

## Articles

# Each Other's Harvest: Diversity's Deeper Meaning

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I AM DEEPLY GRATEFUL for the opportunity to be part of this symposium to honor and remember my friend Trina Grillo. Trina was an extraordinary human being and a rare and wonderful teacher. I miss her. I miss her brilliant mind, her wondrous laughter, and her careful love. I miss her courageous spirit and the feel of her shoulder next to mine in the day-to-day struggle to make this a more just world. Trina always required that her friends speak the truth to her as best we could. Because I know her spirit is with us today, I will try to speak as plainly as I can about diversity in legal education, the meaning of affirmative action, and the ongoing fight for justice to which she committed her life.

I began my career as a law teacher at the University of San Francisco in 1974. I was one of four new professors hired by U.S.F. that year. Three of us, Stephanie Wildman, David Garcia, and I, did not look like who our students expected to see when they walked into their classes. U.S.F. had never had a Chicano law professor before, and Professor Wildman and I were, respectively, the only woman and the only African American on the faculty. While a black woman had taught at U.S.F. two years previously, her stay was short lived; we were U.S.F.'s first diversity hires. We were pioneers integrating a segregated institution, and we were proud to be the beneficiaries of affirmative action.<sup>1</sup>

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1. What is now called affirmative action, diversity, and "preferential treatment," began as old fashioned desegregation and, in the vast majority of instances, is still little more than a token effort to remedy the effects of old fashioned race and sex discrimination. *See, e.g., Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996) (documenting past and ongoing segregation and discrimination in the Texas educational system); CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997) (providing a personalized history of affirmative action and its asset to all of soci-

The student body was as white as the faculty. There was only one black student in my constitutional law class that first semester. Later I learned that, after my first class, a small delegation of white students had gone to the dean to complain that they had been assigned to my constitutional law section. They felt short changed that their teacher was the affirmative action hire. I remember feeling a mixture of pain and anger at hearing this. They had not bothered to find out who I was, to discover that even by traditional criteria I was easily as well qualified as any of my colleagues. However, I was not surprised. The ideological assault on affirmative action had begun in earnest<sup>2</sup> and the legal attack would soon follow.<sup>3</sup> Even at this early stage in the integration of the law school world, when the number of people of color teaching and studying law was minuscule, the white students were familiar with the rhetoric of "reverse discrimination" and "preferential treatment." They feared that our presence would somehow mean less room for them.

In later years, when I welcomed beginning first year minority students admitted under U.S.F.'s fledgling affirmative action program, I told them this story of my first days in teaching. I wanted them to know that their black professor, who by then had won the school's teaching award and built a reputation as an up-and-coming young scholar, understood what they were about to experience. They would be asked what they had scored on the LSAT, as if that score defined their whole being. Their classmates would tell them about a white college roommate with better scores whose place they had taken. They would be accused of lowering the standards of the

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ety); Peter Charles Hoffer, *Blind to History: The Use of History in Affirmative Action Suits: Another Look at City of Richmond v. J.A. Croson Co.*, 23 RUTGERS L.J. 271 (1992) (criticizing the Supreme Court majority in *Croson* for ignoring the extensive historical record of discrimination against blacks in the contracting industry in Richmond, Virginia).

2. The shift in the attitudes of most white Americans toward race relations, the collapse of the old civil rights coalition, and the evolution of a "new racism" marked by the rhetoric of victim blaming and reverse discrimination, is discussed in JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* (1979). See also LAWRENCE & MATSUDA, *supra* note 1, at 46-53 (discussing the historical origins and context of the backlash against affirmative action as well as the body of academic scholarship that shaped the anti-affirmative action rhetoric and gave the political backlash intellectual legitimacy); STEVEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY* 97-175 (1995) (describing the ways in which political retrenchment over the last 20 years has spawned "a scholarship of backlash"). Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (describing increasing conservative hostility towards civil rights reforms).

3. The first case challenging an affirmative action program to reach the Supreme Court was *DeFunis v. Odegard*, 416 U.S. 312 (1974) (vacating and remanding the case based on mootness because, by the time the case was to be heard by the Supreme Court, the petitioner was in his final quarter of study and no longer faced expulsion). Allen Bakke, the plaintiff in the landmark case of *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), first filed suit in 1975.

entire school and told that they were responsible for the declining bar pass rate.<sup>4</sup>

The message would also come in implicit forms. It might take the guise of lowered expectations or surprise at demonstrated excellence; but they would hear the underlying message: "You do not belong here." My first lesson to them was that this message was false. I wanted them to understand that these were words in defense of privilege disguised as merit. They were as bright as any of their classmates. If separate and unequal educational systems had deprived them of skills given to their white classmates, these were skills that could be learned and mastered.<sup>5</sup>

While they could match their peers at every task that was put before them, I wanted them to remember that they were not here simply to play the game as it had always been played, adding a soupçon of colorful pigment and exotic culture to the world of the privileged. They were here to help change the law school, and, when they graduated, to change the institutions where they would work: the firms, the boards, the prosecutor's and public defender's offices, the judiciary, the boards of supervisors, and the state legislatures. They were admitted because, in addition to their intellect and academic skills, they brought with them special gifts of experience, understanding, insight, anger, compassion, and even love, that are the legacy of

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4. See Lino Graglia, *Special Admission of the 'Culturally Deprived' to Law School*, 3 BLACK L.J. 232 (1973) (arguing that special admission policies favoring minorities will result in admission of unqualified students, bringing down the overall academic quality of the institutions which admit them, and resulting in personal failure and frustrations for the students themselves); see also Lino Graglia, *Podberesky, Hopwood, and Adarand: Implications for the Future of Race-Based Programs*, 16 N. ILL. U. L. REV. 287, 289 (1996) (echoing, in this later article, as in the earlier article, that students admitted under preferential programs are not in the "same academic ball-park" as regular admittees, and the obvious result will be "frustration, humiliation, and resentment") [hereinafter Graglia, *Podberesky*].

