

A DELIBERATIVE DEFENSE OF DIVERSITY: MOVING BEYOND THE AFFIRMATIVE ACTION DEBATE TO EMBRACE A 21ST CENTURY VIEW OF EQUALITY

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“Diversity” is a recent construct in our equal protection jurisprudence, but during its relatively short existence it has garnered many critics. Even critical race scholars, the most vocal proponents of aggressive civil rights and equal protection enforcement, are skeptical about “diversity,” to say nothing of its many opponents. Critiques of “diversity” argue that it is vague, an alter ego of affirmative action, and an inferior method of achieving the remedial purposes of equal protection abound. More troubling than this scholarly critique of diversity, however, is the “mixed motive” analysis of the diversity interest in the Court’s equal protection jurisprudence that conflates the aspirational aims of diversity with the remedial aims of affirmative action. Diversity can and should be defended and materially distinguished from affirmative action both in the instrumentalist theories justifying it, as well as in the legal standards by which its constitutionality is evaluated. This Article offers that defense.

The primary aim of this Article is to elucidate the “diversity interest,” as recognized in our equal protection jurisprudence, through the lens of modern diversity practice. This corporate perspective on constitutional law may seem inapt. But viewing the constitutional diversity interest through the lens of modern diversity practice exposes the deficiency of our equal protection jurisprudence grounded solely in a remedial principle of equality to appropriately define or adequately accommodate the distinct aspirational aims of the diversity interest. Modern diversity practice offers insight and

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analogy for how our equal protection jurisprudence should respond to this deficiency, first by defining the various instrumentalist justifications for the diversity interest, and second by reframing the equal protection analysis to suit the constitutional contours of the diversity interest. Modern diversity practice offers both a theoretical and empirical defense of diversity that can help illuminate the legal analysis of diversity and move our equal protection jurisprudence from a backward-looking doctrine of redress to a forward-looking doctrine of egalitarianism.

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I. INTRODUCTION

This Article argues that the constitutional “diversity interest” recognized by the Supreme Court in *Regents of the University of California v. Bakke*,¹ *Metro Broadcasting, Inc. v. FCC*,² and *Grutter v. Bollinger*³ presents an opportunity to modernize and harmonize our equal protection jurisprudence, but that this opportunity has been unfulfilled by the Court’s incomplete and inapt treatment of the diversity interest to date. Viewing these cases through the lens of “modern diversity practice” both reveals the inadequacy of the Court’s treatment of the diversity interest in these cases, and also offers a prescription for the cure.

“Modern diversity practice” refers to the comprehensive, enterprise-wide strategic diversity initiatives that were developed in the 1990’s.⁴ Rather than a retrospective remedial focus, these diversity

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

² *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

³ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁴ Many of the concepts on which modern diversity practice is based originated from the theories of diversity management articulated first by R. Roosevelt Thomas Jr. in his 1991 work *BEYOND RACE AND GENDER: UNLEASHING THE POWER OF YOUR TOTAL WORKFORCE BY MANAGING DIVERSITY* and then by David A. Thomas and Robin J. Ely in their 1996 work, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.–Oct. 1996 at 74, 79. Although diversity in higher education traces its origins back to Justice Powell’s plurality opinion in *Bakke*, campus-wide diversity initiatives in colleges and universities are a much newer endeavor, arguably arising after the inception of corporate diversity practices. See, e.g., Ben Gose, *The Rise of the Chief Diversity Officer*, THE CHRON. OF HIGHER EDUC., SEPT. 2006, at B1 (“Many campus-diversity experts believe that universities are following the lead of the corporate world, where chief diversity officers have been in vogue since the 1990’s.”); Damon A. Williams and Katrina C. Wade-Golden, *The Chief Diversity Officer*, CUPA-HR J., Spring/Summer 2007, at 38 (“In many respects, the development of chief diversity officer roles in higher education follows the same meteoric path that recently took place in the corporate environment and is beginning to emerge in other nonprofit sectors.”). As well, some form of “diversity” initiatives in the United States Armed Forces date back to the Vietnam War era, when disparities in the racial composition of the enlisted and officer ranks resulted in “racial polarization, pervasive disciplinary problems, and racially motivated incidents . . .” Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae In Support of Respondents, *Grutter v. Bollinger* and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (Nos. 02-241, 02-516). Yet recent data suggests that the armed services have also adapted their diversity practices to mirror the modern diversity practices of corporate America. See DoD Directive 1350.2 (Aug. 18, 1995) (citing earlier Directive of December 23, 1988, governing

initiatives are driven and informed by prospective and strategic considerations such as improved business competence,⁵ increased operational performance,⁶ and good corporate citizenship.⁷ Modern diversity practice is distinguished herein from the diversity training and other limited diversity practices that were a part of equal opportunity/affirmative action programming as far back as the 1960's.⁸ It has long been argued by diversity practitioners⁹ that the diversity initiatives developed and deployed as a part of modern diversity practice are not repackaged affirmative action programming.¹⁰ Despite this claim, both critics and skeptics abound. Even critical race scholars, who are otherwise staunch proponents of remedial or corrective measures designed to redress the lingering effects of our country's long and tortured history of civil rights discriminations,¹¹ have frequently criticized diversity.¹²

Notwithstanding these critiques, from the perspective of a diversity practitioner, the distinction between modern diversity practice and affirmative action is more than a notion.¹³ More troubling than

Military Equal Opportunity (MEO) program); *see also, e.g.*, Gail Zoppo, *Federal Agencies Competing for Top Talent*, DIVERSITYINC, June 2010, at 166, 168 (noting that “[t]he federal agencies . . . have been taking diversity-management cues from corporate America”; quoting Captain Kenneth J. Barrett, head of the Navy's Diversity Directorate, saying “the Navy implemented its diversity plan in 2006 with the stipulation ‘to no longer accept the status quo.’”).

⁵ *See* discussion *infra* Section II.C.1.

⁶ *See* discussion *infra* Section II.C.2.

⁷ *See* discussion *infra* Section II.C.3.

⁸ *See, e.g.*, Rohini Anand & Mary-Frances Winters, *A Retrospective View of Corporate Diversity Training from 1964 to the Present*, 7 ACAD. OF MGMT. LEARNING & EDUC. 356, 358. *See* discussion by R. Roosevelt Thomas Jr. (one of the authors of modern diversity practice), *Affirmative Action: From the Perspective of Diversity*, PHYLON, Autumn–Winter 2001, at 99 (noting a “general inability of managers and individual contributors to delineate managing diversity from affirmative action [as] troublesome.”).

⁹ As a diversity practitioner for well over a decade, I have continuously defended “modern diversity practice” against both practical and legal challenge. I served as a member of the first group practicing diversity in a major national law firm. The group's leader, Weldon Latham, was retained by Texaco Chairman Peter I. Bijur in the aftermath of the 1996 Texaco settlement, *see* discussion *infra* Section II.A.1.

¹⁰ *See* Avery Gordon, *The Work of Corporate Culture: Diversity Management*, SOCIAL TEXT, Autumn–Winter 1995, at 9 (“Diversity management is highly invested in distinguishing itself from affirmative action.”).

¹¹ Some of the pioneers include Charles Lawrence, Mari Matsuda, Kimberlé Crenshaw, Cheryl Harris, Patricia Williams, Derrick Bell, Richard Delgado, and Lani Guinier, to name a few. These were scholars whom I studied and studied under during my own law school experience. Their ideas and critical thinking were formative in shaping my own path as a diversity practitioner and my thinking as an emerging scholar.

¹² *See, e.g.*, Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 720 (2008) (citing six reasons why “diversity” fails as a remedial social justice tool); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C. R. & C. L. 171, 176 (2005) (critiquing diversity's utility as a “vehicle of change” to “further the civil rights agenda”); Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 CAL. L. REV. 1149, 1150 (2003) (reviewing ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002)) (critiquing “diversity” as an “underdeveloped” concept, especially in relation to affirmative action, including as referenced by Justice Powell in *Bakke*); Charles Lawrence, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 766 (1997) (criticizing Justice Powell for “de-coupling” the remedial and diversity interests in *Bakke*).

