy Wallace, *UC Law School Class May Have Only 1 Black*, L.A. TIMES, June 27, 1997, at A1; Michelle Locke, *Black Law Students Hurt By Affirmative Action Ban*, THE DENVER POST, July 12, 1997, at A4; Kenneth R. Weiss, *UC Law Schools' New Rules Cost Minority Spots*, L.A. TIMES, May 15, 1997, at A1; Peter Applebome, *Minority Law School Enrollment Plunges In California & Texas*, N.Y. TIMES, June 28, 1997, at A1.

courts have found unlawful segregation.[20] As with the diversity rationale, however, the issue of the scope of voluntary affirmative action remains quite unclear. The Supreme Court has both embraced the need to have institutions voluntarily bring themselves into compliance with the civil rights laws, even in the absence of a direct showing of discriminatory behavior,[21] and expressed increasing ambivalence about the political decisions that would lead institutions to embrace express racial considerations in official policies.[22]

As applied to higher education, there is a significant body of law, beginning with *Bakke* itself, that allows affirmative action not only as a remedy for the present effects of past discrimination, but as an affirmative duty where the racial identifiability of previously segregated institutions persists.[23] This issue remains highly relevant in public higher education. A number of educational institutions in the Deep South are still operating under consent decrees arising from the *Adams* litigation.[24] Texas, for example, entered into a consent decree with the Department of Education in 1983 under threat of a cessation of all federal funding for education. This consent decree was operationalized in a series of "Texas Plans" that provided for specific objectives in minority recruitment, subject to continuing federal oversight.[25] For state institutions subject to such federal oversight, affirmative action is an integral part of remedying the present effects of prior discriminatory exclusion. In no walk of civil rights law have courts required or even accepted remedies for racial exclusion that did not

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[20] *See, e.g.*, United States v. Paradise, 480 U.S. 149, 166–86 (1987) (plurality opinion) (holding that a one-black-for-one-white promotion requirement survived strict scrutiny under the Equal Protection Clause).

[21] *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 627–30 (1987) (holding that, in order to justify its voluntary adoption of an affirmative action plan, an employer need not point to its own prior discriminatory practices, but merely to a conspicuous imbalance in traditionally segregated job categories).

[22] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (noting the majority black composition of the Richmond City Council that adopted minority set-asides in public contracting); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying strict scrutiny to all race-based preferences, regardless of federal government participation).

[23] *See* United States v. Fordice, 505 U.S. 717, 733–38 (1992) (finding that Mississippi's college admissions policy, which had required higher ACT scores for *historically white* universities than for *historically black* universities, had present discriminatory effects) (emphasis added).

[24] *See* Adams v. Bell, 711 F.2d 161, 164 (D.C. Cir. 1983) (affirming the district court's consent decree to bring the North Carolina higher education system into compliance with Title VI). The *Adams* litigation was eventually dismissed *sub nomine* Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990). But this dismissal of plaintiffs' claims for further relief did not affect the consent decrees with southern universities, which had been spun off from the *Adams* litigation. *See id.* at 746–47 n.4.

[25] *See* Hopwood v. Texas, 861 F. Supp. 551, 555–57 (W.D. Tex. 1994).

consider race in crafting appropriate attempts to undo the prior segregative practice. It is inconceivable that any race-blind measure could come close to accomplishing such an objective without undermining all other functioning of the institution.

The ongoing obligations of desegregation were a cornerstone of the defense of UT in *Hopwood.* We were able to persuade the trial court that the vestiges of discrimination were not merely the lore of a bygone era. At the time of the *Hopwood* trial, desegregation litigation continued in more than forty Texas school districts,[26] and a majority of the in-state applicant pool to UT Law School in 1992 attended public schools that were still deemed *de jure* segregated by supervising federal courts.[27] Although this was ultimately rejected by the Fifth Circuit[28]—which held that only discrimination by the exact governmental unit was relevant—the broader fact is that this defense is not available to most of the institutions of higher education that engage in affirmative action.

