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Dean Kromans's Diversity Narrative: Liberal Education Ideology versus Social Justice?

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DUNWODY COMMENTARY

DEAN KRONMAN'S DIVERSITY NARRATIVE: LIBERAL EDUCATIONAL IDEOLOGY VERSUS SOCIAL JUSTICE?

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I. NARRATIVES OF SOCIAL CONFLICT AND DIVERSITY IN THE ACADEMY

A. *Professional Affiliations*

A young minority scholar writes an article over 200 pages on the theory of conflict of laws. He is appointed a member of the Committee of the AALS Conflict of Laws Section. He has ideas about globalism and the conflict of laws. These ideas may have anticipated the trend toward globalism and the importance of the rules of private international law in

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giving some coherence to the legal aspects of globalism. He suggests that future panels of the Section might focus on the international aspects of American private international law. The Chair, in conversations with the minority scholar, tries to put the matter off and suggests that the Executive Committee might discuss the issue at the next annual AALS meeting. Since our minority colleague is next in line to be a nominated chair of the Section, a meeting is scheduled for early in the morning, prior to the Section meeting, in order to officially approve his nomination as Chair. The following morning's breakfast meeting fails to transpire because the current Chair fails to appear. Our minority colleague scurries to the Section meeting in a vein effort to find the Chair. The Chair is nowhere to be found. About five minutes after the Section's deliberations should have commenced, the Chair finally appears. When approached by our minority colleague, the Chair physically pushes him aside and charges past him to the podium. He immediately calls for nominations from the floor. He "settles" upon recognizing a prearranged "friend" to nominate another "friend" and quickly puts an end to the episode. The shocked minority member leaves the Section and in the twenty years that have passed since that sinister event, has never attended another AALS Conflict of Laws Section meeting. He still does conflicts work but with colleagues in Europe.

B. *Affirmative Action and University Policy*

At a University in the early 1990's, a perception surfaced in higher administration circles that affirmative action (diversity) was doomed. The University, like the Nation, was going through a transitional period, and political orthodoxies of the day seemed to be influenced by the agenda of the radical right. It became apparent to senior members of the Association of Black Faculty that they were getting conflicting signals about the recruitment and retention of African-American faculty. Some administrators claimed to be committed to diversity and increasing the African-American presence on campus. Other administrators were sending lukewarm signals about the same issues. A minority faculty member from the law school was asked by a group of senior African American faculty to meet with the President and secure his support for the policy of attracting and keeping an African-American presence on campus.

At the meeting with the President, the minority faculty member got to the point with dispatch. He asked the President whether he would be willing to take a visible leadership role on the issue of diversity and affirmative action. The President responded with the following question: "Why should I?" The faculty member suggested that among other things, good race relations in a University setting is something that any administrator should value highly. The President raised a theoretical

question of whether it was possible to translate a value ("ought") into a policy ("is") in the context of higher education decisionmaking. It so happens that this particular faculty member had written extensively on the precise point of what intellectual procedures can and should be used to ground value judgments in circumstances of particular application. He suggested to the President that he was fully aware of the epistemological implications of his statement and that this was an issue the President could not win from an intellectual standpoint. The President exploded, telling the minority faculty member that, on the contrary, he would intellectually "whip" that faculty member. With the temperature rising considerably, the tension was broken with an interruption from a telephone call from the President's boss. When he returned his attention to the faculty member, the President pointed out that he appreciated faculty members who could intellectually stand up for themselves. However, the President stated that he was no longer bound by affirmative action (diversity) in terms of University policy. The faculty member then asked him whether the court order directing the University to desegregate had been modified or terminated. The President responded by asking what court order he was talking about. The faculty member then indicated that there was a standing court order and that, as of the previous day when he had looked into the situation, it had not been terminated. Therefore, he suggested that if the University, in repudiating affirmative action, was also to be seen as repudiating the court desegregation order, the President, the University, and the State could find themselves in a legally embarrassing position. He recommended that those who had advised the President that the court's order no longer bound the University should at least explain the basis of their advice to him. At this point, the meeting was terminated.

When the minority faculty member returns to the law school, he is met in the hallway by a minority administrator. The administrator says to him, "Professor, what on Earth happened over there?" He says, "Nothing much," to which the administrator replies that the President had called the Dean of the law school to determine what the basis was for the advice he had received, which stated the University was no longer bound by the Court order. The Dean admitted that the Court order had not been terminated, but suggested that inaction provided a plausible case for construing the order as no longer binding on the University. This answer was quite disconcerting to the President, and he quickly responded by eliminating a minimally publicized committee established by the Dean of the law school whose objective was to provide a rationale for the repudiation of affirmative action and diversity.

C. *The College of Law and the Rule of Law*

A minority faculty member receives a grant from the government to enhance human rights and rule of law development in an African university. The law school and the University sign the agreement and protocols with the relevant government agency. The minority faculty member is a co-principal investigator of the project. The project is deemed a great success by external and governmental evaluators. It is evaluated as number one of some one-hundred projects world-wide.

The project involved (1) an effort to improve the basics of legal education and curriculum development, (2) development of human rights and interdisciplinary curricular innovation, (3) the creation of a human rights library, human rights center, and a human rights journal, (4) outreach and clinical activity, and (5) increased research and graduate level development. An article is devoted to the project in the prestigious Journal of Higher Education and an article about the project is published in The Economist.

The minority faculty member hears from colleagues that the Dean cannot understand why he is wasting his time on this project. He is summoned to appear before the Dean to explain why the law school (through that faculty member) is engaged in this kind of project. The following is a recreation of the conversation.

> *Dean*: What has this project got to do with the priorities of this law school? Why are you spending your faculty time (after hours) on this project?
> *Minority Faculty Member*: This is a project approved by the law school and the University.
> *Dean*: That does not interest us. Why should this law school be identified with this project?
> *Minority Faculty Member*: Have you heard of the rule of law?
> *Dean*: What's that got to do with our concerns?
> *Minority Faculty Member*: Have you heard of the ABA? Have you heard of the CEELI initiative? Do you know the ABA supports legal development in Eastern Europe and Africa? Do you understand that these projects are justified by that organization's commitment to the international rule of law? Do you realize that the moral foundations of legal education here are supposed to support the rule of law idea?
> *Dean*: Well we're not attacking you, we just wanted to know what it was all about.
>
> Later, the Associate Dean shows up and says, "We do not want you to contribute your time and efforts to help in the development of the new journal you established under the grant."

II. KRONMAN ON DIVERSITY IN HIGHER EDUCATION

Dean Kronman's essay[1] on diversity in higher education is at once powerfully insightful and correspondingly complex. Indeed, with a concept as malleable as diversity, the discourse he seeks to promote can at times be quite slippery. The essay underscores the important way in which the national public discourse about affirmative action and diversity has to a substantial degree been legalized. By legalizing the discourse, we in turn also predetermine the scope of the facts about racial prejudice in the United States as well as the normative horizons that should guide our pathway through the thicket of racism and racial deprivation. In effect, this permits the public discourse to be infected with legal signs and symbols invariably couched in an adversarial style and formulated with a keen eye to the litigation context.

This style of discourse has in my view captured the process of how we communicate meaningfully about matters of racism, deprivation, and social justice. Indeed, race relations matters are about a core discourse concerning the basic or fundamental values and moral precepts of American civilization. Although legal discourse is important, and words carry more weight coming from the mouths of jurists than from the mouths of social scientists or novelists, law can at times obscure rather than illuminate real public policy issues. In my view, the discourse about race relations in the United States has been regrettably a discourse that has thrown more darkness than light on the central question which challenges the public order of the United States. That issue is the role of race and social justice in the discourse about the being and becoming of the kind of public order that law is supposed to defend and enhance. On the whole, Dean Kronman's essay makes an important contribution to illumination rather than darkness in this important matter.