¹³ Tanya Washington offers an equally compelling case for distinguishing between diversity and remedial affirmative action. *See The Diversity Dichotomy: The Supreme Court's Reluctance to Give Race a Capital 'R'*, 72 U. CIN. L. REV. 977 (2004).

the scholarly critique, however, is the incomplete and tangled legal framework within which the Court has analyzed diversity.¹⁴ The Court's analysis of the "diversity interest" suffers first from confusion over the conceptual distinction between remedial affirmative action on the one hand, and the aspirational diversity interest on the other. This conceptual confusion is compounded by the analytical deficiency of our equal protection doctrine to accommodate a non-remedial interest. Viewing the diversity interest through the lens of modern diversity practice can help: (1) clarify the definition and scope of the diversity interest; (2) offer an analytic construct for equal protection properly suited to the diversity interest; and (3) provide a substantive response to the skeptics and critics alike. This paper aspires to all three objectives.

Modern diversity practice has evolved and established itself as distinct from affirmative action. Although comparisons of the two often focus on the practical distinctions between modern diversity practice and affirmative action, the core distinction is theoretical.¹⁵ Modern diversity practice is supported by three dominant theories: (1) the business case (improved business competence), (2) functional theory (increased operational performance), and (3) corporate social responsibility (CSR)/pluralism (good corporate citizenship). By contrast, affirmative action is supported *solely* by a remedial theory. Not coincidentally, a remedial theory has also dominated our equal protection jurisprudence. In construing the Equal Protection Clause, the Court has relied on a "mediating principle" to give content to the otherwise ambiguous language of the clause.¹⁶ This mediating principle operates as a theory of constitutional review. It is a critical analytical construct that provides the framework within which the equal protection analysis operates. It structures the Court's reasoning in evaluating the legitimacy of race-conscious government action (compelling interest), as well as the inquiries that determine the permissible constitutional contours of that race-conscious action (narrow tailoring).¹⁷

The mediating principles that have dominated equal protection analysis are the anti-subordination and anti-discrimination principles. Notwithstanding their differing approaches to achieving equality, both principles are informed by a remedial theory of equal protection. These remedial mediating principles coincide well with our constitutional analysis of affirmative action. However, when

¹⁴ This conclusion is supported by the commentary of numerous legal scholars who have criticized diversity as a viable means of extending the civil rights progress achieved through affirmative action and traditional remedial/anti-subordination efforts. *See supra* note 12 citing works by Trina Jones, Kenneth Nunn, Charles Lawrence, Devon Carbado, and Mitu Gulati. Each of these scholars has appropriately identified deficiencies in the current legal doctrines and theories that prevent effective use of diversity under existing anti-discrimination and equal protection law.

¹⁵ There are significant practical differences as well, such as the broader scope of the definition of diversity, discussion *infra* at 8 (including "secondary dimensions" beyond traditional EEO categories), and the broader scope of diversity initiatives, discussion *infra* Section II.A.2 (encompassing not only employment recruiting and hiring, but also supplier diversity, marketing and communications, and corporate philanthropy). Although a discussion of the practical differences between modern diversity practice and affirmative action are beyond the scope of this article, for such a discussion, see Steven Ramirez, *Diversity and the Boardroom*, 6 STAN. J. L. BUS. & FIN. 85, 88 n.8 (2000).

¹⁶ *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, PHILOSOPHY & PUBLIC AFFAIRS, Winter 1976, at 108 [hereinafter Fiss, *Groups*]. John Hart Ely in his seminal work *Democracy and Distrust* referred to the Equal Protection Clause as one of the most "open textured" clauses of the Constitution, inviting interpretation from imported meaning outside of the text. JOHN ELY, *DEMOCRACY AND DISTRUST* 13–14 (1980).

¹⁷ Equal protection claims are subject to varying levels of judicial review. The highest level of review, strict scrutiny, applies to claims involving "race-based" government action. *Adarand Constructors v. Peña*, 515 U.S. 200, 222 (1995). This paper is directed to claims of race-conscious government action arising under the Equal Protection Clause, which are presumptively subjected to strict scrutiny. To withstand strict scrutiny, race-conscious action must be supported by a compelling government interest and must be narrowly tailored to meet that interest. *Id.*

the Equal Protection Clause is called upon to evaluate the merits of the “diversity interest,” these remedial principles prove wholly ineffective to the task of sorting out the constitutional legitimacy of that aspirational interest or defining its constitutional contours.

This Article is divided into five parts. Part II provides an overview of the history and theory of modern diversity practice¹⁸ with specific attention to the ways in which this history and theory are distinct from the history and theory of affirmative action. Part III offers an overview of the two mediating principles that provide the analytic construct within which our equal protection jurisprudence of race currently operates. Through an analysis of the Supreme Court’s opinions in the three “diversity cases” (*Bakke*, *Metro Broadcasting* and *Grutter*), Part IV reveals the inadequacy of an equality norm defined solely in terms of a remedial principle of equal protection to effectively accommodate the constitutionally recognized diversity interest. Finally, borrowing from Justice Powell’s abandoned strict scrutiny standard in *Bakke*, Part V offers a competing framework for evaluating the constitutional legitimacy of the diversity interest and defining its constitutional contours.

II. DISTINGUISHING MODERN DIVERSITY PRACTICE FROM AFFIRMATIVE ACTION IN THEORY

A. History & Origins of Modern Diversity Practice

It would be an overstatement to say that the word diversity or the practice of diversity was foreign to our national lexicon or legal discourse prior to the advent of modern diversity practice. Certainly, use of the term “diversity” was widespread in the effort to improve minority representation in many different types of institutions since 1978 when Justice Powell authored his plurality opinion in *Regents of the University of California v. Bakke*,¹⁹ wherein it was first acknowledged that, in addition to remedying past discrimination, attaining the educational benefits of “diversity” could justify the use of race-conscious admissions practices by colleges and universities. Thereafter, diversity was a common refrain in the equal opportunity context, often appearing alongside affirmative action as part and parcel of a range of equal opportunity efforts.²⁰ Nevertheless, in 1996, a once obscure lawsuit against Texaco and the ensuing high-profile settlement became the proverbial “game changer” for diversity, particularly in the corporate context.²¹ Texaco became a model not only for future discrimination settlements, but also numerous programmatic diversity initiatives that were developed in corporations across America in

¹⁸ The focus is on corporate diversity practice, *see* discussion, *infra* Section II.C, recognizing that there are both similarities and differences between diversity practice in the corporate context and that in other contexts, most notably higher education. However, starting from the premise that corporate diversity practice has served as a template for much of the proliferation of modern diversity practice, *see supra* note 4, the similarities are paramount and the differences may be of diminishing significance over time.

¹⁹ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

²⁰ The term “workforce diversity” may trace back as far as 1987, when WORKFORCE 2000 was published by the Hudson Institute, foreshadowing major demographic shifts in the new millennium workforce comprised of dramatically higher numbers of women and minorities, particularly as “net new entrants” to the workforce. Anand & Winters, *supra* note 8.