5. The University of San Francisco was one of the pioneering schools in establishing effective academic support programs. Jeffrey Kupers, Narissa Sklov, and Maxine Auerbach believed and proved that students from educationally disadvantaged backgrounds could not only do the work but excel. Trina Grillo became the first full time tenure track faculty member to head the program at U.S.F., and she was nationally recognized as a trailblazer and authority in the field of academic support. Several essays in this symposium discuss academic support programs. See, e.g., Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839 (1997); Martha Peters, *Bridging Troubled Waters: Academic Support's Role in Modeling and "Helping" in Legal Education*, 31 U.S.F. L. REV. 861 (1997); see also Charles L. Finke, *Affirmative Action in Law School Academic Support Programs*, 39 J. LEGAL EDUC. 55 (1989); Kristine S. Knapland and Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157 (1995); Paul Wangerin, *Law School Academic Support Programs*, 40 HASTINGS L.J. 771 (1989); Kristine Knaplund, *The Role of Academic Support at UCLA*, SALT EQUALIZER, April, 1994, at 11; Kent D. Lollis, *The Academic Assistance Program Initiatives of the Law School Admission Council*, *id.* at 8; Paula Lustbader, *The Academic Resource Center at Puget Sound*, *id.* at 12; Laurie Zimet, *The Academic Success Program at Santa Clara*, *id.* at 9.

struggle against oppression. When they graduated, they would take these gifts back home again to their families and communities, enhanced by new skills and an increased understanding of the politics of power that is law. Just as important, these were gifts to share with white classmates, teachers, and colleagues and with friends and allies from other communities of color. Their's were the gifts most necessary to the achievement of our collective liberation from the disease of racism.<sup>6</sup>

A little over a year ago, I was invited to speak at the induction ceremony for the appointment of Maria Elena James as a United States Magistrate Judge in the U.S. District Court for the Northern District of California. Judge James was one of my students at U.S.F. as was her sister Josepha James, who is now a highly regarded prosecutor in Alameda County. The Federal Court building auditorium in Oakland was filled to overflowing with Maria's large and loving family and with people from every walk of life whose lives had been touched by this gifted and generous woman. It was a multicultural gathering that embodied what is best about northern California. When the dignitaries in the audience were introduced I could not help but swell with pride. Among them were two Superior Court Judges, Martin Jenkins and Peggy Hora, and the U.S. Attorney, Mike Yamaguchi. They had all been my students at U.S.F., as had many others in that room.

On the stage with the other federal judges sat Judge Sandra Brown Armstrong. Sandra had received one of the two highest grades in my evening Constitutional law class. I smiled as I remembered the day that Sandra came to talk with me in my office. As she rummaged through her handbag to find a pen, she pulled out a rather large gun and placed it on my desk. "Oh, you didn't know that I was a police officer?" she said when she saw the shocked look on my face.<sup>7</sup>

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6. I have written about the ubiquity of the disease of racism in a society where, even in the most benign of settings, our children learn the lessons of white supremacy. I have also criticized the Supreme Court's discriminatory intent requirement established in *Washington v. Davis*, 426 U.S. 229 (1976), for its failure to recognize this reality. See Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1 (1995) [hereinafter Lawrence, *Color-Blindness*]; Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

7. Before becoming a federal judge, Sandra Armstrong served as Deputy District Attorney in Alameda County (1978-79, 1980-82), a trial attorney in the Department of Justice (1982-83), a Commissioner on the Consumer Product Safety Commission (1983-86), and a Commissioner on the United States Parole Commission (1986-89). For Judge Armstrong's resumé see 1 *Almanac of the Federal Judiciary, Ninth Circuit* 27-29. Ironically, Judge Armstrong's extremely successful career in public service may have been the indirect consequence of racial discrimination in San Francisco's private bar. I remember Sandra coming to speak to me about her disappointment when, despite her almost straight A average, she did not receive an offer from an elite law firm with which she had interviewed.

These individuals, and many others like them, have changed the face of San Francisco's and the nation's bar. They were part of a generation of minority and women students who came to this law school in the early years of affirmative action. They ignored the many messages that told them they did not belong, and they became valued members of this community. They founded the Black American Law Students Association (BALSA), LaRaza, the Asian-Pacific American Law Students Association (APALSA), and the Women's Law Association. They made life-long friends from all races. And when Allan Bakke filed his "reverse discrimination" suit, launching the first full scale assault against affirmative action, they were in the front lines of resistance against that assault. They marched and held rallies and had teach-ins. They signed petitions and helped draft amicus briefs. When U.S.F.'s dean submitted a proposal to the faculty that would have decreased the number of minority students by half, a coalition of Black, Latino, Asian, and progressive white students drafted a counter proposal and staged a demonstration that forced us to move the faculty meeting across the street to a gymnasium to accommodate the crowd.<sup>8</sup> An understanding of what would be lost if these doors were once again shut to people of color and a deep commitment to the struggle for racial justice were their gifts to their teachers and classmates. The struggle itself was a critical part of the education that made them what they are today.

On October 12, 1977, the United States Supreme Court heard oral arguments in *Regents of the University of California v. Bakke*.<sup>9</sup> In cities across the country, multiracial crowds of young people raised placards and chanted "We Won't Go Back," putting the Court and the world on notice: Whatever the outcome of the case, the struggle would continue. The protesters would not accept a return to the days when they and their communities were excluded from institutions of power and privilege.

When the Court announced its decision, it was sharply divided. Four Justices voted to strike down the University of California medical school's affirmative action program and order Allan Bakke's admission. Another four justices voted to uphold the U.C. Davis admissions program.

Justice Lewis F. Powell cast the deciding vote in an opinion that straddled the two camps in the Court and struck a compromise between the forces for and against affirmative action. He agreed with four of his colleagues that Bakke had been wronged by the medical school, but he agreed with the other four that it was legitimate to use race as a factor in selecting

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8. See ERIC ABRAHAMSON, *THE UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW: A HISTORY 1912-1987* 112 (1987).

9. 438 U.S. 265 (1978).

applicants.<sup>10</sup> Powell's opinion said that all racial classifications "are suspect" and can only be justified if necessary to achieve a "compelling state interest."<sup>11</sup> Remedying past societal discrimination was not such a compelling interest, he said.<sup>12</sup> Societal discrimination was "too amorphous,"<sup>13</sup> but a court, a legislature, or a government agency could consider race in order to remedy specifically identified past discriminatory acts that violated the law.<sup>14</sup>

Furthermore, a university could consider race in admissions if it was essential to the creation of a diverse student body.<sup>15</sup> A university faculty, he argued, had a compelling interest in exercising its First Amendment right to academic freedom; the freedom to select a student body of its choosing was part of that right. If a university faculty believed that a racially diverse student body was important to its students' education, and it could only achieve such a student body if it considered the race of applicants, then it was constitutional to consider the race of an applicant as one of many factors in the admissions process.<sup>16</sup>

Almost twenty years after the Supreme Court announced its decision in *Bakke*, we are in the midst of another assault on affirmative action. Here, in California, the anti-affirmative action attack began with the University of California Regents' ban on affirmative action in the nation's largest public university. Shortly thereafter, the voters of California passed Proposition 209, which seeks to amend the California Constitution to outlaw race and gender based affirmative action in all public agencies.<sup>17</sup> In Texas, a Fifth

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10. See *id.* at 315–20.

11. Justice Powell stated: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 291.

12. See *id.* at 305–06.

13. *Id.* at 307.

14. See *id.* at 307–08.

15. See *id.* at 311.

16. The Court in *Bakke* commented on a diverse student body, stating:

The atmosphere of 'speculation, experiment, and creation'—so essential to higher education—is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the '[N]ation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples.

Thus in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas' petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

*Id.* at 312–313 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

17. See CAL. CONST. art. I, § 31(a); see also *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), *rev'd*, 110 F.3d 1431 (9th Cir. 1997). See generally, Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q.