Dean Kronman's essay is essentially a narrative divided into four parts. The first part covers the well-understood political divide that posits diversity as a polarizing principle with its partisan groups on the left and right. Kronman believes that by the application of insight, reason, and philosophical sophistication, one can carve out a middle position which may not satisfy either side in the partisan debate, but which might make a practical contribution to the possibility that partisans in conflict tend to operate with overblown premises (I should add here that a part of my comment is devoted to a critique and possible deconstruction of the narrative implicit in Kronman's essay of the parameters about precisely

1. *See* Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861 (2000).

this kind of debate and the importance of whether the liberal middle is really the middle).[2]

The second part of Kronman's essay works on a sophisticated distinction in the higher education context between values that are "internal" and "external," and those values which are clearly inherent in whatever moral meaning we give to the concept of diversity. Here Kronman makes a particularly strong argument that the internal goals of higher education as seen from an internal perspective hold a compelling (one is tempted to say) universal justification for the enhancement of educational values.[3]

The third part of Kronman's narrative looks specifically at what distinctive educational value might attach to concepts of race and ethnicity. It is here that Kronman's narrative gets particularly interesting. Kronman gives us a tour of certain central features of the Western tradition of political thought and moral sensibility.[4] In one way or another, we find that the lower classes, the marginalized classes, the lumpen proletariat of the planet, are recognized as having a moral stake in community and a claim to social position and equity. As the argument gravitates to the position of race, there is an empirical recognition that black and white Americans live segregated lives. We may imply that segregation means more than separation, for it often means deprivation. The empirical or statistical basis of segregation suggests to Dean Kronman that we have a problem of transitional justice. One has to be cautious about the justification of diversity as an educational value as well as a social justice value. Perhaps these overlap, but the implications of the overlap are not altogether obvious. Dean Kronman looks at where his narrative has taken him and classically expresses liberal "cautions and concerns."[5] The heart of the matter, according to Kronman's narrative, is that diversity seems to include a transitional racial and ethnic factor which has a kind of transitional educational value. Furthermore, there is diversity without regard to race which is ostensibly timeless.

Because of the breadth and sophistication of Dean Kronman's approach to the diversity issue, it would be difficult to comment on all of the specifics raised in his essay without also writing a much lengthier piece. What I am going to try to do is to provide a narrative commentary on the Kronman piece that essentially broadens, challenges, or shifts the terms of the debate. Let us comment briefly on why Kronman's essay is so important to the affirmative action/diversity debate. I would submit that Dean Kronman has written the kind of piece that seeks to preempt in an

2. *See id.* at 862-64.
3. *See id.* at 864-68.
4. *See id.* at 868-72.
5. *Id.* at 872-77.

important way how we conceptualize the discourse about diversity and affirmative action. For those who hold a strong ideological antipathy to the institutions validated by the public policies of affirmative action and diversity, preemption is particularly important. This is because the role of the courts lurks as a brooding omnipresence over social justice questions. Indeed, the courts have been stacked with ideologically driven appointees, who have sought to arrest public policy relating to affirmative action and diversity on the basis that these public policies represent racism directed at the white majority of the United States.

In my comment, I want to challenge the generally accepted outlines of the race, ethnicity, and affirmative action narrative. What my alternative narrative seeks to show is that in important ways, the conventional narrative obscured the central issues revolving around social democratic values. I want to go further and stress that from the point of view of intellectual responsibility, the public discourse does not seriously comprehend the centrality of social democratic values as the cornerstone of post war prosperity and the linkage of social prosperity to social and racial justice. I believe there is an interesting historical parallel reflected in the Supreme Court's long standing effort to constrain ideas of social democratic entitlement as indicated in the litigation strategies to outlaw the New Deal in the pre-World War II context.

As a threshold matter, it is important to add that Dean Kronman has represented in an impressive way the importance of intellectual responsibility in public interest matters. His essay, with considerable skill, brings a wide range of multi-disciplinary insights which are combined with a clarity of sophisticated philosophical analysis and a sharp practical sense of the lawyer's capacity to both enlighten and influence the direction of important questions of value and public policy. I see in Kronman's work at least some elements of the pioneering scholarship of Gunnar Myrdal's *An American Dilemma*.[6] It will doubtlessly be recalled that Myrdal sought to both describe and evaluate American race relations against the explicit ideals of the political system.[7] It may be that in Kronman's essay, he continues that tradition and moves us expansively on issues of race and ethnicity in the direction of a larger discourse about both social justice and academic promise.

III. INITIAL OUTLINES FOR AN ALTERNATIVE NARRATIVE

The United States has been described as an ethnic and racial melting pot of unmelted lumps. Many of Thomas Jefferson's blood relatives are black and many are white. Some look white but have black relatives and, while

6. *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA (1962).
7. *See id.* Part V.

"culturally" white, could be functionally black. Vast numbers of African-Americans have "white" blood, and vast numbers of whites have mixed black/Asian and other blood lines. As a political and economic matter, if one is white, one potentially has a brighter future in America's political landscape. If one is black, the prospects are bleaker. A similar vista could be statistically employed in access to and participation in the valued things of modern society such as wealth, respect, education, labor, health, well-being and of course the institutions of political power. African-Americans constitute the most conspicuous minority in the United States. Apart from the special historical and political issues of American Indians, African Americans have perhaps the longest and most intimate association with racial deprivation and more. The morality of slavery and colonialism starts long before the juridical trail of tears initiated by Chief Justice Taney in 1856. Taney's honesty however abhorrent, captures the heart and soul of the matter. Consider briefly the following quotations from *Scott v. Sandford*:[8]

> [C]an a Negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities guarantied by that instrument to the citizen? One of these rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.[9]
>
> The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a state, in the sense in which the word "citizen" is used in the Constitution of the United States.[10]
>
> Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?[11]
>
> The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error

8. 60 U.S. (19 How.) 393, 403 (1856).
9. *Id.*
10. *Id.*
11. *Id.* at 406.

could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.[12]

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it, in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[13]

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that, "when in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this Declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of

12. *Id.*
13. *Id.* at 407.

> mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation."[14]

Thus spoke the former Chief Justice of the United States. In so speaking, Taney gave the imprimatur of law, justice, and moral sensibility to the slave owners, the segregationists, and those committed to the principles of white supremacy. *Dred Scott* is an important beginning point. It establishes the basis of race relations discourse at ground zero in the United States as we move from the justification of slavery via *Dred Scott* to the justification of racial prejudice via *Plessy v. Ferguson*[15] to the justification of desegregation via *Brown v. Board of Education*[16] to the justification of affirmative action as an aspect of desegregation, the undermining of affirmative action via *Regents of the University of California v. Bakke*,[17] and the invention of diversity as indicated in Justice Powell's plurality opinion in *Bakke*. Dean Kronman draws our attention to "the sound observation that legal norms always operate against a background of social and economic forces whose influence limits the law's effectiveness as an instrument of moral change . . . ."[18] If we were for a moment to step back, we might modestly change the meaning of Kronman's statement and suggest that allied to this statement is another basic question about the nature of law. For example, is it in the nature of law that it responds to problems that emerge from the social context? When we examine the legal development from *Dred Scott* to *Bakke* and beyond, we may observe some curious twists in the legal doctrine. It is especially curious that the trail of legal doctrine moves from the vindication of slavery to the vindication of social justice to the vindication of educational excellence. This is a rather slippery vista for anyone who wishes to give coherence to the development of legal doctrine and who

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14. *Id.* at 409-10. It would be an interesting exercise in understanding the semantics and syntactics of the Supreme Court and lower courts to trace the discourse regarding race relations from *Dred Scott* to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). What is clear is that Taney set the tone of the discourse and his language, repulsive as it may seem to some, resonates through time and space. One should hesitate about comparing and contrasting contemporary terms and phrases of current Supreme Court justices with Taney's language. However, when the language of Justices on the Court proclaims the principle that Whites are victims of racial discrimination and prejudice, one might find a subliminal but important linkage or thread to Taney's own assumptions. In terms of result, Taney thought he was protecting Whites and White property interests, and certain justices on the Supreme Court certainly believe that they too must protect Whites and White property entitlements today. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring).