Even beyond the limited number of institutions that could conceivably claim to be affirmatively engaged in remedying actual discrimination, the remedial argument has significant vulnerabilities in the litigation context. First, as is evident in the panel opinion of the Fifth Circuit in *Hopwood*, it is highly unlikely in this day and age that the institutions of higher education that have heavily internalized a commitment to affirmative action are at the same time remedying their own discrimination. Even in the public education context, the court in *Hopwood* found there to be an insufficient nexus between ongoing lack of minority educational opportunity in the K–12 context, and attempts at remedial admissions at the law school level. Second, the remedial argument puts a great deal of pressure on the apparent mismatch between those individuals who have borne the brunt of inadequate educational opportunity in the past and the likely beneficiaries of such programs in the present. Whereas the former are likely to be poor, under-educated, and ill-prepared for the rigors of elite higher educational institutions, the latter are quite likely to be the children of the middle-class whose families have benefited from the fruits of the civil rights revolution.[29] Moreover, when the affirmative action program in question concerns that highly rarefied world of admissions to elite professional schools, the pool from which potential affirmative action admittees are drawn is national in scope—thereby further weakening the link between the site of educational disadvantage and the residence of potential beneficiaries. Thus, in

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[26] *See id.* at 554.

[27] *See id.* at 573 (finding continued impact on the applicant pool and citing to further details in trial record).

[28] *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

[29] This point is most forcefully made in WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 112–18 (1987).

Hopwood, the Fifth Circuit found that the heavy recruitment of black students from outside Texas was further reason to discredit the remedial defense put forward by the University.[30]

I do not consider these objections to the remedial argument by any means dispositive. Lack of educational opportunity for minorities in a state such as Texas, which is pushing 40% black and Mexican-American, punishes not only the victims of that educational deficit. Rather, it robs the state of political and intellectual leadership from those communities, thwarts the development of a more robust minority middle class from which future competitive applicants should come, and perpetuates the racial and ethnic dimensions of a socioeconomic divide that arose heavily imbued with noxious state action. While such considerations would not satisfy the narrow remedial vision of the *Hopwood* panel opinion, they appear more in keeping with Supreme Court precedents in cases such as *Johnson v. Transportation Agency*[31] and *United States v. Fordice*.[32] The main point, however, is to emphasize the real vulnerability of the *Bakke* rationale when under an as-applied challenge.

IV. RECASTING THE DEBATE

What then is really at issue in affirmative action? I believe it is not captured by either the diversity argument or the claim to be remedying present effects of past discrimination. Rather, affirmative action represents a point of compromise in the contradictory missions of the elite universities. They serve as both the guardians of a meritocratic vision of achievement and as the guarantors of opportunity so that the elites of the society may be replenished from the diverse groups that have built this country. Affirmative action grows out of the frustration with the apparent intractability of this country's inability to achieve these twin objectives with regard to black Americans. It is a pragmatic and oftentimes messy accommodation of two of the central values of higher education. While elements of this argument can be read back into *Bakke*'s invocation of diversity and remediation as the justifications for affirmative action, the fit is far from perfect. To begin with, the focus on accommodation

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[30] A particularly pejorative denunciation of this argument was recently formulated by Michael Greve, the Director of the Center for Individual Rights, which represented some of the plaintiffs in *Hopwood*. Per Greve, "the University of Texas pointed to sustained discrimination in Texas elementary schools . . . and argued that *therefore* the law school should be permitted to import two dozen black out-of-state students under preferential admissions standards." Michael Greve, *The Vanity of Diversity*, THE WKLY. STANDARD, July 20, 1998 at 26, 28 (emphasis in original).

[31] 480 U.S. 616 (1987).

[32] 505 U.S. 717 (1992).

of competing missions is far too institutionally-oriented to fit squarely within the narrow remedial jurisprudence to which *Bakke* adheres. Similarly, the focus on competing institutional and societal aims is far more qualified than the first-order claims for diversity advanced in the aftermath of *Bakke*.