Circuit Court of Appeals panel invalidated the admissions program at that state's flagship university law school,<sup>18</sup> and once again the op-ed pages and the talk shows are filled with the old and familiar rhetoric of "racial preference," "anti-merit," "quota," "stigma," and "reverse discrimination." The Supreme Court has severely limited the scope of affirmative action in the workplace by its decisions in *City of Richmond v. Croson*<sup>19</sup> and *Adarand v. Peña*,<sup>20</sup> and, although the Court did not grant certiorari in *Hopwood*, some are predicting the end of affirmative action in higher education.<sup>21</sup>

## I. The Future of Racial Diversity As a Compelling Interest

What is the future of affirmative action in higher education and in our law schools? Many people believe the answer to that question lies in *Bakke's* meaning and in its fate. Did the *Bakke* Court set out a justification for affirmative action in education that is distinguishable from the Court's decisions invalidating contracting set-asides in *Croson* and *Adarand*? If so, is that justification still viable given the current composition of the Supreme Court?

Opponents of affirmative action contend that *Bakke* is dead. They argue that *Croson* and *Adarand* make clear that the only compelling interest that justifies race conscious affirmative action is the remedy of the continu-

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999 (1996) (assessing only the impact of the California Civil Rights Initiative on women and minorities and not on its constitutionality); Sam Gideon Anson, *Indecent Proposal: The Selling of CCRI. How Proposition 209 Evolved From Crusade to Wedge Issue*, L.A. WEEKLY, Nov. 1, 1996, at 34; Ken Chavez, *Affirmative Action Ban Wins*, SACRAMENTO BEE, Nov. 6, 1996, at A1.

18. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

19. 488 U.S. 469 (1989) (striking down Richmond's plan requiring prime contractors awarded city construction contracts to sub-contract at least 30% of the dollar amount to one or more minority business enterprises).

20. 515 U.S. 200 (1995) (holding that a federal program designed to provide highway contracts to disadvantaged business enterprises must withstand strict scrutiny).

21. See, e.g., Robert Alt, *Toward Equal Protection: A Review of Affirmative Action*, 36 WASHBURN L.J. 179, 189, 194 n.95 (1997) (arguing that *Hopwood*, *Taxman*, and Proposition 209 together form part of a national movement against preferential policies and adding that after *Hopwood*, when the Fifth Circuit rejected past discrimination as a viable defense for such a preferential policy, despite the long proven record of discrimination in Texas, in the future it will be very hard to use past discrimination effectively as a defense for affirmative action policies); Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839 (1996) (arguing that diversity must be justified on First Amendment grounds as well as Equal Protection grounds, and that all such justifications must fail, because attempting to create diversity on campus through affirmative action programs conflicts with the fundamental free speech values of the First Amendment); Graglia, *Podberesky*, supra note 4 (arguing that the holdings in *Podberesky*, *Hopwood*, and *Adarand*, indicate increased skepticism and stricter scrutiny towards racial preference programs by courts, and that this stiffening of opinion will eventually lead to the elimination of all such programs).

ing effects of specifically identified past discrimination,<sup>22</sup> and that such remedial programs must be narrowly tailored to that purpose.<sup>23</sup> Thus, in *Hopwood*, the Fifth Circuit opined that "the purpose of achieving a diverse student body is not a compelling interest."<sup>24</sup> The court noted that Supreme Court decisions after *Bakke* "state that non-remedial state interests will never justify racial classifications,"<sup>25</sup> and insisted that "classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection."<sup>26</sup>

By contrast, affirmative action's supporters have looked to Powell's *Bakke* decision for the salvation of affirmative action in higher education. They have argued that *Croson* and *Adarand* have not overruled *Bakke*, and that Powell's diversity reasoning is uniquely applicable to the educational setting where the pedagogic purposes of affirmative action, flexible processes of admissions, and faculty hiring distinguish it from the contract set-aside cases.<sup>27</sup>

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22. See *Hopwood*, 78 F.3d at 952-55; *Podberesky v. Kirwan*, 38 F.3d 147, 153, 155 (4th Cir. 1994) (en banc), *reh'g denied*, 46 F.3d 5 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995); see also Chen, *supra*, note 21, at 1857-58; Graglia, *Podberesky*, *supra* note 4, at 292, 293.

23. See *Podberesky*, 38 F.3d at 153, 158.

24. *Hopwood*, 78 F.3d at 944.

25. *Id.*

26. *Id.*

27. One strategy for defending affirmative action programs in university admissions and hiring has been to accept Justice Powell's proffered compromise and rely upon his distinction between a faculty's pedagogic interest in diversity and its interest in remedying past societal discrimination. If the use of race to achieve educational diversity can be distinguished from race conscious policies designed to integrate the work place or give minorities greater access to government contracts, then university programs might be saved from the increasingly fatal strict scrutiny to which the latter have been subjected. See, e.g., Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745 (1996).

Amar and Katyal, in an article that is both a careful examination of the doctrinal precedent and a thoughtful consideration of the policy-based and structural arguments for diversity, see the vision of university diversity as "the heart and soul of *Bakke*." *Id.* at 1750. They argue that the most important distinction between contracting set-asides and education is that set-asides can "balkanize" and "encourag[e] segregation" while education "unites people from different walks of life." *Id.* at 1749. "Integrated education . . . does not just benefit minorities—it advantages *all* students in a distinctive way, by bringing rich and poor, black and white, urban and rural, together to teach and learn from each other as democratic equals." *Id.*

Amar and Katyal's otherwise powerful argument for the benefits of racially integrated schooling is diminished by their need to maintain Powell's dichotomy between the forward looking purpose of diversity (learning about and from one another) and the backward looking purpose of rectifying societal racism. See *id.* at 1776. For example, they speak of "bringing elements of society into a . . . common conversation" without noting that our nation's historical and contemporary racism must be a primary subject of that conversation. They argue further that *Brown v. Board of Education's* mandate that segregated schools be dismantled makes education "sui generis," and, even if affirmative action is unconstitutional in other areas, schools may take race into account to bring races together. See *id.* at 1775. They note that Powell is careful to distinguish this special role for education from the "broad remediation of 'societal discrimination.'" *Id.* But if



As an advocate of affirmative action, I have argued not just for the maintenance of affirmative action but for its expansion.<sup>28</sup> I stand in solidarity with my academic colleagues and with the public interest bar who pursue what they no doubt see as the most pragmatic strategy for saving affirmative action in higher education: to separate the fight for integration in the university from the doctrinally undermined fight for integration in the workplace and to distinguish the diversity rationale from the remedial rationale. But I believe that this distinction is misconceived. The diversity rationale is inseparable from the purpose of remedying our society's racism.