15. 163 U.S. 537 (1896).

16. 347 U.S. 483 (1954).

17. 438 U.S. 265 (1978).

18. Kronman, *supra* note 1, at 862.

wishes to appraise legal doctrine in terms of some articulable standard of the public or common interest.

Dean Kronman's article seeks to find a working practical liberal solution to the evolution of legal doctrines that seem to represent an incoherent and morally fractured response to the problems of historic injustice, transmitted trans-generationally, and the effort to infuse the concept of citizenship with enough of the core values of human dignity to remake the Constitutional promise of hierarchy and division into one that aspires to the universality of equal respect for all. Dean Kronman has sought to redefine the debate about diversity and higher education. In doing so, he has in my view laid the seeds for a compelling discourse that diversity itself is indeed an articulable educational value that can be justified on educational grounds. It is politically important in my view, that diversity itself be salvaged because its fundamental justification in my view, weak as it may seem, is not only reflected in the defense of educational values, but because it has become in fact, a synonym that keeps alive the principles of the ideology of social democratic entitlement. That is to say, it keeps alive the idea that a minimally decent society is a society that simply does not abolish the principle of social justice on the basis that the Constitution of the United States permits only the vindication of negative rights rather than a position of neutrality with regard to the vindication of positive rights. Let us more carefully examine the trail Dean Kronman takes us through in the diversity debate.

The distinction that Dean Kronman makes in seeking to "justify" diversity from an "internal" educational point of view is important for the reason that Kronman himself makes explicit:

> Justice Powell and others claimed that programs of affirmative action should be viewed as making a contribution to the advancement of the educational process itself—as promoting an internal educational good. Colleges and universities must have the discretion, they insisted, to weigh this good against the costs that such programs entail and to make the pedagogical judgments involved. And once affirmative action is seen in this light . . . the claims of disappointed non-minority applicants are bound to seem less pressing, for *no* applicant has a right to be admitted to the school of his or her choice so long as the applicant's rejection can be explained as a consequence of the school's efforts to maintain an optimal environment for teaching and learning. By recharacterizing affirmative action as a means of achieving an end internal to the enterprise of education—rather than as a technique for promoting a redistributive goal external to it—Powell and those who followed his lead succeeded in dampening the two most

> powerful arguments against affirmative action, and initiated the diversity debate in which we are still engaged today.[19]

Dean Kronman does not suggest that there is no overlap between the internal and the external viewpoint. There is. It seems to me however that the heuristic value of the "internal" perspective on diversity in higher education does provide greater illumination about the key moral questions under consideration than a perspective that shifts imperceptibly between external and internal values. As Kronman suggests, all internal and external value implications must be appreciated. That is to say, the importance of "external" values to "internal/external" values have important points of overlap. From a pragmatic perspective, these overlapping intersections about basic goals or values are an inevitable part of the task of not only clarifying value judgement, but also using disciplined intellectual tools to ground these value judgments (and) perspectives in particular contexts. There are, however, important concerns lurking in the interstices of the internal perspective which must be more carefully assayed.

I suspect that the juridical roots of the distinction rest on the crucial premise found in Professor H.L.A. Hart's work[20] about the internal and external aspects of law. According to Hart, the binding character of law, according to rules, is only intelligible from an "internal" point of view. Applying this insight to Kronman's analysis, a clever argument is implicitly advanced that players inside the institutions of higher learning meaningfully assay the internal values of higher education, and if these values "bind" the producers and consumers in a way that is meaningful to participants inside the academy, then the role of Supreme Court judges who are "external" players and who should exercise restraint. Indeed, external players must exercise a measure of prudential deference to these "internal" values, lest they substitute their own inexpert opinions and judgments on higher education for which they are essentially "external" participants. Educational values, in short, are the province in the first place of educators and cannot "bind" or mean the same thing for judges and lawyers. Indeed, they morally "bind" educators (internal players) quite differently. In short, educators are entitled to a degree of deference in educational assessments from judges and lawyers

This is therefore a useful distinction. It has value-added quality when we consider that goals or objectives of other institutional forms such as the police or business are much simpler than the complex values that constitute the goals and objectives of higher education. This distinction is important in clarifying the values that the higher educational establishment

19. *Id.* at 863.

20. *See generally* H.L.A. HART, THE CONCEPT OF LAWS (1962).

promotes and defends. It is worth remembering the larger problem of laws' internal values, and the external conditions and consequences that shape its directions. For example, if *Dred Scott* or *Plessy* had been accepted as reflecting the fundamental internal values of the legal systems pronouncement on race-relations, we would in effect be accepting a principle that would reify the impact of law and moral sensibility on the character of race-relations. In doing so, we would have frozen the choice between aspirations for citizenship based on "respect" and the tradition of racial supremacy fed by social, cultural, and political prejudice.[21] I would therefore also submit that an external perspective is crucial to changing the internal norms of law and the other social institutions. I do not believe that

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21. The leading study on the nature of prejudice is GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954). The precise line that distinguishes prejudice from discrimination that is meant to victimize the target is not always clearly maintained. But it is clear, that prejudice is a much stronger form of discrimination when discrimination is used in the context of group deprivations based on race, religion, or other labels of cultural identity. A further and insightful study is that of Morris Ginsberg, Prejudice, Address Before the Central Jewish Lecture Committee at the Third Jacques Cohen Memorial Lecture (Woburn Press, June 12, 1958). Ginsberg describes racial or ethnic prejudice as comprising the following elements:

> Firstly there is uncritical *generalisation.* This results in the attribution to all members of a group qualities in fact only observed in a few. Second, there is *specification,* or selective emphasis, that is the tendency to consider certain qualities as specially characteristic of a group which are in fact to be found equally commonly in other groups, e.g. when Jews are said to be ostentatious or pushful. Thirdly, there is *omission* that is the tendency to overlook desirable qualities in the group which is disliked, or when they are too obvious to be denied to dismiss them as "untypical." Fourthly there is *discrimination,* that is the tendency to condemn acts of one group which would be condoned or not noticed or even praised when committed by others, for example, when similar acts are considered as sharp practice in one case but regarded as showing business acumen in the other; or when Jews are condemned as "money-minded" in a country where competition and the striving for money are considered proper and normal for everybody.
>
> Other factors of importance are reliance on hear-say, suggestibility, self-deception, conscious and unconscious, sophistication and rationalization. Once the prejudiced beliefs are built up they tend to arouse emotions or passions similar to those which originally gave rise to them and thus to sustain or intensify them. They can impose themselves on the individual and become coercive and intolerant. The mass of beliefs thus engendered tends to be supported by other beliefs; for people like to think they have reasons for what they believe. In this way systems of belief are built up which are highly resistant and blind to doubt or criticism. The strength of prejudices and like that of dogmas lies not in the reasoning on which they are based but in the mass of feelings behind them. Hence they do not yield easily to reasoning or even to persuasion.