This approach requires a certain degree of doctrinal overhauling. At the very least, it would require some softening of the rhetoric of *Bakke* and cases such as *Wygant v. Jackson Board of Education*,[33] which appear to deny to major societal institutions the capacity to mediate between these conflicting objectives.[34] This argument was developed in an amicus brief in *Piscataway Township Board of Education v. Taxman*,[35] written by Charles Alan Wright, Douglas Laycock, and me.[36] *Taxman* was scheduled to present the Supreme Court with its first education-based affirmative action case since *Bakke*, until it settled through the financial intervention of justifiably concerned civil rights groups. As academics and as lawyers involved in *Hopwood*, our concern was that *Taxman* presented a curious fact pattern through which to judge affirmative action. The case concerned the employment prospects of equally credentialed teachers in the layoff context and did not present any of the conventional concerns over remediation or diversity in the educational product. But beyond that, the amicus brief was intended to expose the Court to the mediating role that affirmative action could play in higher education. Moreover, as revisited at length in Jeffrey Rosen's insightful article in *The New Yorker* on the effect of Proposition 209, we wanted to show the Court the potential consequences of a simple-minded abandonment of all affirmative action.[37]

The gist of the argument is that affirmative action allows institutions of higher education to mediate between the competing claims of exclusivity and opportunity for group advancement, particularly with regard to black Americans. Our argument is, at bottom, a pragmatic one that claims that absent some sensible mediation, the dual role of the university is placed at deep risk. The central tenets of the argument correspond heavily to the subsequent, well-publicized defense of affirmative action by the long-time critic of such programs, Nathan Glazer.[38] Because our brief has prompted significant

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[33] 476 U.S. 267 (1986).

[34] *See id.* at 283–84.

[35] 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997), *and cert. dismissed*, 118 S. Ct. 595 (1997).

[36] Brief of Charles Alan Wright, Douglas Laycock, and Samuel Issacharoff as Amici Curiae in support of Respondent, Piscataway Township Bd. of Educ. v. Taxman, 91 F.3d 1547 (3d Cir. 1996) (No. 96-679) *available in* 1997 WL 626055 [hereinafter Amici Brief].

[37] *See* Jeffrey Rosen, *Damage Control*, THE NEW YORKER, Feb. 23, 1998, at 58.

[38] *See* Nathan Glazer, *In Defense of Preference*, THE NEW REPUBLIC, Apr. 6, 1998, at 18.

coverage in its own right, I will reproduce with only mild editing (and with the indulgence of my more senior colleagues) the core of the argument that makes the point about the role of affirmative action with regard to public institutions in general, and the University of Texas in particular. I will then expand this to apply to higher education more broadly.

A. *Affirmative Action and the Mission of the Public University*

The great public universities in this country must of necessity pursue multiple and partially conflicting missions. The University of Texas at Austin, as an elite public institution in a populist state, is as clear an example as can be imagined. The academic goals of excellence in teaching and research require the flagship public universities to be highly selective in their admission of students. At the same time, they are public institutions that must serve, and be seen to serve, all the people of the state. Public education is part of the process by which skills and credentials are created and cannot be simply a reward for pre-existing skills and credentials, many of them created at earlier stages of the public education system.

Because of this dual orientation, public universities have historically provided a principal path by which talented citizens of modest means join the elites of American society. Consequently, they have been a principal mechanism for integrating racial and ethnic minorities. These public universities have been an indispensable mechanism for successive waves of immigrants to become part of the mainstream of American society. This integrative function is especially important in law schools, which train a disproportionate share of the future political leadership of the state and nation. Unfortunately, this pathway to integration has been least available to those Americans who have borne the greatest brunt of official and private discrimination in the provision of education and other public goods—most especially black Americans everywhere and Mexican-Americans in the Southwest.

There is no escaping the tension between exclusivity to preserve high academic standards and inclusivity to offer advancement and integration into American society. Affirmative action has been the one successful mechanism that allowed elite public institutions to pursue both commitments. Only affirmative action permits a school to admit the very best white students and also the very best black and Mexican-American students in more than token numbers. Achieving the twin aims of public higher education is a compelling state interest that should be allowed to justify the appropriately limited use of racial classifications.

As the data set forth below illustrate, a modest preference in admissions can produce large gains in the public university's ability to serve its integrative

mission, without significant cost to its pursuit of excellence. No other method achieves both missions. The only color-blind substitute for affirmative action is to lower admission standards generally with the goal of increasing the number of minority students in the admissible pool. But no incremental lowering of admissions standards will solve the problem. There are more students of all races at every level of entering credentials than at the level just above it. This means that even a modest reduction of admission standards creates many more admissible students than the school can accommodate. Most of these surplus students will be white. There are minority candidates at every level of entering credentials, but at each level, there are many more white applicants. To admit from this larger pool without relying on the credentials that tend to exclude minority applicants requires admission by lottery or by some subjective, unreliable, and certainly less reviewable method such as interviews.