More importantly, I believe that this seemingly "pragmatic" approach is a misguided strategy. In the end, the fight for affirmative action in our universities and in our workplaces is a political struggle. To rely upon the formalism of legal doctrine to save university affirmative action will only further entrench existing regimes of race, gender, and class privilege.<sup>29</sup>

My purpose here is to articulate a deeper meaning for diversity. I argue that diversity cannot be an end in itself—it is substanceless. It has no inherent meaning and cannot be a compelling interest unless we ask the prior question: diversity to what purpose? The answer to this question is that we seek racial diversity in our student bodies and faculties because a central mission of the university must be the eradication of America's racism. We cannot pursue that mission without the collaboration of significant numbers of those who have experienced and continue to experience racial subordination. This freedom-fighting purpose may be only one of several reasons for seeking racial diversity in the academy, but it should be the primary one. Once articulated, it makes apparent the necessary connection between affirmative action's backward-looking purpose of remedying the effects of our nation's history of slavery and racial apartheid and its forward-looking

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*Brown* made school integration a special case, it was because segregated schools were where black and white children learned the societal lesson of white supremacy and black inferiority. Therefore, schools were where that message should be unlearned. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campuses*, 1990 DUKE L.J. 431 (1990) (arguing that *Brown* should be understood to hold that segregation violates the equal protection clause because it conveys the defamatory message of black inferiority).

28. See LAWRENCE & MATSUDA, *supra* note 1. The authors offer:

a vision of affirmative action that includes those disadvantaged by class, as well as those excluded for other social reasons, including homophobia. Nondiscrimination is not enough when powerful state-supported forces systematically keep some people out of the social world: devalued, silenced, casually violated. In a time when many say affirmative action has gone too far, we say it has not gone far enough and argue for aggressive expansion of existing programs.

*Id.* at 7.

29. See *id.* at 41–58.

purpose of preparing students for the work of fighting the disease of racism and creating a better world.<sup>30</sup>

## II. The Shallow Meaning of Diversity

I begin by revisiting Justice Powell's *Bakke* opinion. Two aspects of that opinion contribute to a shallow and ultimately retrogressive understanding of diversity. The first is Powell's division of the state's judicial interests into backward-looking and forward-looking affirmative action.<sup>31</sup> The second is his argument that the school's interest in racial diversity is grounded in its first amendment rights to free speech.<sup>32</sup>

Powell saw two university interests in race-conscious admissions: (1) remedial interests, where affirmative action is intended to provide redress for or correct the effects of past harms,<sup>33</sup> and (2) institutional interests, where affirmative action's purpose is the achievement of the university's pedagogical goals of transmitting certain information, ideas, and mores.<sup>34</sup> Powell believed remedial affirmative action is appropriate only when fault is established and a blameworthy perpetrator identified.<sup>35</sup> Affirmative action in pursuit of the university's academic interest in diversity is more easily justified and survives strict scrutiny unless quotas are employed.<sup>36</sup> By de-coupling these two interests and treating them differently, Powell failed to recognize that they are two sides of the same coin. The institutional interest in racial diversity is compelling because the university must have a racially diverse student body to play its part in remedying historic societal racism. It is the experience of societal racism that makes students of color uniquely qualified to participate in this institutional enterprise.

## III. The "Big Lie": Limiting Remedies for Historical Racism

For Powell, remedial, or backwards-looking, affirmative action is only permissible when it is designed to correct identified instances of past dis-

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30. See Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986). Sullivan argues that the Supreme Court has only approved affirmative action as a remedy for past discrimination, but has refused to justify it as a path to a "racially integrated future." *Id.* at 80. The result, she says, is that in the Court's view, "affirmative action should be compensatory only, not 'affirmative' at all." *Id.* at 86.

31. See discussion *infra* Part III.

32. See discussion *infra* Part IV.

33. See *Bakke*, 438 U.S. 265, 307, 311-13 (1978).

34. See *id.* at 313.

35. See *id.* at 301, 310.

36. See *id.* at 316-19.

crimination.<sup>37</sup> Societal discrimination is too “amorphous.”<sup>38</sup> Today’s white applicant should not be held responsible for the sins of the distant past.<sup>39</sup> We are a “nation of minorities,”<sup>40</sup> Powell argued, most of whom have been discriminated against at some point in our history. Justice O’Connor embraced the idea of a limited use of remedial affirmative action in her majority opinions in *Croson* and *Adarand* and it is the view of a majority of the court today.<sup>41</sup>

Alan Freeman called this view of antidiscrimination law the “perpetrator perspective.”<sup>42</sup> It is a model of equal protection that was firmly established by the discriminatory intent requirement of *Washington v. Davis*.<sup>43</sup> No matter how extensive the tangible evidence of continuing effects of past racism, there is no legally cognizable harm unless a blameworthy perpetrator is identified and shown to have caused the injury.<sup>44</sup> For constitutional purposes, this perpetrator must also be a state actor.<sup>45</sup> By this judicial sleight of hand, the injuries of past and contemporary discrimination are transformed into no injury at all.<sup>46</sup>

I call this “the Big Lie.” Despite overwhelming evidence of continuing racial discrimination,<sup>47</sup> the Court tells us our nation has overcome its racism.<sup>48</sup> To believe this we must accept a formal and extremely narrow defi-

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37. See *id.* at 307–09.

38. See *id.* at 307.

39. See *id.*

40. *Id.* at 292.

41. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 499 (1989).

42. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–54 (1978).

43. 426 U.S. 229, 238–42 (1976); see also Freeman, *supra* note 42, at 1052–57.

44. 426 U.S. at 238–42. See generally Freeman, *supra* note 42 (arguing that civil rights law in the twenty-five years after *Brown* has served more to rationalize the continuing effects of racial discrimination than to produce any genuine liberation from race and class oppression); Charles R. Lawrence III, ‘Justice’ or ‘Just Us’: *Racism and the Role of Ideology*, 35 STAN. L. REV. 831, 848–850 (1983) [hereinafter Lawrence, ‘Justice’] (arguing that the equal protection doctrine promotes an ideological imagery that fosters racism).

45. See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

46. For a discussion of how the state action doctrine and the discriminatory intent requirement in *Washington v. Davis* transform the real life injury of racial discrimination into the absence of race discrimination, see Freeman, *supra* note 42. See also Lawrence, ‘Justice,’ *supra* note 44, at 847–848.

47. The recently formed Presidential Advisory Board on Race has called the problem “‘virtually intractable,’” and has noted that it continues to influence almost all aspects of American life including policies regulating the economy, education, health, even the environment. See *Board Hopes to Destroy ‘Intractable’ Racism: U.S. Must Upgrade its Worst Schools, Open Marketplace*, ARIZ. REPUBLIC, July 15, 1997, at A3.