Id. at 9.

Brown would have been possible without some elements of an external perspective. Dean Kronman would likely not argue with this caution. It is however worth stating to ensure a realistic perspective as a backdrop to the discussion and justification of diversity.

In *Brown*, the "internal" perspective was in my view influenced by "external" issues which were both empirical and normative. The reality of racial prejudice in fact created second class citizenship. Second class citizenship was incompatible with the moral, and by construction, the juridical foundations of the principle of equality. This leads me to my first concern in Dean Kronman's piece which has to do with the essential narrative itself.

IV. UNPACKING THE NARRATIVE

The narrative from *Dred Scott* to *Plessy* to *Brown* and beyond is a well-known and generally agreed-upon one. I want to challenge the essentials of that narrative. I want to shift the narrative from an emphasis on a linear tracing of the case law to the rules behind the rules of the constitutional adjudication. It is well known that the Supreme Court has used a conceptual test to frame the discourse about the scope of Constitutional supervision over, *inter alia*, race-relations. The close supervision test, namely the strict scrutiny test, is the test around which the control and regulation of race-relations by law has ultimately been based. The test was originally articulated in a famous footnote from *United States v. Carolene Products*.[22] As the test has evolved, it remains unclear whether the conceptual basis of test itself has been compromised by the Supreme Court's use of the strict scrutiny standard to radically limit the policies of affirmative action and possibly enter the future of diversity. Justice Stone's strict scrutiny test was formulated against the problem in general of minorities. The minority's problem, in fact, reflected the broader question of the social and power context of group deprivations: in short, the problems of group prejudice, deprivation, power and social conflict. Because the conceptual basis of the test as reflected in *Carolene Products*

22. 304 U.S. 144 (1938). Footnote four of the *Carolene Products* case provides, in relevant part:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities. [W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 153 n.4 (citations omitted).

would be useful in understanding the scope of its application in the context of affirmative action cases, it is useful to give it some attention.

The Stone footnote[23] must assume some relevant feature of the social and political environment within which law must function. If this is true, we might acknowledge that there are two primary features of general social context that emerge from the note: (i) the idea of an identifiable sub-group or "minority," and (ii) the idea of targeting that group as an object of prejudice. The first idea is interesting. What could Stone have had in mind by the terms "discrete and insular minority"?[24] I suggest only two possible things: it refers to the problem of "groups" in the larger processes of national effective power. It assumes, however benign the political climate, such groups if vulnerable to that political abuse can and should be (a) identified and (b) protected by basic law. The second principle refers to the form of "abuse" viz, prejudice. The historic reference may have had African Americans in mind, or it may have had Southern European, East European or Irish immigrants in mind. As Bruce Ackerman points out,[25] Justice Stone has been clearly aware of the prejudice indicated in the Nuremberg laws based on anti-Semitic Nazism, targeting the Jewish community in Germany. What clearly must have influenced Stone is that these European immigrants were largely "minorities" identified as such and potentially subject to targeted prejudice.[26] As a leading jurist of his time, Stone would have been fully aware of the effort to protect minorities and indigenous peoples through the League of Nations minorities and mandate systems. Among the issues the League addressed were the concerns about problems of power, prejudice, deprivation, and social conflict. Our narrative thus starts with the core insights of *Carolene Products.*

Now it will be recalled, in order to establish a framework for the defense of diversity in higher education, Kronman provides us with a brief narrative of the evolution of race-relations law. The narrative takes us to *Bakke* and the "attractive" claim of Justice Powell that diversity is an educational value and that race can be a factor in making an educational judgment about criteria for admission to an institution of higher education. The issues of social and racial justice and the strategies of affirmative action, are now preempted by educational goals. Diversity is an educational goal, and race and ethnic issues are matters of educational value rather than social and racial justice. Perhaps these are discrete

23. *See id.*

24. *Id.*

25. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 741 (1985).

26. *See* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE PROTECTION OF THE RIGHTS OF MINORITIES (1991) (see especially Part I, pertaining to the concept and history of the protection of minorities).

incommensurables; perhaps educational judgments however much we seek to reasonably objectify them are more an internal art form than an external objective science. What I think can be said with confidence is that to collapse claims of social and racial justice into a claim for educational value may in fact depreciate the claims to racial and social justice from a moral and juridical perspective. Has diversity watered down the claims for social justice? Has diversity or social justice enhanced the position of white women, "white" elite Hispanics, and others in society? Has it happened because it is based not on social justice but indirectly based on the justification for racial diversity? That is to say, it is based on the deprivations experienced by African-Americans. Does this diminish the claims for racial justice based on social justice versus "diversity" grounds? The story of Powell's "attractive" claim must be rethought. These complex claims to social justice played out in a context of conflict pluralism challenge the moral and juridical foundations of basic claims and basic rights and are structured around a legal drama whose parameters are defined by the *Carolene Products* footnote.

V. TOWARDS AN ALTERNATIVE NARRATIVE

As U.S. law evolves from *Dred Scott* and *Plessy* to *Brown* and *Bakke* and *City of Richmond v. J.A. Croson Co.*,[27] a dramatic change takes place in the context and normative issue which Stone's influential note addresses. The words change, their meanings change, and a society of conflict pluralism evolves from a society of alleged consensus pluralism. But the conflicts endure. The deprivations based on race endure. Deprivations and prejudice are moderated by more neutral terms and prejudice becomes discrimination, but prejudice remains real. The term minorities becomes a symbol for race. The terms "race" and "minorities" have meaning and coherence only in the context of the social relations context of power, privilege, and deprivation. The term "prejudice" disappears from the legal lexicon and "discrimination" is substituted. "Discrimination" is a serviceable term if the original content and purpose of Stone's test is kept in mind. *Brown*, for example, deals with "racial discrimination."[28] The terms "racial discrimination" must be read conjunctively. Read apart, or disjunctively from each other, they obscure context and moral sensibility. The term "race" means nothing outside of the context of power relations—conflict pluralism if you will. This means that there is an "in-group" dominating a system of power relations. This group may be a numerical majority (White Americans) or a functional

27. 488 U.S. 469 (1989).
28. 347 U.S. at 490.

majority (White, Apartheid South Africa). There must be an "out-group," identified by a culturally understood label of identity (race). To subject the label "race" to strict scrutiny runs into the odd proposition that the dominant group which creates the rules of affirmative intervention to protect the subservient group does so by discriminating (distinguishing) between itself and the others and inflicts "discrimination"/prejudice on itself! This is literally true if discrimination is meant to make "distinctions." It is not true if discrimination is a synonym for prejudice. The dominant class, the White group, is now a "suspect" class.