The risk of misunderstanding is great, so let us be perfectly clear even at the risk of redundancy. There *are* qualified minority students who can succeed at elite professional schools and whose admission has no significant effect on intellectual standards. These are the students admitted pursuant to well-designed affirmative action plans. The insuperable difficulty is that we cannot target those students without taking race into account. The following chart, taken from the 1997 resident applicant pool to the University of Texas School of Law shows that simply dipping lower into the pool would not alter the predicted number of minority applicants:

RACIAL COMPOSITION OF RESIDENT APPLICANT POOL

INDEX SCORE	ANGLO	BLACK	MEX.-AM	OTHER
196 & up	83%	0.9%	4.1%	12%
191 & up	83%	1.0%	5.2%	11%
185 & up	80%	1.5%	7.5%	11%
1997–98 enrolled:		0.9%	5.6%	

Thus, if UT were to admit by lottery at the qualifications level of these students, the lottery would draw only a few of the available minorities at that level, because there are also many white applicants at that level. For a lottery or similar admission standard to significantly change the number of minorities admitted, the threshold for entry into the lottery must be set low enough that the underrepresentation of minorities at the very highest levels of credentials no longer skews the racial makeup of the pool as a whole.[39] It becomes a simple

[39] Nor is it clear that this approach would have the effect of significantly increasing minority admissions. To a large extent, the pool of applicants is self-selected as a result of the

matter of mathematics that the threshold for entry into the lottery must be far below the current boundary-zone between admissible and inadmissible students.

To use such methods is necessarily to admit many students of all races from the lower ranges of the pool and to exclude many students of all races who are more qualified than those admitted—and with only modest increases in minority representation. In the present circumstances of public education, for a lottery to achieve more than token representation of minority students in the most selective academic units would require admitting by lottery from a pool that reaches far below the current minimum standards for admissions. Even here, given the continued disparity in representation in the applicant pool, the increase in minority representation will continue to be uncertain, while the diminution of the academic caliber of the student body as a whole will be inescapable.

A university that pursued this course would no longer be a great university. Its student body would be much weaker than before and its curriculum would necessarily have to be adapted to the new student body. Faculty recruitment and retention, and ultimately budgets, would come under similar pressure. Having lost the students and faculty that made them special, the flagship public universities would no longer have any special claim to funds, whether from appropriations, tuition, or research grants.

The great research universities have contributed important advances to human knowledge, to economic development, to national defense, and to public health. Nearly every state has created one or more flagship universities with competitive admissions and a strong commitment to research, and other public universities, colleges, and junior colleges with less competitive or noncompetitive admissions and less emphasis on research. This allocation of functions is so widespread because it serves compelling interests. But, without affirmative action, the flagship public universities must either abandon their commitment to selective admissions, with all that that entails, or they must abandon their commitment to public education's integrative and service functions. Modest affirmative action plans, subject to the judicially enforceable limits discussed below, are the least restrictive means of pursuing both missions.

The reality is that flagship public universities cannot pursue either of their missions unless they pursue both of them. The costs of ending affirmative action will not be borne by only one of the competing missions. In the short run, color-blind admissions will produce flagship schools that are overwhelmingly white, or in some cases, white and Asian. But that is only a transitional

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publication of information about admission prospects. As soon as knowledge that a high-ranking school was prepared to engage in lottery admissions, the pool would no longer be as constricted. Many non-minorities who presently do not apply because of the remote chance of admission would presumably recalculate the odds of gaining admission.

consequence, because it is not sustainable. Barring a miraculous improvement in elementary and secondary education for minority students, color-blind admissions will soon produce either public universities without competitive admissions, public universities without adequate funds, or both. Either way, the end of affirmative action is a formula for the destruction of the great public universities.