48. See *Croson*, 488 U.S. at 552 (Marshall, J., dissenting) (agreeing that the Court believes our nation has overcome its racism).

dition of racism: only self-professed bigots are racists and none of us is responsible for perpetuating even very recent white supremacy. The big lie is seductive because most Americans want to believe it is true. Powell's restriction on backward-looking affirmative action incorporates the big lie into affirmative action doctrine.<sup>49</sup>

The recent Fifth Circuit decision in *Hopwood v. Texas*<sup>50</sup> is an example of Powell's restriction on remedial affirmative action taken to its logical extreme. Cheryl Hopwood and three other rejected white applicants sued the University of Texas Law School, claiming that the school's affirmative action admissions program violated their constitutional right to equal protection of the laws.<sup>51</sup> Like Allen Bakke, they argued that the program amounted to reverse discrimination because their scores on traditional admissions criteria were higher than those of most Black and Mexican American applicants.<sup>52</sup>

A federal district court held that a revised version of the law school admissions program, that considered race as a plus, was constitutional because it was necessary to remedy the continuing effects of a history of official discrimination in primary, secondary, and higher education in Texas.<sup>53</sup> This discrimination was "well documented in history books, case law, and the state's legislative history" said the District Court, and it was "not a relic of the past."<sup>54</sup> In 1994, desegregation lawsuits remained pending against over forty different Texas school districts.<sup>55</sup> Although the public school population in Texas was approximately half white and half minority, the vast majority of both white and minority students attended schools that were segregated in fact, if not by law.<sup>56</sup> The high school graduation rate for Whites was 81.5% compared to 66.1% for Blacks and 44.6% for Hispanics.<sup>57</sup>

The Office of Civil Rights (OCR) in the United States Department of Education investigated Texas universities between 1978 and 1980 and found that Texas had "failed to eliminate vestiges of its former de jure ra-

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49. See LAWRENCE & MATSUDA, *supra* note 1, at 67-87 (discussing how the argument against affirmative action is premised upon a denial of the existence of past and continuing racism); see also Lawrence, *Color-Blindness*, *supra* note 6, at 3-9.

50. 78 F.3d 932 (5th Cir. 1996)

51. See *id.* at 938.

52. See *id.* at 937.

53. See *Hopwood v. Texas*, 861 F. Supp. 551, 578 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996).

54. *Id.* at 554.

55. See *id.*

56. See *id.*

57. See *id.* at 554 n.3.

cially dual system . . . which segregated blacks and whites . . .”<sup>58</sup> and that there were strong indications of discrimination against Hispanics. In 1994, Texas had still not satisfied the OCR that it had eliminated its segregated system of public higher education.<sup>59</sup>

Cheryl Hopwood and her co-plaintiffs appealed the district court’s ruling to the Fifth Circuit Court of Appeals.<sup>60</sup> In the 1960s, this deep-south court was known for its fearless and heroic judges, white southerners who dared to enforce the rights of blacks in the face of ostracism by their own communities and threats from the Klan and the White Citizens Council.<sup>61</sup> These men understood that the south they loved must face up to its racism before it could be healed of it. In contrast, the Fifth Circuit of the 1990s was dominated by conservative judges committed to turning back the constitutional clock to a time before the liberal Warren Court had set a racial revolution in motion. All three of the judges on the panel that heard the *Hopwood* appeal were Reagan and Bush appointees,<sup>62</sup> and, not surprisingly, they voted to reverse the district court and declare the Texas admissions program unconstitutional.<sup>63</sup>

The opening sentences of the Fifth Circuit opinion reversing the district court were typical of the upside-down rhetoric of “reverse discrimination.”

[I]n order to increase the enrollment of certain favored classes of minority students, the University of Texas School of Law discriminates in favor of those applicants by giving substantial racial preferences in its admissions program. The beneficiaries of this system are blacks and Mexican Americans, to the detriment of whites and non-preferred minorities.<sup>64</sup>

According to the circuit court judges, Black and Mexican American beneficiaries of affirmative action were a “favored class.” In fact, the University of Texas had instituted affirmative action precisely because these minority groups were disfavored by traditional University admissions practices and by historical and contemporary racial discrimination in the Texas educational system.

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58. *Id.* at 556.

59. *See id.* at 556–57.

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

61. *See generally* JACK BASS, UNLIKELY HEROES (University of Alabama Press 1990) (1981); J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961); FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978).

62. Judge Jerry Smith, the author of the court’s opinion, was appointed by President Reagan. *See 2 Almanac of the Federal Judiciary, Fifth Circuit* 18. He was joined by Judges DeMoss and Weiner, both of whom were appointed by President Bush. *See id.* at 6, 20.

63. *See Hopwood*, 78 F.3d at 934–35.

64. *Id.* at 934.

Texas is a state with an active Ku Klux Klan and regularly reported hate crimes against people of color.<sup>65</sup> Texas only admitted Blacks to its law school when it was forced to do so by the United States Supreme Court in 1950.<sup>66</sup> As recently as 1960, the University of Texas segregated Mexican American students in campus housing and assigned them to a dormitory known as "the barracks." Until the mid 1960s, a Texas Board of Regents policy prohibited Blacks from living in or visiting white dorms.<sup>67</sup> All of this was erased by the Fifth Circuit's willful disregard of the district court's detailed findings of fact. Adopting Powell's reasoning, they noted that the state did not have a compelling interest in remedying the present effects of societal discrimination,<sup>68</sup> and that the district court erred in expanding the remedial justification to reach all public education within the state because that too was a "vague and amorphous" injury.<sup>69</sup>

#### IV. Constitutionalizing White Power

The second troublesome feature of Powell's *Bakke* opinion is his argument that the attainment of a diverse student body is compelling because it furthers the university's First Amendment right of academic freedom.<sup>70</sup> The First Amendment protects a university faculty's right to determine the content of the curriculum and which students will best contribute to the achievement of those pedagogic goals.<sup>71</sup> This argument constitutionalizes

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65. See *THE KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE* (Sandra Bullard, ed., 4th ed. 1991); see also *KLANWATCH: INTELLIGENCE REPORT*, Aug. 1995, at 19 (Southern Poverty Law Center) (reporting on hate crimes, rallies, and other activities engaged in by the Klan and other like minded organizations from all around the country); see *id.* Feb. 1996, at 4, 5, 14, 15 (showing active KKK groups in Texas).

66. See *Sweatt v. Painter*, 339 U.S. 629 (1950).

67. See *Hopwood v. Texas*, 861 F. Supp. 551, 555 (W.D. Tex. 1994).

68. See *Hopwood*, 78 F.3d at 949.

69. See *id.* at 950.

70. The Court stated that:

The fourth goal asserted by petitioner is the attainment of a diverse student body. This is clearly a constitutionally permissible goal for an institution of higher education. 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.

*Bakke*, 438 U.S. at 311-12.