The term race in the discourse seems to be decontextualized; it is in effect far narrower than the term "minority" used by Stone. The term race is virtually meaningless as a description of marginalized power (context) and discrimination which in context can and should be read as prejudice. In short, when the terms race and discrimination are vested with juridical basic rights meanings, that is to say, construction which emphasizes syntactics rather than semantics, there is no concept of racial discrimination or racial prejudice in the Supreme Court's discourse, as in *Croson*.[29] We are led to the astigmatic view that any distinction in which racial identification must perforce "exist" is "discrimination." Hence, the result is the odd notion that whites are a discriminated class—reverse discrimination. In my view, a white woman may make a case that there is specific or institutional discrimination against her. A black woman may make the same claim. But she is often a victim of racial prejudice and a white woman is not. There is a case to be made for justifying the bringing of women into the academy on grounds of social justice. The claims of black women and men in the United States rest on a stronger case, more than simply "discrimination," the case rests on prejudice. This is a factor which constrains equal opportunity for African American people and without an articulate strategy to remedy its continuing efforts, consigns the vast human resources of the African American community to a vista of perpetual marginality. Consider the following:

> It remains to be added that the factors making for group prejudice often operate in a circular manner. Thus in the case of the Jews the inner tendency toward isolation encouraged a policy of discrimination and discrimination in turn made for further isolation. Similarly, as has been argued at length by Myrdal in the U.S.A., white prejudice causes discrimination against Negroes and keeps down their standard of living, and the low standards in turn stimulate antipathy and further discrimination. (*An American Dilemma,* Ch. III). Professor MacIver has described in more detail how the conditions

29. *Croson*, 488 U.S. at 469.

> produced by discrimination tend to sustain it. The group with greater power deprives the other group of the opportunities to social and economic advance. The upper group is thus strengthened in the sense of its own superiority. This in turn is reinforced by the factual evidence of inferiority that accompanies the lack of opportunity and the habits of subservience resulting from a policy of discrimination. In this way self perpetuating complexes of conditions making for prejudice are created and sustained. (Cf. *The More Perfect Union*, Ch. IV).[30]

The core value of the "internal" perspective of diversity in higher education is that it distinguishes diversity from affirmative action. Diversity now holds an independent justification apart from the issues of racial, gender, or social justice. The value of this perspective is twofold. First, it limits the court substituting a legal judgment for an educational judgment in the field of higher education. Second, it provides a degree of academic autonomy from politicizing the issue of what "worth" is, or what public good or public interest is, in access to higher education. This is a good stop-gap strategy and it has received an articulate justification by a distinguished educator who doubles as a lawyer. The procedural problem is that it may by implication concede that racial justice is constitutionally prohibited racism, and that the strategies of affirmative action cannot be justified in either moral or juridical terms. If we accept the independent and distinguishable justification for diversity, how do we justify affirmative action? I suspect that there is confusion about the overlap of diversity and affirmative action. It may be that many believed that Justice Powell's "attractive" suggestion that race could be a factor in diversity salvages affirmative action which would otherwise be infirm as reverse discrimination. Indeed, the Fifth Circuit Court of Appeals, in *Hopwood v. Texas*,[31] struck down the Texas diversity/affirmative action plan with an understanding that it was fundamentally overruling the plurality in *Bakke*.[32] That is to say, what *Hopwood*, and by fair "prediction" the U.S. Supreme Court will do, is to accept the proposition that all (including diversity-based) affirmative action is unlawful. The *Hopwood* decision was based mainly in the jurisprudence of the *Croson* case, a case that emerged from the allocation of local governmental contracts in which the City of Richmond required a percentage of contracts be awarded to minority businesses.[33] Business values are not the same as higher educational values. However, justifying diversity on the discrete terms of

30. Ginsberg, supra note 21, at 12-13.
31. 78 F.3d 932 (5th Cir. 1996).
32. *See id.* at 934.
33. *Croson*, 488 U.S. at 476.

educational values. However, justifying diversity on the discrete terms of higher educational values must not obscure the work of a slippery concept like diversity in the larger national discourse about social and racial justice.

VI. THE NARRATIVE CONTINUES

The term "diversity" is loaded with multiple meanings and corresponding complex, sometimes resulting in incoherent social and legal consequences. In the *Bakke* case, Justice Powell quoted a famous line from Holmes, stating that a word is simply the skin of a living thought.[34] Kronman's piece gives a feel for the texture of the skin and toys in a complex but interesting way with the "life" under the skin. As a matter of political theory, the term diversity obscures more than it possibly reveals. For example, the term holds that race may be an element of diversity and as such it is a factor that may lawfully be considered in the allocation of social or educational goods. The reference to "race" as "diversity" is not the same thing as "race" and "prejudice." We may justify special protections of law to the victims and the potential victims of racial stereotyping supported by the animus of prejudice and the power base of social control or dominance. Here we might see the justification of "intervention" as designed to ameliorate social conflict based on racial stratification. We may also seek justification in the idea that social peace be sustainable peace; that racial prejudice not simply be prohibited or proscribed, but that continuing policies and interventions on behalf of the target group facilitate the emergence of transcendent identifications that broader symbols of who is included in the "we" displace the symbols of ethnic or racial rigidity based on the identification by racial pedigree of "we" and the "other." But what does diversity have to do with social conflict or social justice? Diversity, in effect, has been constructed by a plurality of the Supreme Court as a substitute for the principal of affirmative action.[35] The principle of affirmative action and its vindication in law is more complex than the negative principle of non-discrimination as a legal norm. The principle of non-discrimination or non-prejudice would be justified by the simple proposition that every human being is entitled to a measure of equal concern and respect and that prejudice or invidiously motivated discriminations destroy those values. Affirmative action works on the principle, well accepted in international law, that levels of social and/or racial or other forms of stratification are often institutionalized matters and cannot easily be remedied without some form

34. University of Cal. v. Bakke, 438 U.S. 265, 284 (1978) (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)).

35. *See id.* at 311-15.

of affirmative collective intervention. Such intervention could, of course, require a public or moral justification.

In general, the precise justification for affirmative social interventions might be predicated upon the principle that social or community peace is a good thing and that deprivations which entrench hierarchy and stratification reproduce social conflict often to the detriment of the common good of the society as a whole. This principle could be extended to include the idea that a society which either encourages or neglects vast segments of its population, and reduces their opportunities in life to the most minimal and dismal levels of participation in the social matrix of values necessary for even the most minimal level of deference, dignity, and respect, is a matter to be avoided. This must be done if necessary, by active social, collective, or possibly even governmental intervention. In effect, what this entails is a joining of issues on the values behind the dominant ideologies of the emergent millennium. In short, the ideologies of social democracy, liberal democracy, or perhaps even the basic ideals of "New Deal" democracy are emphatically committed to the principle that social justice is a political and juridical good and that the goods and values of a defensible social order should be optimally produced and reasonably widely distributed. If the freedoms of the market or the political marketplace cannot affect a neater balance between production and distribution, some forms of intervention may be necessary, although the forms of intervention may strategically be complex arrangements between the institutions of government, labor, capital, and civil society. At the heart of a society opposed to social democracy is a juxtaposition of a society structurally resembling a pyramid in which one might structurally delineate the number of members of society who monopolize the upper tenth of any and all values.

PYRAMID ILLUSTRATION

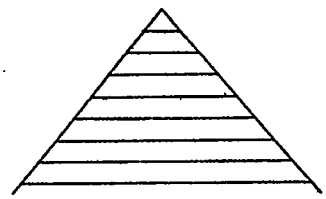

Diagram A[36]

36. *See* HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JUISPRUDENCE FOR A FREE SOCIETY

The social democratic geometrical figure resembles more the structure of an onion or a turnip in which we see a vaster aggregate of people sharing the middle, upper middle, and lower middle and only a small category occupying the top and bottom portion.