If affirmative action is ended, inevitable political, economic, and legal forces will pressure the great public universities to lower admission standards as far as necessary to avoid resegregation. This reduction of academic standards in response to the end of affirmative action is already happening. In response to *Hopwood*, the Texas legislature passed two bills to reduce admissions standards. One guarantees admission to any public university in Texas to any student who graduates in the top ten percent of his high school class, without regard to what courses he took or his performance on standardized tests.[40] The idea is to make standardized tests irrelevant and to make a virtue of segregated high schools, guaranteeing admission to ten percent of the students in such schools. No one knows what consequences this experiment will have. It may swamp more selective universities with students, and it may displace more qualified students who graduated in the second ten percent at stronger high schools or after taking a more challenging high school curriculum. Certainly, it creates powerful incentives for high school students to avoid challenging courses.[41]

The second new Texas statute requires Texas universities to use the same minimum grade-point average (if any) for all applicants, including scholarship athletes.[42] If generalized, this bill would require either something very close to open admissions and an inundating tide of students, or the end of Division I football and basketball and the risk—which hardly any university administration has been willing to run—of sharp reductions in alumni support. For now, the University of Texas believes it is outside the scope of this draconian legislation because it does not require a minimum grade-point average.

Each of these initiatives is entirely consistent with the opinion of the court of appeals in *Hopwood*. No one is defying the court, and we are not suggesting that rights must yield because of public disagreement with them. Nor is the destruction of the great public universities like an *in terrorem* threat to close public schools in the face of desegregation. The great public universities would

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[40] *See* TEX. EDUC. CODE ANN. § 51.803 (West Supp. 1998).

[41] The University of California is considering a similar but less drastic proposal. A Task Force has recommended that the University no longer require undergraduate applicants for admission to report standardized test scores, and the Regents are now considering this recommendation. *See U. of California Weighs Optional S.A.T.'s*, N.Y. TIMES, Sept. 21, 1997, at 32.

[42] *See* TEX. EDUC. CODE ANN. § 51.9245 (West Supp. 1998).

not be closed; they would be gradually transformed into something entirely different.

The resegregation of the great public universities resulting from the end of affirmative action would be immediate and highly visible; the destruction caused by lowered admission standards would be gradual, mostly in the future, and less visible even as it comes to pass. Those who supported the bills to lower admission standards were acting in what they honestly conceived to be the best interest of public higher education in Texas. Certainly, no one is consciously threatening to destroy the great public universities. But that is where we are headed under the rule of *Hopwood*. If that case becomes law for the nation, there will eventually be no great public universities—not for the nation, and not for the white plaintiffs either. If similar requirements of color-blindness are extended to the great private universities under Title VI, they would face the same destructive choice of rapid resegregation or dramatic reduction in admission standards and overall quality. Appropriately limited affirmative action is the least restrictive means to avoid this choice and to preserve the great universities.

B. *Private Universities*

The foregoing discussion of the role of the flagship public research universities describes only a fraction of the extensive public higher education system in the United States. That focus is entirely appropriate because it is these front-rank institutions and their graduate and professional schools that have selective admissions programs and affirmative action programs as well. Second-tier public institutions, ranging from junior colleges and community colleges to commuter campuses and regionally-based, four-year schools, simply do not maintain the same level of student selectivity as to trigger the concerns in the affirmative action debate.

Restricting the comparison to the elite strata of private universities and the first-tier public universities reveals a fundamental overlap in the role these institutions play. Essentially all are heavily geared toward research; all are heavily dependent on governmental funding in terms of grants and student financial assistance; all contract directly with governmental entities; and all provide access to their students into the higher echelons of society. Indeed, except for the direct public subsidies of the public universities, there is little that distinguishes a Berkeley from a Stanford, and so on down the ladder of selectivity.

But the comparison is more fundamental than the financial support from the state, or even the overlaps between the legal commands of the Fourteenth

Amendment and Title VI.[43] All these universities play a distinct role in transmitting the knowledge and values of the society across generations and, at least since the advent of selective admissions, in allowing for new groups to replenish the elite strata of society. The special mission of the university has been recognized, at least tacitly, in the Supreme Court's occasional discussions of the value of academic freedom.[44] In *Bakke*, Justice Powell also invoked the First Amendment as a consideration in protecting some latitude for the universities to shape their admissions systems. In my view, this should not be seen as a free pass for universities to disregard legal commands that would apply elsewhere. Rather, the invocation of the First Amendment, drawn against the backdrop of prior recognition of academic freedom as a corresponding constitutional value, should mean that legal regulation must recognize the public role of the great universities.