71. The Court held that:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study

*Id.* at 312 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

Powell's argument focuses on curriculum and teaching, but his argument applies as well to a faculty's right to determine the content of research and scholarship. If a faculty decides that the

the power of a privileged educational establishment to determine what learning shall be valued and who shall be taught. University faculties, administrations, and boards of trustees continue to be dominated by white males.<sup>72</sup> Under Justice Powell's analysis, these white males have a constitutional right to determine, based on ideas and values widely shared by that privileged group, who will gain access to knowledge and power. Thus, a racially diverse student body is a compelling interest for only as long as those who run the school think it so.<sup>73</sup> Powell's reasoning could as easily justify an all white school as one that is racially diverse.<sup>74</sup>

Of course, in the context of the *Bakke* case, the faculty's goal of achieving a racially diverse student body was in pursuit of the pedagogical goal of teaching students about the racially divided world in which they live. Powell's opinion makes clear that what is often euphemistically called "race relations" is what must be learned in the academy.<sup>75</sup> However, the same opinion rejects the purpose of remedying "societal discrimination" as too "amorphous";<sup>76</sup> yet surely we learn race relations in pursuit of that amorphous goal.

How does one explain this contradiction? Powell could not admit that racism in America was still concrete and real without abandoning the Court's commitment to legal formalism and the big lie. Nonetheless, he had heard Archibald Cox's prophetic warning at oral argument that if the Court forbade any consideration of race, our universities would become once

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study of race relations, the culture or history of African Americans, or the epidemiology of diseases affecting certain minority communities are important intellectual or scientific endeavors, then they should also have the right to determine which individuals, or what combinations of individuals, will be best qualified to serve those academic goals.

72. Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital*, March, 1995 (Bureau of National Affairs) (finding that 85 percent of tenured professors are white and male).

73. If the First Amendment right to academic freedom protected the California Board of Regents decision to use race as one factor to achieve a racially diverse student body in 1979, it equally protects the decision to repeal those affirmative action programs seventeen years later by a Board that did not view the racial integration of the university's student body as a high priority.

74. There is nothing in Powell's analysis to explain why a faculty that is ideologically committed to white supremacy could not successfully assert its First Amendment right to protect a decision to admit only white students to its university. Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that the IRS may deny tax-exempt status—normally accorded charitable organizations that serve a public interest and do not act in ways contrary to public policy—to an institution that racially discriminates). Bob Jones argued, unsuccessfully, that its racially discriminatory policy was mandated by its religious beliefs and that the IRS's denial was a violation of its First Amendment right to free exercise of religion. See *id.* at 602.

75. Thus, for Powell, it was appropriate to consider race in admissions. See 438 U.S. at 316–18. The Court appended information from the Harvard College Admissions Program, stating the need "to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States." *Id.* at 323 (Powell, J., appendix to opinion).

76. *Id.* at 307.

again virtually all white.<sup>77</sup> Powell believed Cox, and he believed the young people who had shouted loud and clear that they knew they belonged inside the university's gates and they would not go back to the days of legal segregation. Justice Powell gave half the baby to the unreality of legal formalism and half to the political pragmatism of legal realism. But, dividing the baby is never a just solution. When the argument for racial diversity is grounded in the faculty's speech rights, affirmative action is divorced from its true purpose: anti-racism. We are in danger of losing sight of that important goal.

Again, the Fifth Circuit opinion in *Hopwood* provides an example of how a substanceless definition of diversity undermines what ought be affirmative action's true purpose. The court of appeals argued that intervening precedent required them to reject diversity as a compelling interest.<sup>78</sup> The

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77. That Cox's warning was prophetic is borne out by the admissions statistics at the University of Texas Law School at Austin in the year immediately after the Fifth Circuit's *Hopwood* decision went into effect. Similarly drastic statistics resulted at the University of California law schools at Berkeley and Los Angeles in the wake of the University of California Regent's decision to end affirmative action in admissions in the California system. At UCLA only 21 black students were admitted to the first year class entering law school in 1997—an 80 percent drop from the year before and “the lowest number of African Americans offered admission since 1970.” Rene Sanchez & Sue Anne Pressley, *Minority Admissions Fall With Preference Ban*, WASH. POST, May 19, 1997, at A1. At U.C. Berkeley's Boalt Hall, 14 Blacks were accepted, but they all declined. The entering law school class at Boalt will have exactly one black student—a student who had deferred admission from the previous year. See Sandra Torry, *ABA Leader Criticizes Admissions Policies*, WASH. POST, Aug. 5, 1997, at A7. A similar situation prevails at the University of Texas Law School. As of July 6, the law school had received tuition deposits from 468 students, only 26 of whom are Hispanic, and four of whom are Black. See *Black, Latino Enrollment Plunges at Texas Law School*, L.A. TIMES, Aug. 28, 1997, at A18. The fall in minority enrollment is of sufficient concern to prompt a Department of Education investigation into the “colorblind” admission policy in the University of California system to see whether it discriminates against minorities. See also Ken Chavez, *Probe of Possible UC Bias*, SACRAMENTO BEE, July 15, 1997, at A1; Kenneth R. Weiss, *UC Law Schools' New Rules Cost Minorities Spots*, L.A. TIMES, May 15, 1997, at A1.

The declining enrollment of minorities is equally dismaying at some of the University of California medical schools, the original battle ground of the *Bakke* decision. Out of 196 black applicants to the U.C. San Diego medical school, none got in. See *Two UC Medical Incoming Classes Have No Blacks*, S.F. CHRON., Aug. 1, 1997, at A1. Out of 171 black applicants to U.C. Irvine, one got in, but will attend Davis. See *id.* That means that two U.C. medical schools will have no black students at all in their first year classes. See also *No Blacks Make UCSD Med School*, S.F. EXAMINER, July 31, 1997, at A2.

78. See 78 F.3d at 944–45 (noting that no other justice joined the portion of Powell's opinion that relied on the diversity rationale and that *Adarand* had overruled *Metro Broad. Inc. v. F.C.C.*, 497 U.S. 547 (1990), where the Court relied on Powell's diversity argument to uphold an FCC affirmative action program). The Fifth Circuit went on to quote Justice O'Connor's dissent in *Metro Broadcasting* which it argued had been vindicated by the Court's *Adarand* decision: “Modern equal protection has recognized only one compelling state interest: remedying the effects of [past] discrimination.” 78 F.3d. at 945 (quoting *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting)). Cf. Amar & Katyal, *supra* note 27, at 1761 (arguing that Justice O'Connor's



court then went on to offer its own rationale for rejecting Justice Powell's argument. Race as a means of achieving diversity of ideas, values, or beliefs assumed that a certain individual possessed characteristics, "by virtue of being a member of a certain racial group," that properly related to the faculty's academic freedom.<sup>79</sup> "To believe that a person's race controls his point of view is to stereotype him."<sup>80</sup> This argument, that using race as a

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*Metro Broadcasting* dissent "only repudiated an extension of *Bakke* beyond the education context").

79. 78 F.3d at 946.