²¹ *See, e.g.*, Geoffrey Colvin & Eileen P. Gunn, *The Best 50 Companies for Asians, Blacks & Hispanics: Companies that pursue diversity outperform the S&P 500. Coincidence?*, FORTUNE (July 19, 1999), available at http://money.cnn.com/magazines/fortune/fortune_archive/1999/07/19/263098/index.htm (“When CEOs really speak candidly, they acknowledged that Texaco was the case that changed everything.”).

an effort to forestall their own risk of suit, as well as in recognition of the rapid diversification and globalization of labor and economic markets.²²

1. Texaco Suit & the Settlement

In 1994, six African American Texaco employees filed suit on behalf of themselves and a class of approximately 1400 similarly situated employees, claiming that Texaco engaged in a pattern and practice of discrimination against African Americans in “promotions, compensation, and the terms and conditions of their employment, including training and job assignments.”²³ The suit proceeded in relative obscurity for two years. Then, in November of 1996, an audiotape of several Texaco executives discussing the pending litigation was leaked to the press. The tape included disparaging references to African American employees²⁴ and comments evidencing an intent to withhold and/or destroy documents damaging to Texaco’s defense.²⁵ Overnight, news of the Texaco litigation was splashed across the headlines of every major news outlet, and Texaco’s stock plummeted, wiping out nearly \$1 billion in market value in a mere two days.²⁶ Reverend Jesse Jackson not only called for an immediate boycott of Texaco, but threatened to host a busload of protesters at a Texaco shareholder’s meeting in New York City.²⁷ A case that had languished in litigation for years and had been filed for \$71 million was settled within weeks for the then record sum of \$176.1 million.²⁸ The settlement included arguably the most far-reaching programmatic relief ever negotiated in an employment discrimination suit to that date. The settlement mandated five years of judicial oversight, creation of an outside advisory task force (comprised of civic, business, and civil rights leaders), and implementation of numerous corporate-wide diversity initiatives, together accounting for nearly \$40 million of the settlement amount.²⁹

Responding to news of the settlement, then Texaco Chairman Peter Bijur publicly committed to “take Texaco into the 21st Century as a model of *diversity*.”³⁰ And that is exactly what he did. Texaco

²² There is evidence that these efforts were successful in reducing liability under EEO laws. *See, e.g.*, Nancy Montwieler, *Dominguez Lauds Federal Contractors as ‘Pivotal’ in Attaining EEO, Diversity Goals*, 155 Daily Lab. Rep. (BNA) B-1 (2004).

²³ Special Master’s Report, *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997) (No. 94 Civ. 2015 (CLB)).

²⁴ Using coded language, the executives made derogatory remarks about minority employees, including referring to the African-American employees as black jellybeans. *See, e.g.*, Nancy Levit, *Megacases, Diversity and the Elusive Goal if [sic] Workplace Reform*, 49 B.C. L. Rev. 367, 390 (2008).

²⁵ *Id.*; *see also* Letter from CEO Peter I. Bijur to Employees, *available at* <http://www.texaco.com/sitelets/diversity/taskforce/letter.html>.

²⁶ *See, e.g.*, Marianne M. Jennings, *Texaco: The Jelly Bean Diversity Fiasco*, in *BUSINESS ETHICS: CASE STUDIES AND SELECTED READINGS* (3d ed. 1999).

²⁷ *See* Allanna Sullivan & Peter Fritsch, *Texaco Chairman Meets Advocates for Civil Rights*, WALL ST. J., Nov. 13, 1996, at B3.

²⁸ Cheryl Wade, *Corporate Governance as Corporate Social Responsibility: Empathy & Race Discrimination*, 76 TUL. L. REV. 1461, 1463 (2004).

²⁹ *Id.*

³⁰ Statement by Peter I. Bijur (Nov. 12, 1996), *available at* <http://www.texaco.com/sitelets/diversity/taskforce/statemnt.html> (emphasis added).

became not only a model for future employment discrimination settlements (such as the subsequent record-breaking \$192 million Coca-Cola settlement in 1999), but also a model for the emergence of a new corporate diversity paradigm.³¹

2. Rise of Corporate Diversity Practice

Suddenly corporations were awash in diversity programming focused on diversity recruiting and hiring, affinity groups, and supplier diversity initiatives, among other things.³² The Chief Diversity Officer became the newest member of the corporate executive team, and corporate profiles touted their commitment to, investments in, and results around diversity for both internal and external audiences. Critically, from the very start, this diversity paradigm was distinguished from its equal opportunity/affirmative action predecessor in that the scope was broader than mere compliance with legal Equal Employment Opportunity (“EEO”) requirements. These new diversity initiatives explicitly encompassed a broad range of demographic attributes far beyond the traditional affirmative action categories of race and gender, or even the additional EEO categories of religion, national origin, age, and disability. Diversity initiatives were defined to include not only sexual orientation,³³ but often many intangible attributes that have the ability to contribute to a more robust and dynamic work environment,³⁴ including learning style, work style, organizational role, educational background, work or life experience, and geography.³⁵ Therefore, unlike affirmative action, which is defined only to include race, color, religion, sex, and national origin,³⁶ diversity is susceptible to varying definitions across organizations and has expanded over time. This fundamental distinction between the scope of

³¹ See, e.g., Nancy Levit, *Megacases, Diversity and the Elusive Goal of [sic] Workplace Reform*, 49 B.C. L. Rev. 367 (2008) (describing proliferation of diversity initiatives after settlement through consent decree of “megacases” of employment discrimination).

³² See David Wilkins, *From ‘Separate is Inherently Unequal’ to ‘Diversity is Good For Business’: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556 (2004) (“In the last fifteen years, there has been an explosion in corporate diversity initiatives.”).

³³ Sexual orientation, as well as gender identity and expression, is a class protected under some state and local EEO laws.

³⁴ One topic of particular interest to modern diversity practice today is generational diversity. This is not about EEO-centric age discrimination in any sense, but about the unique cultural markers framed in terms of the historic events and formative experiences that define generations. ANICK TOLBIZE, U. MINN. RESEARCH AND TRAINING CTR. ON CMTY. LIVING, *GENERATIONAL DIFFERENCES IN THE WORKPLACE* 2–4 (2008), available at http://rtc.umn.edu/docs/2_18_Gen_diff_workplace.pdf. Research has demonstrated that issues of generational diversity can transcend the most powerful primary dimensions of identity, such as race and gender. Rich Paul, *Engaging the Multi-generational Workforce*, HR MGMT. REPORT, <http://www.hrmreport.com/article/Engaging-the-Multi-generational-Workforce/> (last visited Jan. 2, 2012). Gender-neutral demands for work-life balance that correlate with the rise of Generation X and the entry of Generation Y (or the Millennials) in the workforce are emblematic of the way these issues emerge and are understood in modern diversity practice. See TOLBIZE, *supra*, at 5.

³⁵ In diversity terms, these are distinguished as primary (immutable or physical attributes) and secondary (mutable or intangible attributes) dimensions of diversity. MARILYN LODEN, *IMPLEMENTING DIVERSITY* (1996) (Loden introduced this concept through use of a diversity wheel with two concentric circles displaying the primary and secondary dimensions of diversity as inner and outer circles, respectively).

³⁶ EEO Equal Opportunity Clause, 41 C.F.R. § 60-1.4 (2011). Pursuant to the 1974 Vietnam Era Veteran’s Readjustment Assistance Act, disabled veterans are also included in some definitions of affirmative action. 38 U.S.C. § 4212(d) (2006) and the implementing regulations at 41 C.F.R. § 61-250.1 et seq. (2008).

affirmative action and modern diversity practice extends beyond the definition of the terms and includes the theories informing diversity.

B. History and Theory of Affirmative Action

Whereas modern diversity practice is a recent phenomenon dating back roughly to the 1990's, affirmative action traces its origins to 1961 when President John F. Kennedy signed Executive Order 10925 expanding the previous efforts at equal opportunity in government contracting and civil service from mere non-discrimination to "affirmative action."³⁷ This mandate was extended in 1965 by President Lyndon Johnson as embodied in Executive Order 11246, which remains in effect today.³⁸ Promulgated as part of the newly enacted civil rights legislation,³⁹ the impetus for the affirmative action mandate of Executive Order 11246 was the same as the impetus underlying the Civil Rights Act of 1964.⁴⁰ Both Executive Order 11246 and the Civil Rights Act of 1964 were the culmination of decades of political and civil activism to redress the plight of minorities, particularly African Americans, suffering under the weight of discrimination in education and employment, as well as in other areas.⁴¹ Cases considering and upholding affirmative action pursuant to Executive Order 11246 specifically and affirmative action programs under Title VII generally make this remedial purpose clear.⁴² Affirmative action, therefore, is appropriately understood in relation to this history as the use of race-conscious policies for the specific purpose of redressing past discrimination and its lingering effects.⁴³

Notwithstanding a developing body of scholarship assigning other instrumental purposes to affirmative action policies and practices,⁴⁴ the only such instrumental purpose reflected in the legislative history or judicial interpretation and enforcement of affirmative action is a remedial purpose.⁴⁵ The developing body of scholarship on instrumental affirmative action is, therefore, more normative than descriptive. The "affirmative action" referred to herein, and contrasted with modern diversity practice, is

³⁷ J. EDWARD KELLOUGH, UNDERSTANDING AFFIRMATIVE ACTION: POLITICS, DISCRIMINATION, AND THE SEARCH FOR JUSTICE (2006).