TURNIP ILLUSTRATION

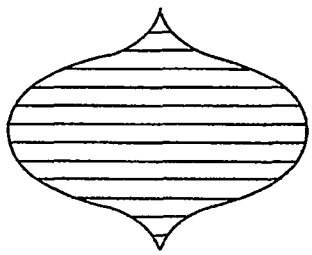

Diagram B[37]

I use these illustrations to show that the ideological debate can often be obscured and depreciated by the juridical debate. Moreover, the development of juridical science and symbols often reshape the discourse about the value issues at stake in ways that carry less illumination, greater complexity, and perhaps an even greater capacity for greater social mischief. The first point to note is that the concept of affirmative action as a juridical construct carries both a strength and a weakness. Its strength lies in the fact that it empirically references a target population of deprivation. That population is disproportionately represented at the bottom of the social pyramid or at the bottom of the social turnip. It recognizes that in certain circumstances race, social stratification, social dominance and deprivation are remarkably reflected in race relations. In this sense, we are given an important indicator of how to organize social strategies for the improvement of the element of social justice dominated by the socio-political dynamic of racial prejudice. Here rules that target "racial prejudice," "racial discrimination," "racial dominance," and "invidious discrimination," facilitate the alleviation of injustice, and the stigmatizing of vulnerable groups.

The analytical focus of several Supreme Court justices in race-relation cases is in many ways astigmatic. These justices do not effectively

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344 (1992).

37. *See id.*

differentiate between labels or markers based on group identification for the purposes of enhancing legitimate claims to social justice, equalizing opportunity in access to social process values on the one hand, and distinctions animated by brute, naked prejudice whose objective is to deprive, stigmatize and freeze the social position of the historically subjugated group so identified. The Albanian Minorities case, decided by the PCIJ in 1927, has absolutely no problem analytically or practically in making precisely this kind of distinction.[38] The approach of the Supreme Court in *Yick Wo v. Hopkins*[39] may in some degree be more compatible with the practical approach to understanding racism. In *Yick Wo*, Justice Mathews reviewed certain San Francisco ordinances, which, although "neutral" on their face, indicated that whatever the manifest intent of the ordinances, they represented state action "so unequal and oppressive as to amount to a practical denial . . . of . . . equal protection of the laws . . . ."[40] The Court used the explicit language of practical denial. In words that resonate with contemporary meanings, Justice Mathews continued: "Through the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered . . . with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[41] The stress on the practical, the factual, "evil eye"; the facts of an "unequal hand" show a remarkable capacity of the Court to distinguish between a beneficent social policy and invidious prejudice. *Yick Wo* takes a quite functional approach to the role of the Court in supervising race-relations.

Later cases seem to retreat from the *Yick Wo* approach. *Washington v. Davis*,[42] for example, seems to restrict the "evil eye" and "unequal hand" theory of Justice Mathews. However, Justice White does concede that a differential racial impact "solely" (that is without more) is insufficient to sustain a constitutional transgression.[43] *Yick Wo* clearly means or includes more, than the term "solely" implies.

Moreover, a deep and important issue about the nature of racism is rooted in the judicial assumptions of *Yick Wo*. These ideas reflect the way in which racism may be triggered and the external manifestation of its expression. An ostensibly neutral ordinance which seeks to prescribe brick buildings might be seen in context to mean the targeting of the livelihood

38. Minority schools in Albania. Advisory opinion of the permanent Court of International Justice 1935 P.C.I.J. (Series A/B) No. 64.

39. 118 U.S. 356 (1886).

40. *Id.* at 373.

41. *Id.* at 373-74.

42. 426 U.S. 229 (1976).

43. *Id.* at 239.

of a discrete and insular minority. That minority may in the context know exactly that brick buildings are meant to be economic discrimination animated by racial prejudice. In other words, racism often emerges from the private motives of personality types prediposed to prejudice. It becomes socially relevant when those private prejudice-prone motives are displaced on public objects. This means the acquisition and control of privilege and property for the dominant group. That group is capable of "displacing" its racist pathology, of deprivation, stigmatization and prejudice (in the worst cases, genocide) on the dominated group. Finally, there is the crucial tricky matter of packaging the malady: Racism is rationalized as being in the "public interest." This means that racist communication is not always of the grotesque and crude variety. It comes in coded communications whose meanings must be teased out of context, and indirect methods of investigation and analysis. Thus imperialist, colonialist "racism" comes packaged as the "white man's burden" or the "dominant classes" "manifest destiny." In more contemporary contexts such as South Africa's apartheid, the scheme of racial domination was packaged as "separate development." Possibly the worst if not most dastardly example of rationalization was indicated in front of the Auschwitz death camp—"work" it read, brought "freedom." In a way this was literally true, because those fit for "slave labor" were worked to "death" and, given the horror of Auschwitz, death could actually be a form of "liberation."

In the contemporary United States, race has been a long standing instrument of political manipulation. Playing the "race" card has been a hallmark of certain political factions, especially in conservative circles. Thus ostensibly neutral words often convey racial meanings to certain target groups. For example, to campaign on the issue of "crime" is a coded symbol that culturally among whites identifies crime with race and personal insecurity. Similarly the issue of "no new taxes" and the coded phrase that accompanied it, viz., that we "read" the "lips" of the communicator, means no social spending for the underclass who are disproportionately black. When a presidential contender consciously visits a university which prohibits black-white dating, he affirms an antipathy to miscegenation. We can reverse the code quite deftly when we hold that a social policy such as affirmative action is racial discrimination, thus inverting the role of victimizer and victim.

A substantial element of racism is generated by unconscious pathologies and thus there may be a measure of uncomfortable truth in the principle of Socratic insight that "vice is ignorance." If further academic license is to be drawn from Dean Kronman's defense of moral philosophy, it lies in the element of Socratic extremism which holds that an unexamined life is not worth living. If the term unexamined is roughly analogous to the terms "unconscious" or even "preconscious," then we

may plausibly conclude that an unexamined life driven by unconscious prejudices is a potentially lethal life from the point of view of the victim who wants life without deprivations based on "otherness."

Indeed, the rules of affirmative action seek to ensure that we move from the absence of stigmatization and dominance, to a vista of at least reasonable access to the basic values implied in a defensible notion of social justice. In effect, the former principle is more amenable to juridical interventions because it essentially vindicates a principle of negative freedom and equality. It essentially tells a state what it must not do. It may not touch the question of prejudice and discrimination beyond the state. That is to say, if we join issue with a discourse about the scope of government, we will at once see that the bigger the government, the greater the area of social control it determines and the greater the scope of a court's capacity to police governmentally sanctioned prejudice and discrimination will be. However, if we focus on minimum government, then there is much less that the government regulates and much more that is regulated by the market or the civil society, and therefore much less scope for a court to intervene to prohibit invidious discrimination. If the antipathy to racial prejudice is indeed deeply rooted, then social strategies to develop a concept of racial justice may be quite useful. But it should be understood that the concept of racial justice is an extremely limited form of social justice from a social democratic perspective. So the larger question emerges. When the Republicans created affirmative action what exactly animated them? For example, while the Republicans were opposed to the New Deal and its social democratic animating principles, they were moved nevertheless to do something about the extreme forms of deprivation based on race. Affirmative action may thus be seen as a conservative strategic adjustment. From this point of view, affirmative action is far more limited than a full-blown commitment to a theory of social justice and flexible social upward mobility. This could be seen as Nixonian conservatism cutting its losses.