80. *Id.* In support of this proposition, the court relies on another conservative appellate judge, stating: "The use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 12 (1974); see also Justice O'Connor's dissenting opinion in *Metro Broadcasting*, 497 U.S. at 615 (expressing concern about the FCC licensing scheme that operated by "identifying what constitutes a 'black viewpoint,' an 'Asian viewpoint,' an 'Arab viewpoint,' and so on . . ."). This anti-essentialist argument is also a favorite of conservatives of color who oppose affirmative action. See, e.g., STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991). In this book, Carter recounts his own ambivalence as a beneficiary of affirmative action programs, and criticizes what he terms the "diversity movement" for arguing that people of color should be valued "specially because of the nature of oppression in [their] history." *Id.* at 209. He takes issue with the concept that the views and opinions of minorities must by definition be different than those of whites, and worries that an emphasis on the unique voice of minorities means that those members of minority communities who hold more "white" viewpoints will be denounced as unauthentic, or worse traitorous. See *id.* at 99-123; SHELBY STEELE, THE CONTENT OF OUR CHARACTER 172 (1990) (arguing that Black identity is "a skin that needs shedding," as it induces Blacks to define themselves as perpetual victims, saps the initiative of the Black community, and overall has a profoundly demoralizing effect); see also Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (critiquing the works of legal scholars such as Derrick Bell, Richard Delgado, and Mari Matsuda, and opposing the emphasis he perceives these authors place on the value of minority scholarship as representing a unique and crucial perspective that can only be supplied by people of color). "The strategy of elevating racial status to an intellectual credential undermines the conception of intellectual merit as a mark of *achieved* distinction by confusing the relationship between racial background and scholarly expertise." *Id.* at 1805; see also Linda Chavez, *Racial Justice: Changing the Tune*, LEGAL TIMES, Dec. 26, 1994, at 18 (arguing that preferential policies and affirmative action only exacerbate race relations in the country, because of increased White resentment, and stigmatization of the minority beneficiaries of such programs); Randall Kennedy, *My Race Problem—and Ours*, ATLANTIC MONTHLY, May 1997, at 55, 66 (arguing that Blacks should not embrace racial loyalty any more than Whites should, because it is as wrong for Blacks to favor other Blacks for purely racial reasons as it is for Whites to favor other Whites for purely racial reasons); cf. MARI MATSUDA, WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW xi (1996) ("Who I am in relation to the historical forces that constrain my choices and options is critical to my understanding of law and justice. This is not the same as saying, in a deterministic or simplistic way, that identity is fixed, that it is everything, or that it is an end in itself."); see also LAWRENCE & MATSUDA, *supra* note 1, at 225; Angela P. Harris, *Symposium: Critical Race Theory—Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994). Matsuda, Lawrence, and Harris argue that not all forms of group identification are essentialist and advocating those forms of identity politics that create individual agency by recognizing the ways in which

proxy for point of view essentializes and stereotypes individuals admitted under affirmative action programs as well as those white individuals who are consequently denied admissions, is premised on Powell's argument that the university seeks racial diversity to diversify points of view rather than learning about and combating a particular idea: "white supremacy." If the university admits African American students to diversify "points of view"—which, in the context of the First Amendment, implies differing politics or ideology—then, the Fifth Circuit argued, the implication must be that all Blacks think alike.

If the university admits non-white students for the specific purpose of teaching all students about the social reality of racism, then the black students' presence in the classroom and community is valued because they have experienced racism as persons defined as inferior by that ideology. In this context, "point of view" implies perspective vis-à-vis the object to be studied: American racism.<sup>81</sup> The assumption here is not that members of a certain racial group will share an ideology, but that members of a non-white racial group will have experienced white supremacy differently than whites and will therefore possess a different knowledge of American racism.<sup>82</sup>

In short, when the First Amendment justification for diversity—academic conversation—is separated from the substantive content of that conversation—learning about the social reality of racism—it is not apparent why race should be a factor in deciding who should participate in that conversation. "What does the color of an individual's skin matter in a discussion of quantum physics?" is the paradigm rhetorical question posed by affirmative action's opponents.<sup>83</sup> When racism is our topic of study, it be-

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race is socially constructed and using oppositional social constructions of race to fight racism's group defamation.

81. See Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992) (discussing the importance of positioned perspective to the insights of the work of minority scholars and teachers); see also PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 6 (1991) (discussing "purposeful doublevoicedness"); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989) (urging lawyers to see the world from the standpoint of the oppressed and to maintain multiple consciousness as a way of transferring the details of our own special knowledge to the standard jurisprudential discourse); Martha Minow *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (exploring attempts by the Supreme Court to seek the perspective of persons with different backgrounds and urging a continual search from unheard points of view).

82. When the object of study is racism, race is no longer what the Fifth Circuit referred to as a "proxy" for a socially relevant characteristic. See *Hopwood*, 78 F.3d at 946. Race is the socially relevant characteristic.

83. Of course, the answer to this question is not self evident. It may well be that the actual scientific theory is racially neutral, but even scientists work in a world where race is not irrelevant. For example, was the role that racism played in the choice of the victims of the nuclear bombs dropped on Hiroshima and Nagasaki a relevant ethical issue for the scientists who created the

comes clear that we must include participants who have experienced racism from the bottom as well as the top.<sup>84</sup>

## V. The Deeper Meaning of Diversity

When racial diversity's purpose is anti-racism or, more inclusively, anti-subordination, its defense is clear. Solving what Du Bois called "the problem of the twentieth century"<sup>85</sup> is still among our most pressing and perilous concerns as we enter the twenty-first century. Certainly a university is justified, and I would argue morally and constitutionally obligated, to center its pedagogy and research around disestablishing white supremacist structures and ideologies. Once we acknowledge the continuing existence of racism and commit ourselves to its disestablishment, the applicant who has been identified and treated by the society as a subordinated racial minority will bring to that freedom fighting enterprise a life experience that makes her peculiarly qualified for the task.

This is not to say that she will have the same qualifications as every other person who shares her racial identity, nor will she have the same point of view.<sup>86</sup> What she does share with all of her brothers and sisters of color is a lifetime experience as a person of color in a racist society. No white person has this qualification.

In addition to the qualification of experience, the minority applicant will have the qualifications of motivation and commitment to the fight against racism.<sup>87</sup> While everyone is harmed by the damage racism does to

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bomb? Should not the chemists, biologists, geologists, and engineers who study and work with environmental pollutants be concerned with how racism may affect their use and disposal?

84. See Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-26.

85. W.E.B. DU BOIS, *SOULS OF BLACK FOLK* xxxi (Bantam Books 1989) (1903).

86. Justice Powell recognized that one reason for admitting significant numbers of Blacks was "to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States." *Bakke*, 438 U.S. at 323 (Powell, J., appendix to opinion). See also Amar & Katyal, *supra* note 27, at 1763 n.87 (arguing that a proper application of Powell's diversity interest "does not assume that there is, say, only one way to be black"). Amar & Katyal note that "[a] critical mass of students of a particular group may be needed so that other students become aware of the group (and of the diversity within the group)." *Id.* at 1777. I have been the only black faculty member teaching at a law school on more than one occasion, and I can testify from personal experience to the benefits that accrue to my colleagues, my students, and myself, by being one of seven tenured African American faculty currently teaching at Georgetown instead of a sole black face representing every African American in all I say and do.