³⁸ Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 24, 1965).

³⁹ Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, national origin, sex, or religion. 42 U.S.C. § 2000(e) (1964).

⁴⁰ KELLOUGH, *supra* note 37, at 32–33 (In the introduction, Kellough explicitly and unequivocally defines affirmative action as "a variety of strategies designed to enhance employment, educational, or business opportunities for groups, such as racial or ethnic minorities and women, who have suffered discrimination.").

⁴¹ See generally Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431 (1966).

⁴² See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Associated Gen. Contractors, Inc. v. ITC*, 361 F. Supp. 1293 (D. Mass. 1973) (describing affirmative action as a 'covenant for present performance which will hopefully have the effect of abolishing the results of past discriminations. . . .') (internal citations omitted); *Contractor's Ass'n v. Sec'y of Labor*, 442 F.2d 159 (3d Cir. 1971) (citing the purpose of the act as "remedial").

⁴³ JILL NORGREN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND LAW* 58 (2006).

⁴⁴ This shift in scholarship has been marked since the decision in *Grutter v. Bollinger*; see generally Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677 (2004) (describing the post-*Grutter* use of race as instrumental rather than remedial and questioning the legitimacy of this turn towards instrumental affirmative action).

⁴⁵ See generally KELLOUGH, *supra* note 37; Vaas, *supra* note 41.

that commonly understood and adjudicated as remedial in scope and retrospective in outlook.⁴⁶ By contrast, modern diversity practice is aspirational in scope and prospective in outlook.

C. Theories of Modern Diversity Practice

A catalyst for modern diversity practice was undoubtedly the shockwave that reverberated throughout corporate America as a consequence of the 1996 Texaco settlement. Corporate CEOs, boards, general counsel, and human resource executives were all in agreement that diversity was a useful prophylactic against the threat of Texaco-like liability, if nothing else. In other words, the costs of not managing diversity were enormous in terms of the potential for legal liability.⁴⁷ In this regard, diversity could very well have proceeded along a path very similar to EEO enforcement. However, as modern diversity practice emerged as an independent discipline supported first by experiential learning, then eventually by scholarship and empirical research,⁴⁸ what was once viewed as a “good” thing to do increasingly became viewed as the “necessary” thing to do. A number of theoretical models emerged to justify continued adherence to and even expansion of modern diversity practice. This Article will address the three theories most commonly cited in modern diversity practice. These three theories also coincide with the legal theories that have been articulated, though not fully developed, in support of the “diversity interest” in the equal protection context and thus have particular relevance to the present analysis.

1. The “Business Case”

The first justification that emerged as modern diversity practice evolved is the “business case.”⁴⁹ The “business case” posits that in an increasingly diverse national and competitive global economy, businesses that fail to leverage diversity to increase competitive advantage, expand market share, and deliver culturally competent products and services will fail to thrive in the twenty-first century marketplace.⁵⁰ The United States is becoming an increasingly diverse nation. In 1987, the Hudson Institute published *Workforce 2000*, which simultaneously coined the term “workforce diversity” and marked a finite turning point in our national demography by predicting a “majority minority” nation by the year 2050.⁵¹ *Workforce 2000* had an even greater impact on businesses by also predicting that by the year 2000, eighty-five percent of net new entrants to the labor force would be women and minorities.⁵² This represented a startling reality for American businesses previously dominated by a white male labor

⁴⁶ *Id.*

⁴⁷ See Levit, *supra* note 31.

⁴⁸ See Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J. L. BUS. & FIN. 85, 102 (2000) (discussing the development of empirical support for corporate diversity initiatives).

⁴⁹ For an extended discussion of the “business case” in broader context, see the seminal work of R. Roosevelt Thomas Jr. BEYOND RACE AND GENDER: UNLEASHING THE POWER OF YOUR TOTAL WORKFORCE BY MANAGING DIVERSITY (1991) and *From Affirmative Action to Affirming Diversity*, HARV. BUS. REV., Mar.–Apr. 1990, at 107.

⁵⁰ See, e.g., Brief for General Motors Corporation as Amici Curiae Supporting Respondents at 23–24, *Grutter v. Bollinger* and *Gratz v. Bollinger*, 539 U.S. 982 (2003), 539 U.S. 244 (2003) (Nos. 02-241, 02-516), 2003 WL 399096 [hereinafter Brief for General Motors].

⁵¹ WORKFORCE 2000 (William B. Johnston & Arnold E. Packer eds., 1987). By 2008, this estimate was revised up to 2042. See Press Release, U.S. Census Bureau, An Older & More Diverse Nation by Midcentury (Aug. 14, 2008), available at <http://www.census.gov/newsroom/releases/archives/population/cb08-123.html>.

⁵² WORKFORCE 2000, *supra* note 51.

force. The influx of female and minority workers posed a risk of discord in a previously homogenous work culture. But it was not just the labor force that was changing rapidly and dramatically. The marketplace was also rapidly diversifying.

In 2009, the combined buying power of the African American, Asian American, Native American and Hispanic markets in the United States was nearly \$2 trillion.⁵³ Asian American and Hispanic growth in buying power over the twenty-year period 1990-2009 far outpaced growth in white buying power, growing by rates of 336% and 361%, respectively, while white buying power grew over the same period by a rate of only 139%.⁵⁴ The national Hispanic buying power alone is larger than the entire economies of all but fourteen countries in the world.⁵⁵ Against this backdrop, it became readily apparent that businesses seeking to capitalize on existing markets, and particularly those seeking to penetrate new markets, needed to focus their attention on minority consumers.⁵⁶ This market diversification was as significant for businesses as the dramatically changing labor force.

This demographic diversity is not just a national phenomenon. Three of the world's five most populous countries are in Asia; a fourth is in South America.⁵⁷ Many of the fastest-growing economies in the world are in Africa and the Middle East.⁵⁸ Increasingly, as technology improves cross-border transactions and diplomacy fosters international trade,⁵⁹ American businesses are servicing clients and competing for business in a global marketplace where emerging countries represent both an opportunity and a threat. Multinational businesses have become the new norm in this global marketplace. Servicing clients, delivering products, and managing operations in this context require a new type of business acumen, namely cross cultural competence.⁶⁰ Viewed from this perspective, the diversity of the labor

⁵³ \$1.96 trillion to be exact, according to the Selig Center for Economic Growth at the University of Georgia. See Jeffrey M. Humphreys, *The Multicultural Economy 2009*, GA. BUS. & ECON. CONDITIONS, Third Q. 2009, at 1, available at <http://www.terry.uga.edu/selig/docs/GBEC0903q.pdf>.

⁵⁴ Over the same period, African American buying power grew by 186% and Native American buying power by 227%. *Id.*

⁵⁵ *2010 Minority Buying Report of The Selig Center*, TERRY COLL. OF BUS. (Nov. 4, 2010), <http://www.terry.uga.edu/news/releases/2010/minority-buying-power-report.html>.