Ultimately, context matters. Higher education is not municipal contracting, just as hiring is not firing, just as the disadvantages facing black Americans are not the same as those facing new immigrants. The pragmatic argument for allowing some race-consciousness in higher education admissions is just that: a pragmatic compromise to mediate the competing demands made on the great universities. It is further noteworthy, as chronicled in the large-scale recent study by William G. Bowen and Derek Bok,[45] that the integrative functions of affirmative action are strongly reproduced in the post-graduate successes of elite school alumni—from both the public and private universities. To the extent that the functional defense of affirmative action can succeed, to the extent that a legal defense can be based on the pragmatic accommodation of competing values in the mission of the first-tier academic institutions, that defense appears to apply to all the first-tier institutions, public or private.

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[43] Title VI extends the non-discrimination command of the Fourteenth Amendment to all educational institutions that receive federal funding for any institutional program, from research to federal guarantees of student loans.

[44] *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 196 (1952); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). For academic treatment of the important values underlying academic freedom, see David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990) and J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989).

[45] *See* Ethan Bronner, *Study Strongly Supports Affirmative Action in Admissions to Elite Colleges*, N.Y. TIMES, Sept. 9, 1998, at A24 (reviewing a study of affirmative action in higher education by William G. Bowen and Derek Bok).

V. WHAT SHOULD BE PERMISSIBLE?

In our amicus brief,[46] we propose a legal standard that seeks to accommodate the real concerns about unbounded affirmative action programs, while at the same time recognizing the real consequences of resegregation that would ensue under the harsh rationale of *Hopwood.* Our proposal follows.

A. *The Magnitude of the Preference*

At least since *United Steelworkers v. Weber*,[47] the Supreme Court has emphasized that, in order to be lawful, racial preferences must be modest in scope.[48] Justice Powell had made a similar point in his opinion in *Bakke*.[49] Unfortunately, the higher-education community and some judicial opinions interpreted Justice Powell's test to make constitutionality depend upon procedural mechanisms that conceal the actual workings of the affirmative action plan. This emphasis has made affirmative action more cumbersome and inefficient without imposing any real limits.

The magnitude of the racial preference is far more important to the legitimate interests of applicants than the details of administration. If it were possible to use racial preferences smaller than the margin of error in the measures used to predict academic success, then the amount of disruption of the interests of the non-preferred would be very small because such a preference would serve essentially as just a tie-breaking mechanism. Unfortunately, more than just tie-breaking is needed to get more than token minority representation in elite academic programs. But an appropriate affirmative action plan would limit preferences to a magnitude that is modest in proportion to the whole distribution of qualifications and that is consistent with a prospect of reasonable success for the beneficiaries of affirmative action. Universities could define a "modest" preference in ways that are readily administrable and judicially reviewable; for example, the preference could be limited to one standard deviation,[50] or even a fraction of a standard deviation, on the primary admissions predictor. There may be many other ways to specify a limit. The point here is simply that the magnitude of the preference should be a central

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[46] *See supra* note 36.

[47] 443 U.S. 193 (1979).

[48] *See id.* at 208.

[49] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316–19 (1978).

[50] *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (using corresponding statistical thresholds and adopting a two standard deviation rule for employment discrimination claims).

issue. It has been a mistake to equate differences of fifty percentiles in *Bakke*,[51] with two points on a scored interview in *Johnson v. Transportation Agency*,[52] and it would be a mistake to equate tie-breaking within a statistical margin of error with unlimited preferences in some other case.

B. *The Magnitude of the Program*

Except in the most circumscribed remedial settings,[53] the Supreme Court's review of affirmative action has always presumed that such preference programs would operate on the margin of established selection criteria. Thus, in *Johnson v. Transportation Agency*, the candidates were evaluated under established selection criteria; the preference given to the first female applicant for a road-maintenance supervisory position was administered after the candidates had been evaluated on these criteria, and, as noted above, the preference was a small fraction of a total derived from the established criteria.[54] This is far different from a program in which predetermined "diversity points" are given to all applicants and form part of the central selection criteria or in which "race norming" of applicant scores makes any cross-group comparisons impossible. In such circumstances, the fear of racial "balkanization" is most pronounced.[55] "Modest programs are less intrusive not simply because they are less visible, but because they allow the vast majority of applicants to rest secure in believing that the customary returns to achievement, perseverance, and merit will be honored."[56]

C. *No Permanent Pursuit of Racial Balance*

Affirmative action must have an endpoint. It is not a permanent source of special treatment, and the Supreme Court has long said that it cannot be used merely to achieve racial balance for its own sake.[57] *A fortiori* affirmative action cannot continue in institutions where minorities have actually become overrepresented, as appears to have been the case in the highly contentious litigation over teacher preferences in Piscataway. But where egregious

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[51] *See* 438 U.S. at 277 n.7.