It is possible that the original Republican support for affirmative action also could have been motivated by the crudeness of playing a visceral race card in electoral politics. In short, working class whites could now possibly believe that their lower class status was a function of reverse discrimination. The political value of attacking the limited notion of social justice encased in the principle of affirmative action has of course obscured the debate that working class, whites who are also socially, culturally, and economically deprived, might too expect a form of social concern that is generally tied to the social democratic culture of social justice. This is not to equate the social deprivations animated by prejudice and the social deprivations animated by class-based prejudices or the imperfections of *bourgeois* democracy. The central point is that a commitment to racial justice should not be construed to mean a

disparagement with regard to social justice for others in society who by birth, circumstance, or simply bad luck are stuck at the bottom of the heap.

The mutation of affirmative action in law by the invention of the concept of diversity, so narrows whatever pretensions to social justice reposed in the theory of affirmative action that one actually sees from an ideological point of view a constitutional strategy with a modest sugar coat that simply removes from legal and political discourse the watered down version of social justice encapsulated in the affirmative action principle. Diversity, as represented in constitutional jurisprudence, makes issues of social justice or racial justice irrelevant to higher education. Diversity in effect makes a very different claim. This claim is that educationally we are enriched by diversity. The "education" value that is therefore the "primary" basis for the normative component or value of the "diversity" idea.

VII. THE NARRATIVE PROGRESSES FURTHER

Judges, it is widely acknowledged, come to their judging role with perspectives of identity, needs, and expectations, both cultural and professional. Their conduct as judges is influenced by matters of culture, class, exigency, and temperament. They are above all influenced by the role and traditions their predecessors have established in the "traditions" of the judging role. One of the great issues of the 20th Century confronting the Supreme Court has been the issue of social justice. It was the central issue of the New Deal when politicians were pitted against a judiciary committed to a conservative agenda. The battle played itself out with a measure of "dignity" in which progressives advocated judicial restraint and conservatives advocated "intervention." The struggle for social justice was transformed by the burgeoning middle-class into a matter of issue and interest-group politics and in this transformation African-Americans were essentially an afterthought. The issue of racial justice (an expansion of the New Deal mobility directed society) became a part of the larger landscape of the New Deal: a kind of New Deal for those who had been excluded because of race and historic circumstance. It is here that the narrative of social justice as issue politics takes a strange detour. The pressures for racial justice were enormous. Would a political commitment compromise or enhance the larger issue of social justice or neutralize the social justice issue?

It is here that Nixon provided the conservative master-stroke. The Nixon-inspired "affirmative action" solution would separate racial justice from social justice; it would at best be a narrow concession to social progressivism and it would anger the working and underclass whites who had not benefitted effectively from the New Deal and post-war prosperity. Helping the black underclass would come at the expense of the poor white.

It was a strategy with incredible political and electoral consequences. More importantly, the Democrats could not "oppose" it, and the Republicans could take credit that they were not "racist" while their fringe groups could politically proclaim the real truth about racism and reverse discrimination against the whites. The real narrative about social and racial justice is about the deft preemption of the terms of an important national discourse about the scope of social democratic values and about the role of the rule of law in defending and protecting values. Indeed, grounded in the fabric of social democratic values are the issues of social justice, of racial justice, of private and public license versus economic, social, and cultural equity, of shared respect and dignity on a rational basis.The interplay of legal ideology and social democratic values emerges from the discourse of the judges on the court themselves, as well as distinguished commentators. From the perspective of social democratic values, the study of Bowen and Bok in *The Shape of the River* provides an empirical basis for the increased quantum of shared respect for African-Americans through social strategies like affirmative action.[44] Ronald Dworkin has written impressively on the lack of coherence of Supreme Court adjudication.[45] For example, Dworkin found that "[t]he equal protection clause is violated . . . when its loss results from its special vulnerability to prejudice or hostility or stereotype and its consequent diminished standing . . . in the political community."[46] It is important that Professor Dworkin has as well reminded us (as did Justice Marshall) that "prejudice" or "hostility" is not the same thing as discrimination. The technical language "strict scrutiny" which is used to identify White Americans as a "suspect class" (this gets funny) is the key analytical conundrum in the antipathy of the Court to affirmative action. What meanings can and should this construction hold? In my view, a perspective of not syntactic originalism but semantic expectation (original or not) should provide a more rational tool of legal analysis. It is gratifying that Professor Dworkin has once more insisted that we see discrimination in the light or darkness of racial prejudice.[47] It is the kind of insight needed to provide a more accurate narrative of America's race and ethnic relations.

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44. *See generally* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998).

45. *See* Ronald Dworkin, *Affirmative Action: Is It Fair?*, 28 J. BLACKS IN HIGHER EDUC. 79 (2000).

46. *Id.* at 80.

47. *See id.*

VIII. CONCLUDING THOUGHTS

Dean Kronman initiates his narrative in terms of the problems of political partisanship. We must be cautious of drawing an easy moral equivalence between those who favor social justice and those who do not. It is important, as I believe Kronman's piece makes clear, that we acknowledge that the partisans who oppose diversity do not oppose it on real internal grounds. They oppose it because as a political and legal symbol its reference is to affirmative action. They oppose affirmative action either on race-based grounds or an ideological antipathy toward social democratic values. Affirmative action, as I have tried to underscore, is actually a watered down version of a general commitment to these values although it is a critical component of the strategy to ameliorate the conditions of deprivation of the black underclass.

Where does this narrative lead us? I am in general agreement with the broad strategy of Dean Kronman's defense of educational diversity. Having said that, I am uncertain of the scope of his principle of transitional value, in which race or ethnicity is a positive factor to be weighed in the distribution of the benefits of higher education. The central factual problem, that issues of racial or ethnic justice must confront, is the social reality of "otherness" and prejudice. Dean Kronman may not be surprised to know that antisemitism and racial hate group activity are alive and well in the United States and other Western democracies. He will, of course, be aware of the recrudescence of group or mass murder, ethnic cleansing and genocide (for example, Bosnia, Rwanda). Racism indeed may be man's most enduring and dangerous myth system. When one confronts the reality of "otherness" in the context of the American dream, I confess that I am a major pessimist. I certainly cannot count myself in the same league as the paragons of non-racialism in the guise of such Justices as Scalia and Thomas. The reality of a pluralistic society that is highly conflict-conditioned is that social differentiation is a reality. Differentiation requires cultural markers; cultural markers that target racial ethnic or minority groups are the critical reality around which a society of conflict pluralism is organized.

The politics of identity is not a per se good or a per se bad phenomenon. It must be accessed against both empirical reality and the normative priority a culture provides to the politics of inclusion or exclusion. Stratification along race and economic lines and political hierarchy are not matters that can simply vanish away in law or moral theory. The brute reality is that racial ethnic markers are invariably accompanied by prejudice and worse. Without a recognition of relative powerlessness and of relative vulnerability, without a commitment to ameliorating the conditions of political vulnerability and attendant marginality, we move toward rather away from, both defensible liberal and

defensible social democratic values. Liberal and social democratic values are also encapsulated in globally sanctioned ideas about the premium we give to human rights values and the commitment to equal respect and dignity. The stakes, nationally and internationally, are indeed very high. Dean Kronman might have purchased valuable time and autonomy for higher education. However, we must be cautious that this does not compromise our concern for the reality and ubiquity of prejudice in our social process, and the dangers that prejudice and hatred hold for the soul of the American experience. Thus the question of critically examining the internal logic and standards used by the lawyers and judges as well as external context of the impact of the Court's role in supervising a nation's race relations law must be continually subject to careful, critical discourse. Indeed, Professor Dworkin, whose work has been earlier referred to,[48] has done a great service in leading a humane discourse on the essential justice and fairness of affirmative action.