⁵⁶ "For many industries, multicultural markets represent the largest relatively untapped organic growth opportunity on the horizon." Stephen Palacios, *Aligning Diversity, CSR and Multicultural Marketing*, HARV. BUS. SCH. PUBL'G CORP., June 2008, at S1.

⁵⁷ The world's five most populous countries in descending order are China, India, the United States, Indonesia, and Brazil. See U.S. Census Bureau Country Rankings, U.S. CENSUS BUREAU, <http://www.census.gov/population/international/data/idb/rank.php> (select "Top 10"; click "Submit") (last visited Jan. 2, 2012).

⁵⁸ See ECONOMY WATCH, <http://www.economywatch.com> (last visited Jan. 2, 2012). EconomyWatch is the largest independent online economics community in the world, cited and relied on by the World Bank, among others. Using data from the International Monetary Fund's tracker of GDP growth, EconomyWatch published a ranked forecast of the fastest growing economies in the world in 2011.

⁵⁹ The end of the Cold War has ushered in a new era of global trade, as evidenced by China's admission to the World Trade Organization ("WTO") in 2001 and Russia's imminent membership as of the end of 2010. See David Jolly, *Russia Clears Last Hurdle for W.T.O. Membership*, N.Y. TIMES, Nov. 10, 2011, <http://www.nytimes.com/2011/11/11/business/global/russia-clears-last-hurdle-for-wto-membership.html>.

⁶⁰ Palacios, *supra* note 56, at S1 ("In the globalizing economy, building cultural competence is a core asset for business success."). For a broad discussion on the framework for understanding and applying cross-cultural competence,

force represents an economic opportunity. The evidence of the benefits obtained from effectively leveraging cross-cultural competence in the global marketplace and of the costs associated with failing to do so is mounting. Increasingly businesses are acknowledging that cross-cultural competence is an integral part of doing business in the rapidly diversifying national and increasingly complex global marketplace.

In light of this evidence, businesses quickly transitioned from managing diversity solely as a legal and employee relations prophylactic to integrating diversity management into their strategic operations. Instead of merely forestalling the risk of suit, diversity management became a way to improve business performance by increasing competitive advantage, expanding market share, and delivering culturally competent products and services to the new global marketplace. The “business case” for diversity may have developed incidentally, but it has become the chief justification for the proliferation of modern diversity practice over time and across virtually every sector and industry of business. If the Texaco settlement was the catalyst for the proliferation of modern diversity practice throughout corporate America, the “business case” was the catalyst for sustaining modern diversity practice and elevating it from a narrow legal or compliance concern to a strategic business imperative.⁶¹

2. Functional Diversity

Closely related to the “business case” for diversity is the theory of functional diversity. Under the theory of functional diversity, it is not the primary dimensions of diversity that matter most, but the secondary dimensions of diversity, i.e., socioeconomic status, geography, work style, learning style, organizational role, function, education, experience, etc.⁶² Under a functional theory, diversity enhances organizational performance by improving problem solving, decision making, and ultimately the quality of output.⁶³ According to this empirical theory, the diversity of background, experience, and perspective in heterogeneous workgroups contributes to greater collaboration, thereby producing superior performance on measures of innovation and problem solving.⁶⁴ Servicing new and emerging markets, as well as the

see generally James P. Johnson, Tomasz Lenartowicz & Salvador Apud, *Cross-cultural Competence in International Business: Toward a Definition and a Model*, 37 J. INT’L BUS. STUD. 525 (2006).

⁶¹ It was this shift in particular that marked the turn from “diversity” to “modern diversity practice.” As diversity increasingly became unmoored from its compliance origins, it transitioned from the “diversity” that so often is conflated with affirmative action to a distinct “modern diversity practice” wholly unrestrained by remedial, prophylactic, or legal considerations of non-discrimination.

⁶² The primary dimensions, to the extent they are relevant, are only relevant because of their interrelationship with the secondary dimensions of diversity. See SCOTT E. PAGE, *THE DIFFERENCE* xiv (2007).

⁶³ See, e.g., Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. OF MGMT. REV. 402, 406 (April 1996) (noting positive effects of ethnic and racial diversity on group-level cognitive outcomes); but cf. J. Stuart Bunderson & Kathleen M. Sutcliffe, *Comparing Alternative Conceptualizations of Functional Diversity in Management Teams: Process and Performance Effects*, 45 ACAD. OF MGMT. J. at 875 (2002) (noting “empirical studies have shown that functionally diverse teams can be more innovative, can develop clearer strategies, can respond more aggressively to competitive threats, and can be quicker to implement certain types of organizational change than functionally homogenous teams,” but also observing that diversity can “inhibit team process and/or effectiveness”) (internal citations omitted).

⁶⁴ See Milliken & Martins, *supra* note 63. These benefits tend to increase over time and with improved mediation of the interpersonal conflict inherent with heterogeneous group dynamics. Notably, “[n]o theory suggests that a workgroup’s diversity on outward personal characteristics such as race and gender should have benefits except to the extent that diversity creates other diversity in the workgroup, such as diversity of information or perspective.” Karen A.

need to create new demand among existing market share all contribute to an increased need for innovation and problem solving. Additionally, the move from an industrial to a knowledge economy places increased demand on businesses to effectively manage human capital for maximum qualitative output.⁶⁵

Empirical studies of the benefits of heterogeneous workgroups date back to the 1960's.⁶⁶ However, it is not surprising that as diversity management grew as a discipline, increased attention was paid to the returns on this investment.⁶⁷ Diversity practitioners, eager to justify their existence and quantify the value of diversity management to corporate executives, reinvigorated and expanded on this body of work by demonstrating the manifold benefits of diversity in the workplace. The social science of diversity bore out its benefits in at least three important ways. Diversity improved decision-making, increased innovation, and produced superior qualitative output.⁶⁸

These discoveries, coupled with the already increasing awareness of the “business case” for diversity, solidified diversity’s place in the business management of virtually every company competing for market share in the national and global marketplaces.⁶⁹ However, the functional theory of diversity, much more than the “business case,” generated momentum for the proliferation of modern diversity practice in wide-ranging contexts far outside its corporate origins. The realization that diversity could be an institutional lever, not just a business lever, represented a “tipping point”⁷⁰ for modern diversity practice. Acknowledgment of the functional benefits of diversity spurred the movement of modern diversity practice from the narrow confines of corporate America to an expansive institutional context

Jehn, Gregory B. Northcraft & Margaret A. Neal, *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, ADMIN. SCIENCE QTRLY., Dec. 1999, at 741, 742.

⁶⁵ See W. Chan Kim & Renee Mauborgne, *Strategy, Value Innovation, and The Knowledge Economy*, 40 SLOAN MGMT. REV. at 41, 44, 51 (1999) (“In creating wealth, knowledge is increasingly taking a front seat to the traditional factors of production . . . [E]ndogenous growth theory . . . informs us of the arrival of the knowledge economy and argues that innovations are no longer exogenous and can be created with the ideas and knowledge within a system.” One of the keys to creation of value innovation is “[t]eam members of diverse backgrounds and perspectives.”).

⁶⁶ See Lois Recascino Wise, *Managing for Diversity Research: What We Know from Empirical Research About the Consequences of Heterogeneity in the Workplace*, Presentation at the Metropolis Conference (Nov. 27–30, 2001).

⁶⁷ Early diversity literature is particularly focused on the “ROI,” or return on investment, in diversity management. This demand for accountability around what by that time had become significant investments in diversity by businesses generated a new body of data and correspondingly new understandings of the operation and benefits of diversity management.

⁶⁸ See SCOTT E. PAGE, *THE DIFFERENCE* (2007). Using empirical models and syllogistic logic, Page offers a defense of the benefits of diversity that he characterizes as “mathematical truths, not feel-good mantras.” *Id.* at xiv. Page makes bold but substantiated claims, such as “collective ability equals individual ability plus diversity” and “diversity trumps ability.” *Id.* His conclusions are that diversity makes a difference by improving workgroup performance outcomes on dimensions of problem solving, information aggregation, and prediction. *Id.*

⁶⁹ Based on my own experience working with clients across sectors and industries for more than a decade, diversity has been slower to take root in businesses that are more regional or local (versus national or global businesses) and/or that do not compete in open markets for significant revenue streams (*i.e.*, business-to-business enterprises versus consumer-facing enterprises).