[52] 480 U.S. 616, 625 (1987).

[53] *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987).

[54] *See Johnson*, 480 U.S. at 641–42.

[55] *See* Shaw v. Reno, 509 U.S. 630, 647–48 (1993) (condemning redistricting that excessively relies on race, and finding that, in gauging the extent of permissible racial considerations, "appearances do matter").

[56] Amici Brief, *supra* note 36, at *18.

[57] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (Powell, J.).

underrepresentation of minorities hampers an institution's ability to perform its mission, affirmative action emerges as the only solution. On the other hand, the need for a limiting principle, for an end-point that will prevent affirmative action programs from becoming institutionalized as a racial spoils system, reveals another difficulty with resting the defense of affirmative action primarily on the diversity justification. Because diversity emerges as an end in its own right in the post-*Bakke* world, its rationale argues for permanence as a feature of educational life—a goal that appears highly vulnerable under current equal protection law.[58]

D. *Clearly Defined and Verifiable Objectives*

This relates back to the extensive discussion earlier of the permissible objectives in affirmative action. While the pre-*Hopwood* caselaw recognizes both the achievement of diversity and the remediation of past discrimination as legitimate objectives, my argument is to recognize a broader mission for institutions of higher education that allows them to balance exclusivity with modest outreach to historically underrepresented groups.

E. *No Disruption of Settled Expectations*

Clearly, context matters. The generalization of the affirmative action discussion obscures the far less intrusive role of modest affirmative action in the higher education setting than in fact patterns such as those presented in *Taxman*.[59]

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[58] *See* Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, U. COLO. L. REV. 939, 940 ("[T]he diversity rationale is highly problematic and ought not to be made to stand alone."). Professor Malamud also notes that "[t]he [v]ery [p]ermanence of [d]iversity-[b]ased [a]ffirmative [a]ction [i]s [p]art of the [p]roblem." *Id.* at 966.

[59] The Supreme Court has long distinguished race-based layoff and discharge from hiring and admissions, and with good reason. *See* Johnson v. Transportation Agency, 480 U.S. 616, 638 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282–84 (1986) (plurality opinion); United Steelworkers v. Weber, 443 U.S. 193, 208 (1979). In *Taxman*, by contrast, the plaintiff invested nine years of her life in the Piscataway school district. *See* Piscataway Township Bd. of Educ. v. Taxman, 91 F.3d 1547, 1551 (3d Cir. 1996). She may well have had a property right in her job, protected by the Due Process Clause. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). She alone bore the cost of the challenged racial preference, and her identity was known before the decision was made.

By contrast, applicants for admission to universities have no portion of their life invested in any particular school, no property right in admission, and no right to a hearing on their application. They can, and most of them do, apply to numerous schools; they cannot reasonably rely on the prospect of admission to any particular school.

The costs of affirmative action are spread over a wide pool of applicants, and for any individual applicant considered *ex ante*, affirmative action has little effect on the odds of admission. The strongest applicants will be admitted with or without affirmative action. The marginal applicants would have far less than an even chance of admission without affirmative action, and only a slightly lesser chance with affirmative action. After the fact, it is difficult to identify the particular applicants whose applications were actually affected by affirmative action. It is appropriate to carefully define the limits on affirmative action, but context matters, and the appropriate limits in admissions decisions should not be nearly so stringent as the appropriate limits in layoff decisions.