One of the issues that ubiquitously emerges in the defense of those who oppose affirmative action is that one cannot separate out the context of justice and merits in any calculation of affirmative action. It might well be recalled that the University of Florida College of Law itself got under the standards bandwagon when an African American applied to be admitted at a time when the school was still segregated. He was, of course, qualified to get in on the same terms as most of his white colleagues. The faculty in its own perceived wisdom decided to change standards just sufficiently enough to block his admission. It might also be paradoxical to note that members of the white majority have themselves long been beneficiaries of at least a form of affirmative action. For example, prestigious universities for a long period admitted Jewish Americans, on the basis, of the Jewish quota. The Jewish quota was not designed to help Jews as minority; it was designed to help marginally qualified whites who ostensibly could not meet the establishments of criteria of "merit."

Similarly, in more recent times, Asian Americans too have been limited by quotas. Apparently, Asian Americans tend to do better in terms of testing criteria than white Americans. They too have been "excluded"—held to quotas in order to benefit ostensibly less able white students. These examples are not meant to defend or attack quotas. They do represent a lead in to an important issue viz., diversity and the idea of merit. Objectifying admissions criteria is usually symbolized by a number reference to grades and standardized tests. This number may be modified by other criteria of supposed merit. For the moment we might all agree that Asians and Jews who scored highly on standardized tests may have been discriminated against when others with lesser scores were favored. I want

48. *See generally id.*

to briefly examine how standardized numbers square with the liberal value attached to educational excellence or merit.

What I think can be said with some confidence is that the concept of merit has had something of an elastic history. In as large a society as the United States, grades are certainly an objective, but not necessarily fool-proof standard of measurement, simply because there would be a substantial difference between universities at the top of the academic ladder and those at the bottom. And even within universities, specialities are often of uneven quality. The reliance on aptitude tests, mainly coming from private organizations whose objectives, methods, and possible excessive claims of the predictability of "merit," may ultimately be more an admissions expedient than a critical standard of objective achievement or scientific predictability. I am uncertain whether implicit in the Kronman's piece there is not a subversive challenge to the issue of how merit squares with diversity. For example, standardized aptitude tests may be too limited and too uni-cultural to be of value as a liberal educational objective. That is to say, the issue of merit, value, or excellence is itself a matter of intellectual controversy. For example, intellectual critics of the status quo often see in conventional academic wisdom a coded signal indicating an antipathy to dangerous knowledge and unsettling thinking. To the extent that conventional academic wisdom finds institutional expression in standardized testing, it may be the case that value assumptions of a particular social group could represent a form of cognitive empathy to one group of testers and cognitive dissonance to another.

Conventional criteria of academic "merit" might also be seen as academic orthodoxy, a concept consistently in tension with the idea that the boundaries of enlightenment are never closed. Academic diversity, I would hold, must as well include the idea that diversity challenges academic orthodoxy. More than that, diversity may indeed be the lifeblood of the drive to expand the horizons of what we know, and how we do the business of knowing. In short, diversity is a synonym for the idea of "change." There is an obvious parallel between this idea and the narrower but very coherent approach taken by Kuhn in his pioneering work, *The Structure of Scientific Revolutions*. In that great work, paradigm change is inherent in doing science. The study seeks to understand the tension between freezing orthodoxy and changing it by paradigmatic shifts. In short, when the criteria of merit are defined, by administrative convenience or academic turf-protecting strategies, or academic "orthodoxy," "diversity" itself becomes an issue of academic, social and political conflict. Merit as orthodoxy and merit as diversity may be odd bedfellows.

In an oblique way, Dean Kronman addresses the issue of value assumptions behind the humanities, the sciences and the issue of diversity. It may be, as Kronman suggests, that diversity has a modest role to play

in the hard sciences. But even here the approach cannot be unqualified. There is a complex relationship between science, scientific responsibility and values. Consider for example the following:

> [V]alue judgments cannot be derived from scientific insights. The assertions of social science and value judgments may legitimately be seen as two distinct types of statement. We may ask, therefore, at which points in the sociologist's research he encounters value judgments, and how he should act in these encounters . . . .
>
> Scientific inquiry begins, at least in temporal terms, with the choice of a subject, and it is here that we find the first possible encounter between social science and value judgments. That the process of inquiry begins with the choice of a subject is rather a trivial statement; but if we advance one step further and ask on what basis a scholar chooses the themes of his research, we have left the realm of triviality . . . value judgments are often a factor in choosing a subject . . . .
>
> . . . [T]he choice of subject is made in what may be called the antechamber of science, where the sociologist is still free from the rules of procedure that will later govern his research. It is probably unrealistic to insist that value judgments be eliminated from the choice of subjects; in any case it is quite unnecessary, since the reason why a subject is regarded as worth investigating is irrelevant in principle to its scientific treatment.[49]

The essence of the matter is that science, social or natural, cannot be entirely value-free. While training in methods and techniques of scientific investigation may be relatively objective and in some measure transcend culture, class, or ethnicity, the problem of what is relevant, what is selected and used as a focus of scientific attention may be influenced by the cultural, racial, or ethnic background of an investigator. An African-American scientist may be more interested in a cure for malaria or sleeping sickness than a first-world white scientist who may be more interested in patenting a cure for heroin addiction. Value commitments and value predispositions may deeply influence the what, where, how and why of scientific education. Needless to say, these thoughts about merit and values will influence the question of how effective standardized tests are for including or excluding people with different value perspectives. Diversity, therefore, might be seen as a quite slippery but important vehicle for asking very fundamental questions about intellectual integrity

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49. Ralf Dahrendorf, *Values and Social Science: the Value Dispute in Perspective* (1957), *in* ESSAYS IN THE THEORY OF SOCIETY 6-7 (1968) (footnote omitted).

and educational value. This comment concludes with a letter to Dean Kronman.

> Dear Tony,
>
> I think your essay is an eloquent statement of a socially responsible educator. It is an essay of considerable intellectual refinement and value. I believe that it largely succeeds in putting old- fashioned civility in an important national conversation. I am however, uncertain about what I should make of the transitional character of racial and ethnic diversity as an aspect of racial and ethnic justice. If I may hazard a prediction, it will be that the struggle for social justice in general, and racial justice in particular, simply will not be a transitional thing. As indicated earlier in this comment, America is a melting pot of unmelted lumps. When you and I make the great Transition, America will still be a melting pot of unmelted lumps, and the struggle for equal respect and dignity will continue.
>
> As ever,
> Winston

Postscript:

As I have come to the conclusion of this comment, I ask for a reflection to its beginning. It is my hope that the three examples which began this piece serve as an illustration of the problems that pervade higher education today, and give the reader concrete examples of concerns which may at times become abstract and theoretical. The human frailties that are intertwined with both social and racial justice signal to us the sensitive nature of this matter and the positive steps that we need to invent and embrace. Through both Dean Kronman's piece and mine, I believe that we have taken the discourse of the subject of diversity beyond its current parameters. Hopefully this will influence institutions of higher education and operational thinking. The narratives highlight the problem, but there has been progress, and I am confident there will continue to be progress. I believe that our institutions of higher education are strong and will survive political storms ahead. They will strive to enlighten, understand and work on an inclusive basis to enhance the human prospect through science and learning and the excellence inherent in the diversity idea.