⁷⁰ MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2002). Gladwell coined this term for the phenomenon when an otherwise ordinary event or thing becomes epidemic in its prevalence and/or impact. *Id.*

that included a renewed interest by institutions of higher education,⁷¹ a broad embrace by institutions of government,⁷² and the support of other institutional actors.⁷³

3. Pluralism/Social Responsibility

The third, and perhaps newest, theory of modern diversity practice posits that diversity is not just good for business, does not just produce superior results, but is also socially responsible in a multi-national global community and in our own pluralist democracy. As modern diversity practice evolved, diversity accountability was increasingly viewed as a part of corporate social responsibility efforts⁷⁴ and justified in social and moral rather than purely business terms.⁷⁵ This evolution was driven by a recognition that modern diversity practice had transcended its human capital management origins. It was no longer simply an effort to maximize the contributions of workers by leveraging their diversity internally, but increasingly became an effort to leverage the institutional commitment to diversity with external stakeholders.

⁷¹ Numerous colleges and universities have recently undertaken campus-wide diversity initiatives that extend far beyond the admissions programs that were commonplace in the aftermath of the Court's 1978 decision in *Bakke*, 438 U.S. 265 (1978), including Harvard University, the University of Virginia, the University of Maryland, Stanford University, the Pennsylvania State University, and the University of California, just to name a few. Many of these have also appointed officers to oversee newly established Diversity Offices to coordinate and administer these programs. *See, e.g., Coleman Named Chief Diversity Officer*, HARV. GAZETTE, Dec. 11, 2009, <http://news.harvard.edu/gazette/story/2009/12/coleman-named-chief-diversity-officer/> (announcing the appointment of a Chief Diversity Officer at Harvard University).

⁷² Several federal agencies have adopted agency-wide diversity practices since the late 1990's. The most recent example is the Dodd-Frank Act. Although the most noted provision of the Act is the creation of a federal consumer protection agency, a less noted but no less significant provision of the Act (Section 342) requires the establishment of offices of Minority and Women Inclusion in each agency overseeing federal banking and securities regulation, including the Federal Reserve. *See* Pub. L. No. 111-203 [H.R. 4173], § 913 (2010).

⁷³ Diversity initiatives can now be found in virtually every type and variety of institutional organization, including hospitals, not-for-profit agencies, and even professional associations. For instance, diversity initiatives abound among the various state and local bar associations, and the American Bar Association established its own Commission on Racial and Ethnic Diversity in the Profession as a result of the 1998 Goal IX initiative.

⁷⁴ *See* Palacios, *supra* note 56, at S2 (quoting Subha Barry, then global head of diversity and inclusion for Merrill Lynch and now the Senior Vice President and Chief Diversity Officer for Freddie Mac, as saying, "From 2001 to 2004, we saw an evolution on all of these fronts, . . . which resulted in greater alignment" referring to diversity, CSR, and multicultural marketing, as well as Frank Cooper, a PepsiCo marketing vice president, as saying, "We used to make a business case for CSR, then a business case for diversity and inclusion, and then for multicultural marketing. Increasingly, these are seen as integrated components of a single strategy."). *See also* *HResponsibility: Where Diversity and CSR Meet*, HR GATEWAY, Apr. 24, 2004; Abigail McWilliams & Donald Siegel, *Corporate Social Responsibility: A Theory of the Firm Perspective*, 26 ACAD. OF MGMT. REV. 117, 122 (2001); John Hasnas, *The Social Responsibility of Corporations and How to Make it Work for You*, 44 THE FREEMAN 332, 333-34 (1994); Jamie Snider, Ronald Paul Hill & Diane Martin, *Corporate Social Responsibility in the 21st Century: A View from the World's Most Successful Firms*, 48 J. BUS. ETHICS 175, 181 (2003).

⁷⁵ *See, e.g.,* Brief for General Motors, *supra* note 50, at 23-24 (noting "[a] stratified work force, in which whites dominate the highest levels of the managerial corps and minorities dominate the labor corps, may foment racial divisiveness. It also would be retrogressive, eliminating many of the productivity gains businesses have made through intensive efforts to eradicate discrimination and improve relations among workers of different races.")

Corporate social responsibility (“CSR”) concerns a business’s management of its impact on environmental, ethical, social and economic issues in the communities in which it operates.⁷⁶ CSR not only ensures that businesses act responsibly with regard to their impact on communities, but seeks to have a positive impact to the greatest extent possible.⁷⁷ Thus, modern diversity practice as informed by CSR implies exceeding legal obligations⁷⁸ rather than mere EEO compliance. In this regard, modern diversity practice attempts to further some social good.⁷⁹ Businesses realized the need to reflect not just the interests of the communities that they serve, but to reflect the diversity of those communities. Diversity as CSR is an expression of the pluralist values inherent in our constitutional principles as a nation of “we the people.”⁸⁰ “We the people” demands that government be both representative of and accountable to the varied constituencies from which it is derived.⁸¹ The pluralist principle of corporate social responsibility similarly demands that the operation and impact of business responds to a multiplicity of interests and constituencies. The pluralist theory of modern diversity practice reflects the need to be broadly inclusive in providing access to the economic enterprise, both at the individual institutional and collective societal levels.⁸² This CSR/pluralist theory of diversity is distinct from the earlier moral justifications for affirmative action, which were entirely remedial.⁸³ Many corporate stakeholders, including consumers,⁸⁴ community activists, and shareholders,⁸⁵ value these positive CSR

⁷⁶ See Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC’Y 268 (1999).

⁷⁷ *Id.*

⁷⁸ McWilliams & Siegel, *supra* note 74, at 117 (“Thus, a company that avoids discriminating against women and minorities is not engaging in a socially responsible act; it is merely abiding by the law.”).

⁷⁹ Paul C. Godfrey, Craig B. Merrill & Jared M. Hansen, *The Relationship Between Corporate Social Responsibility and Shareholder Value: An Empirical Test of the Risk Management Hypothesis*, 30 STRATEGIC MGMT. J. 425, 427 (2009). In contrast, affirmative action attempts to remedy a social harm. See discussion *supra* Section II.B and accompanying notes.

⁸⁰ U.S. CONST. pmbl.

⁸¹ *Id.* This is merely another form of our expression of self-government as “of the people, by the people, for the people.”

⁸² I am neither the first, nor the only, person to suggest that corporate America has preceded government in some respects in advancing the ideals of equality, particularly racial and gender equality. See, e.g., Wade, *supra* note 28 at 1463 (citing Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000) and Cynthia L. Estlund, *The Changing Workplace as a Locus of Integration in a Diverse Society*, 2000 COLUM. BUS. L. REV. 331, 332 (2000) for the proposition that corporate workplaces have served as “a vanguard institution in the movement for greater equality and integration on the basis of race and ethnicity in the society as a whole.”).

⁸³ See discussion *supra* Section II.B.

⁸⁴ See Yuliya Strizhakova et al., *Responses of Global Citizens to Cause-Related Green Marketing* (Nov. 4, 2010) (unpublished manuscript), available at <http://www.camden.rutgers.edu/pdf.marketing.pdf> (on file with the author) (analyzing the economic impact of tying marketing of products to “green” causes in various world markets, noting “[i]n response, global and local companies are actively engaging in green marketing in the U.S. and Western Europe, gaining competitive advantages and building up their brand equity.” *Id.* at 3).

⁸⁵ Godfrey, *supra* note 79. Launched in 1982, the Calvert Social Investment Fund was one of the first investment management groups specializing in “socially responsible” investing. According to Calvert, “responsible management of environmental, social and governance (ESG) factors contributes to sound financial performance which, in turn, can translate into long-term shareholder value.” CALVERT INVESTMENTS, <http://www.calvert.com/sri-calvert.html> (last visited Jan. 4, 2012).

investments. This value, in turn, translates to greater market share and positive returns on these investments.