VI. CONCLUSION: *BAKKE*'S LEGACY

Having gone through the *Hopwood* wars, I found myself, surprisingly, with new-found respect for Powell's opinion in *Bakke*.[60] I now understand *Bakke* to instruct the universities of this country to proceed with the delicate mission of integrating higher education, but with extreme attention to the volatility of excessively apparent racial considerations. *Bakke* can be seen as deriving a central lesson from the failure of court-imposed desegregation at the K–12 level. That lesson is that where the racial considerations in student selection and assignment are too central, too visible, and too at odds with longstanding community practices, they are almost certain to fail. Post-*Bakke* affirmative action offered an alternative. The premise was that institutions of higher education were to diminish the visibility of the racial considerations and to keep the part of the program in which race was dispositive at the margin rather than the heart of admissions. Under these conditions, courts would look favorably on a concerted program of increasing minority (and in particular black) representation in higher education. As we stated in our amicus brief: "Modest programs are less intrusive not simply because they are less visible, but because they allow the vast majority of applicants to rest secure in believing that the

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[60] It is interesting to watch the emergent European Community law evolve toward a *Bakke*-like compromise. In *Kalanke v. Freie Hansestadt Bremen*, the European Court of Justice (ECJ) read the equal treatment directive as forbidding any preferential treatment of female applicants, even in industries that had historically been sex-segregated. *See* Kalanke v. Freie Hansestadt Bremen, 1996 CEC (CCH) 208, 218. The ECJ, following a logic not unlike the Fifth Circuit's in *Hopwood*, found the anti-discrimination principle offended by any manner of differential selection. *See id.* Two years later, however, in *Marschall v. Land Nordhein-Westfalen*, the ECJ changed direction and allowed preferential treatment of women in historically sex-segregated industries so long as there were objective assessments of the capabilities of all candidates and so long as there were no positions categorically set aside for women—an outcome strikingly reminiscent of *Bakke*. *See* Marschall v. Land Nordhein-Westfalen, 1998 CEC (CCH) 152, 166.

customary returns to achievement, perseverance, and merit will be honored."[61] The result was that for a twenty-five-year period, modest affirmative action achieved a measure of integration that far outstripped any successes reached by the more intrusive mechanisms of school busing.[62]

Were there costs? Certainly. Affirmative action is the product of human agency and is certain to carry with it the limitations of its creators. That some schools fashioned programs that were sloppy or simply bad is also unfortunately and inescapably certain. At some levels of disparity in prior achievement, admission to competitive institutions is a recipe for failure for students who have little chance of competing adequately or, in some cases, of even graduating. Moreover, the difficulties with some programs challenged the integrity of the university mission that, in our view, could best be protected by affirmative action. Thus, it is also unfortunately true that some programs bred their own sources of resentment and facilitated silly challenges to knowledge, standards, and any conception of merit.

Nonetheless, I am still persuaded that these problems operated at the margins. The programs were difficult to perfect, but the problem of race is also difficult.

Ironically, one of the virtues of *Bakke* could very well portend its undoing. By lowering the visibility of racial preferences, *Bakke* allowed its defenders to try to understate or even deny the realities of the preferences that were institutionalized.[63] One of the earliest decisions made in the course of the

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[61] Amici Brief, *supra* note 36, at *18.

[62] A less charitable view would hold that the widespread acceptance of affirmative action by university administrators allowed hostile views to be silenced. "From its inception, however, affirmative action has been treated as beyond criticism. People expressing misgivings have routinely been vilified as self-serving foes of racial equality. Black critics have tended to be labeled as traitors to their race, whites as promoters of white supremacy." TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 146 (1995). While the defense of affirmative action has no doubt fallen at times under the unfortunate sway of political correctness, I believe that the combination of modesty of the programs and the ultimate desirability of the integration of the major universities is what primarily accounted for the tacit acceptance of these programs.

[63] One of the conventions of liberal theory is the belief in the value of "transparency" in public decisionmaking. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 133 (1971) (describing transparency of allocation systems as a virtue of liberal society). It is noteworthy, however, that prominent defenders of affirmative action, such as Chris Edley, must contemplate departures from their normal Rawlsian commitment to publicity in order to caution that perhaps the workings of affirmative action should not be publicly discussed. Thus, citing ill-defined "political and social costs," Edley proclaims, "[c]ontroversy has a price, and divisiveness takes its toll. In race matters, the price may be too high to justify the supposed benefits of transparency anyway." CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE 149 (1997). Such a head-in-the-sand option is not available in the course of litigation.

Hopwood litigation was also one of the most unavoidable: to be perfectly candid in admitting that a system of racial preferences was in operation and then proceeding to explain openly why that was necessary. My final conclusion is that if affirmative action cannot be defended on this terrain, it cannot be defended at all.