87. The phenomena of internalized racism or false consciousness on the part of victims of racial subordination will mean that not all people of color will be equally well qualified in this regard. Some persons of color will be motivated to accommodate to oppression or even to collaborate with their oppressor. See JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* 255 (Doubleday, 3rd ed. 1957) (1937) (writing of a similar accommodation among some Blacks in his study). "It may come to pass in the end that the unwelcome force is idealized, that one identifies

our social fabric and our souls, the injury that racism does to racial minorities is concrete, immediate, personal, and unceasing. When Asian American students in Professor Mari Matsuda's class on Asian Americans and Legal Ideology read the most recent figures on the alarming increase in hate crimes against Asians, they saw more than statistics.<sup>88</sup> They were suddenly conscious of their own vulnerability and of their fears for their families' safety.

African American students know first hand the look that crosses the face of the interviewer from the downtown law firm, a look that tells them there will be no call back, no matter how bright and charming and non-threatening they might be. The white colleague who compliments the Latina Stanford Law School graduate on her facility with English may be unaware that his words are a reflection of America's racism, but she will feel the presence of the color line that separates the two of them. Black, Asian, Latino, and Native American students have no choice but to fight racism, because not to fight is to deny one's self.

One of my white colleagues, as part of his criminal justice class, showed a video of an actual police interrogation and confession. At the end of the tape he asked the class for a show of hands indicating whether or not they thought the confession was coerced. The students were shocked to find that the vote was divided along racial lines. Almost all of the white students thought the confession was coerced. All of the students of color thought it voluntary. A student in the class reported that, following the vote, you could cut the tension in the room with a knife. For a skillful teacher like my colleague, this was a learning moment. It is a moment that will never take place in the segregated classrooms of a world without affirmative action.

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with it and takes it into the personality; it sometimes even happens that what is at first resented and feared is finally loved." *Id.* I am not arguing here that race should be used as a proxy for motivation, but that race should be a factor because the sources of motivation for people of color will be different. Both race and other indicators of commitment to the anti-racist struggle should be used in admissions. See also STANLEY M. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* (3rd ed. 1976) (arguing that oppression can cause its victims to seek the approval and love of their oppressors, to emulate them, and even to join them in persecuting friends and family); FRANTZ FANON, *THE WRETCHED OF THE EARTH* 148-205 (Constance Farrington trans., Grove Press 1966) (1963) (describing how readily the nascent, urban middle classes of newly independent countries, especially in Algeria, take on the role and privileges of the old colonial bourgeoisie by oppressing and exploiting the great mass of the people for their own personal profit). They maintain closer ties with the Western countries, who offer them wealth and prestige, than they do with the rural majorities of their own countries, from whom they remain extremely alienated. See *id.*; see also LAWRENCE & MATSUDA, *supra* note 1, at 121-41 (discussing the black opponents of affirmative action).

88. 1995 Audit of Violence Against Asian Pacific Americans: The Consequence of Intolerance in America (3rd Annual Report, National Asian Pacific American Legal Consortium, Aug. 1996) at 1.

Although minorities are uniquely qualified to fight racism, I am not arguing that white students, faculty, lawyers, or judges do not also bring talents, skills, and values that are essential to the project of our common liberation. The fight against racism must, in the end, be an interracial collaboration. The struggle for affirmative action at the University of San Francisco and across the country has always included progressive whites, as did the abolitionist and anti-lynching movements, the freedom rides, and the liberation struggle in South Africa. This observation only reinforces the importance of clearly articulating diversity's purpose. Once fighting racism becomes central to the university's mission, the measure of merit will change for whites as well.

Thus, diversity is no longer a way of maintaining the status quo and protecting the power of those who are currently privileged. Instead, it becomes a means of redefining our educational mission and radically transforming the university.<sup>89</sup>

Several months ago, I went to see the film *Rosewood*,<sup>90</sup> John Singleton's powerful depiction of the story of a small black town in Florida attacked by a white mob. Beginning on New Year's Day, 1923, and for six days thereafter, a vigilante mob set fire to the houses of the town's thirty black families and shot or hung every black person they could find. The orgy of racial violence and lynching was sparked by a young white woman's disputed story that she had been assaulted and beaten by a black intruder while her husband was away at work. It is a stunning and tragic story. But more than the horror and violence itself, I was struck by how intimately connected were the assailants and the assaulted—connected by their humanity and by their destiny to live in a world subsumed by the hateful ideology of white supremacy. I thought about how the legacy of a history ravaged by thousands of lynchings and burnings ties all of us to each other;<sup>91</sup> how we are connected by the everyday violence of poverty, injustice, and the very color line that divides us.<sup>92</sup>

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89. See Charles R. Lawrence III, *Symposium: Race and Remedy in a Multicultural Society—Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 *STAN. L. REV.* 819 (1995).

90. *ROSEWOOD* (Warner Bros. 1997).

91. See Emma Coleman Jordan, *The Power of False Racial Memory and the Metaphor of Lynching*, in *RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS* 37 (Anita Faye Hill & Emma Coleman Jordan eds., 1995); see also IDA B. WELLS, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* (1990, reprint of 1892 pamphlet, William Warren Katz, ed.); IDA B. WELLS-BARNETT, *ON LYNCHINGS: SOUTHERN HORRORS; A RED RECORD; MOB RULE IN NEW ORLEANS* (August Meier ed., Arno Press, 1969) (reprint of three 1890's pamphlets).

92. See Mari Matsuda, *Were You There? Witnessing Welfare Retreat*, 31 *U.S.F. L. REV.* 786–88 (1997).

If we are ever to heal ourselves, if we are ever to find reconciliation, we must confront this history and know how it lives with us today. It is no solution to deny it by calling it "amorphous." It will not do to pretend that diversity is only about free speech. The deeper meaning of diversity is that we must learn the truth from one another about our shared history and its legacy, and we cannot do that learning unless all of us are here.

Paul Robeson, the extraordinary actor, singer, athlete, and radical political activist, who was also trained as a lawyer, was the inspiration for a poem by Gwendolyn Brooks that captures in a few short lines all that I have intended to say. The poem is titled "Paul Robeson." I think it also captures the spirit of Trina Grillo.

### **Paul Robeson**

That time  
we all heard it,  
cool and clear,  
cutting across the hot grit of the day.  
The major Voice.  
The adult Voice  
forgoing Rolling River,  
forgoing tearful tale of bale and barge  
and other symptoms of an old despond.  
Warning, in music-words  
devout and large,  
that we are each other's  
harvest:  
we are each other's  
business:  
we are each other's  
magnitude and bond.<sup>93</sup>

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93. GWENDOLYN BROOKS, *BLACKS 496* (The David Company, 4th ed. 1989) (1945).