What distinguishes each of these theories of modern diversity practice from the remedial theory of affirmative action is their aspirational character. The business case, functional theory, and pluralist justification for modern diversity practice each express an aspirational goal. They promote diversity in pursuit of some future benefit, rather than to redress some past wrong. Even when the actions taken in pursuit of diversity look and feel very similar to affirmative action, it is this prospective and aspirational motivation behind diversity, compared to the retrospective and remedial character of affirmative action, that marks the distinction. It is the difference of “why,” not the difference in “what” that distinguishes diversity materially and fundamentally from affirmative action.⁸⁶ It is this distinction that should inform our understanding and analysis of the two under equal protection law. In determining what the “diversity interest” means in the context of equal protection law, we can reference these theoretical distinctions to help us identify legal distinctions and establish a new legal construct to inform our equal protection analysis. However, before discussing how modern diversity practice can inform our understanding of the diversity interest under modern equal protection law, it is helpful to first put equal protection law in historic context.

III. THE MEDIATING PRINCIPLES OF EQUAL PROTECTION

It has frequently been acknowledged that the simple words of the Equal Protection Clause instructing that “no state shall deny to any person within its jurisdiction the equal protection of the laws” are susceptible to different meanings,⁸⁷ and must necessarily rely on some extra-textual reference for its construction and interpretation.⁸⁸ In his seminal 1976 work, Owen Fiss described this extra-textual

⁸⁶ Lest this distinction between the “why,” rather than the “what,” of diversity and affirmative action appear to be superficial, insignificant, or a mere exercise in semantics, let me offer an argument by analogy. There are many areas of the law where our terminology, understanding, and analysis turn critically on the “why” and not the “what” of certain actions. Killing is an action whose meaning, understanding and analysis under criminal law is dependent not on the mode of killing, but on the motivation for killing. Killing to avoid imminent harm to oneself or another is “self-defense.” See MODEL PENAL CODE § 3.04(2)(b), 3.05(1) (1985). Whereas killing with premeditated intent to cause death or severe bodily harm to another without provocation is “murder.” See *id.* at § 210.2. Closer to the point at hand, we find a similar analogy in constitutional law. Speech is subject to differing constructions, understandings, and analysis under First Amendment law depending on the type of speech involved. Threatening words can in one instance be an actionable crime and in another be protected political speech. This distinction turns not on the words spoken, but on the intent of the speaker and the context of the speech. See, e.g., *Watts v. United States*, 394 U.S. 705, 707 (1969) (reasoning “[w]hat is a threat must be distinguished from what is constitutionally protected speech” in finding that the context of the case and evidence of the petitioner’s intent require an understanding of his speech as constitutionally protected political speech rather than a criminal threat). The same is true for race-conscious measures. They can be on the one hand taken in pursuit of some future benefit not inuring to any particular class of persons, but to institutions or society at large (these are aptly described as diversity measures), or on the other hand taken for corrective or remedial purposes and inure exclusively to the benefit of an identified class of aggrieved persons (these are appropriately defined as affirmative action).

⁸⁷ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 337 (Brennan, J., concurring) (describing the Equal Protection Clause as an “evolving judicial doctrine”); see also *id.* at 339 (Powell, J., concurring) (noting that, in 1963 and 1964, the Equal Protection Clause was “in a state of flux and rapid evolution”).

⁸⁸ Even in the seminal Equal Protection case, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), notwithstanding an extensive discussion and investigation of the legislative history surrounding the adoption of the Fourteenth Amendment, the Court concluded that this evidence was inconclusive at best of the proper construction of the Equal Protection Clause to the question presented there. *Id.* at 489; see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 31 (1980) (“[U]nder the Equal Protection Clause . . . [t]he constitutional text doesn’t give us a clue as to what [the standards] might

reference as a “mediating principle”⁸⁹ and defined the two dominant mediating principles for the Equal Protection Clause as the anti-discrimination and anti-subordination principles.⁹⁰ These two “mediating principles” have dominated the scholarly literature since that time⁹¹ and informed the legal jurisprudence of the Equal Protection Clause since its inception.⁹² They have become competing frameworks in an ongoing struggle to shape the contours and define the content of our equal protection doctrine, notwithstanding the fact that both principles originate from the same remedial view of equal protection.

Both the anti-subordination and anti-discrimination principles purport to express *the* dominant theory by which our Equal Protection Clause should be adjudicated. The argument here is not against either or both of these principles as legitimate theories of Equal Protection.⁹³ The argument here is against the exclusivity of these principles as the only interpretive construct for developing our equal protection jurisprudence, especially in an evolving and increasingly modern context. The anti-subordination and anti-discrimination principles derive from cases adjudicating our former *de jure* system of racial segregation and the resultant *de facto* system of racial discrimination.⁹⁴ This context provides an inadequate framework for conceiving of equal protection outside of these remedial circumstances. These cases theorize and construe equal protection in a discrete historical context, notwithstanding a consistent acknowledgement that equal protection is neither substantively nor conceptually limited to that context.⁹⁵

be, and we are left with a provision whose general concern—equality—is clear enough but whose content beyond that cannot be derived from anything within its four corners or the known intentions of its framers.”).

⁸⁹ Fiss, *Groups*, *supra* note 16, at 108.

⁹⁰ *Id.* Fiss originally defined this latter principle as the “group disadvantaging principle,” but later acknowledged its adoption and redefinition as the anti-subordination principle. See Owen Fiss, *Another Equality*, 20 ISSUES IN LEGAL SCHOLARSHIP at 1 (2004), available at <http://www.bepress.com/ils/iss2/art20> [hereinafter Fiss, *Another Equality*]; see also Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (citing the two dominant theories of equal protection jurisprudence as anti-differentiation (or anti-discrimination) and anti-subordination).

⁹¹ See Reva B. Siegel, *Equality Talk: Anti-Subordination and Anti-Classification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1474 (2004) [hereinafter Siegel, *Equality Talk*] (acknowledging an understanding of anti-discrimination and anti-subordination as the two dominant competing theories of equal protection jurisprudence did not arise until decades after the *Brown* decision); see also Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Colker, *supra* note 90, at 1003; John Hasnas, *Equal Opportunity, Affirmative Action and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 424 (2002) (adding a third anti-oppression principle, which is a subset of the anti-subordination principle, and designating the anti-discrimination principle as anti-differentiation).

⁹² See discussion *infra* Section III.A–B.

⁹³ In choosing between these competing principles for construing the remedial mandate of our Equal Protection Clause, I do, however, firmly and steadfastly subscribe to the anti-subordination theory.

⁹⁴ See discussion *infra* Section IV.

⁹⁵ In *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879), while noting “[w]e doubt very much whether any action of a State, not directed by way of discrimination against the negroes, as a class, will ever be held to come within the purview of [the Equal Protection Clause],” the Court nevertheless went on to conclude, “We are not now called upon to affirm or deny that [the Equal Protection Clause] had other purposes.” *Id.* at 310. Later, in *Brown v. Board of Education*, 347 U.S. 483, 489 (1954) [hereinafter *Brown I*], when the Court rejected the “separate but equal” doctrine, the Court reasoned that even the history of ratification shed no instructive light on the meaning of the Equal Protection Clause, noting that “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 [were] . . . [a]t best,

A. Anti-Subordination

In constructing the anti-subordination principle, Fiss chose as the “theory of primary reference” the remedying of discrimination against blacks.⁹⁶ Indeed, even constitutional historians, though they debate the ultimate intention of the framers in constructing the Equal Protection Clause, agree that one cannot escape the historical context of the ratification of the Fourteenth Amendment as part of the Reconstruction Amendments, and the necessary implications of that context on the construction of the Clause.⁹⁷ Fiss himself bolsters his remedial theory of Equal Protection by reference to the Court’s construction of the Clause as the primary tool for the protection of blacks.⁹⁸ This judicial origin for the anti-subordination principle of equal protection is well-founded.

... inconclusive” particularly as it pertained to equality in public education because there was “so little in the history . . . relating to its intended effect on public education.” *Id.* at 490. Again, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 293 (1978), the Court noted that “[a]lthough many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white ‘majority,’ . . . the Amendment itself was framed in universal terms,” with the intent being to “establ[is]h in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.” Finally, as recently as *Adarand Constructors v. Peña*, 515 U.S. 200, 228 (1995) (Stevens, J., dissenting), notwithstanding an acknowledgement that the strict scrutiny standard was intended to “evaluat[e] carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not,” Justice O’Connor’s plurality opinion acknowledged that the Court was still adjudicating a law designed to “deal with the problem of racial discrimination,” and not to deal with some different or broader notion of equality inherent in the equal protection clause. *See id.* at 230. These cases demonstrate that there has been some judicial instinct to recognize a broader purpose in the Equal Protection Clause than merely remedying a history of discrimination, but that instinct has not been fully realized because so much of the case law has developed in the adjudication of discriminatory Jim Crow laws and the subsequent remedial laws. Only recently has our equal protection jurisprudence considered non-remedial uses of race, with varied responses. *Compare* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding a diversity admissions program), *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003) (upholding a race-conscious police assignment plan to facilitate community policing), *Reynolds v. City of Chicago*, 296 F.3d 524 (7th Cir. 2002) (upholding a race-conscious promotion plan of Hispanic police officers to facilitate diversity and public safety), *and* *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (permitting race-conscious staffing at boot camp to facilitate diversity and safety), *with* *Lomack v. City of Newark*, 463 F.3d 303 (3d Cir. 2006) (striking down a race-conscious assignment plan for firefighters to facilitate diversity), *Patrolmen’s Benevolent Ass’n v. City of New York*, 310 F.3d 43 (2d Cir. 2002) (striking down a racial assignment plan in the police department to facilitate diversity and public safety), *and* *Sch. Bd. of Piscataway v. Taxman*, 91 F.3d 1547 (3d Cir. 1996) (striking down a layoff plan adopted to achieve racial diversity among school teachers).

⁹⁶ While acknowledging the generality of the Equal Protection Clause’s language and admitting its broad scope, Fiss nonetheless argued that “blacks were the intended primary beneficiaries, [and] that it was a concern for their welfare that prompted the Clause.” Fiss, *Groups*, *supra* note 16, at 147. Reva Siegel has described it as “the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.” Siegel, *Equality Talk*, *supra* note 91, at 1472.

⁹⁷ *See generally* ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992) (recounting the history of the ratification of the Equal Protection Clause, including the reasons advanced in support of ratification in historic context).

⁹⁸ Fiss, *Groups*, *supra* note 16, at 147. “Other insular minorities” would presumptively be subject to a similar construction under the infamous footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Notwithstanding this presumptively broad application to “other insular minorities,” discussion of historical subjugation on the basis of race (blacks) and gender (women), and the equal protection implications of both dominate the literature and case law. *See, e.g.*, Colker, *supra* note 90, at 1006–07 (arguing not only that race and gender do dominate equal protection analysis, notwithstanding these other possible bases of inequality, but also that they should dominate equal protection analysis).

In the first Equal Protection case, the *Slaughterhouse Cases*,⁹⁹ decided just four short years after the ratification of the Fourteenth Amendment, the Court observed that,

In light of the history of these amendments, and the pervading purpose of them . . . it is not difficult to give a meaning to this clause. The existence of laws in the States where newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other.¹⁰⁰

In the *Slaughterhouse Cases*, the Court was not construing a law directed against the “newly emancipated negroes,” but the butchers of Louisiana. Compelled by the force of the historical context of the Amendment and recognizing this “pervading purpose” of the Equal Protection Clause, the Court denied the equal protection claim of the Louisiana butchers.

It was not until 1879 that the Court had occasion to construe the Equal Protection Clause in a case involving a state law directed against the “newly emancipated negroes.” In *Strauder v. West Virginia*,¹⁰¹ the Court considered a challenge by a “colored man . . . indicted for murder” to the law of the state of West Virginia precluding colored men from serving as members of a jury.¹⁰² In striking down the law as a violation of the Equal Protection Clause, the Court cited the reasoning of the *Slaughterhouse Cases* and further noted,

The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. . . . No one can fail to be impressed with the one pervading purpose found in all the amendments . . . the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.¹⁰³

By this pronouncement, the anti-subordination principle of the Equal Protection Clause was born, though not acknowledged as such until decades later.¹⁰⁴ From these beginnings, equal protection jurisprudence established a decidedly remedial legal framework. The remedy has ranged from vindicating blacks (and other subordinated groups) from the threat of oppressive legislation and subordinating state action¹⁰⁵ to compensating blacks for the lingering effects of past discriminatory actions.¹⁰⁶ However, the

⁹⁹ The Slaughter-House Cases, 83 U.S. 36 (1872).

¹⁰⁰ *Id.* at 81.

¹⁰¹ *Strauder v. West Virginia*, 100 U.S. 303 (1879).

¹⁰² *Id.* at 304.

¹⁰³ *Id.* at 306–07.

¹⁰⁴ See Siegel, *Equality Talk*, *supra* note 91.

¹⁰⁵ See *Strauder*, 100 U.S. 303; *Sweatt v. Painter*, 339 U.S. 629 (1950) (considering racially segregated state law schools); *Brown v. Bd. of Educ.*, 347 U.S. 483 (considering racially segregated public schools and overturning the “separate but equal” doctrine); *Palmer v. Thompson*, 403 U.S. 217 (1971) (considering racially segregated public pools);

underlying principle of this remedial scheme remains the same, elevating the status of formerly subordinated groups to that of full citizens, with the full rights and benefits of that citizenship, including the right to be free from discrimination and its ill effects.¹⁰⁷

It is this latter aim that has become the centerpiece of the modern anti-subordination principle of equal protection. *Brown v. Board of Education*¹⁰⁸ (*Brown I*) was its beginning. *Brown I* is not only the most celebrated equal protection case in our history, but it also captures the anti-subordination principle more cogently and expresses it more forcefully than any other. The facts of *Brown I* are familiar. It was a consolidated appeal of a series of cases on behalf of “minor Negro plaintiffs” challenging public school segregation laws in Kansas, South Carolina, Virginia and Delaware as a violation of the Equal Protection Clause.¹⁰⁹ In striking down state-sponsored segregation in public schools, the Court reasoned, “Segregation of white and colored children in public schools has a detrimental effect upon the colored children . . . denoting the inferiority of the negro group.”¹¹⁰ This perpetuation of the inferior status of black children caused the Court to invalidate the long-standing Equal Protection principle of “separate but equal”¹¹¹ and thereby breathe new life into the anti-subordination principle.

*Swann v. Charlotte-Mecklenburg Board of Education*¹¹² extended the anti-subordination principle of *Brown I* from merely disrupting the legal subordination of blacks through desegregation to enforcing a more affirmative remedial aim through integration.¹¹³ Although *Brown II*¹¹⁴ ordered public schools

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (considering racially segregated housing); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (discussing interracial cohabitation); *Loving v. Virginia*, 388 U.S. 1 (1967) (interpreting a state statute prohibiting interracial marriage); *but cf.* *Plessy v. Ferguson*, 163 U.S. 537 (1896) (permitting segregation of blacks in intrastate railway cars).

¹⁰⁶ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), discussed *infra* notes 112–121; *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (sanctioning an affirmative action program reserving half of the positions in a skilled craft workers’ training program for blacks to compensate for past discrimination in the skilled craft unions); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (permitting hire of a qualified female applicant over a qualified male applicant on the basis of gender to further affirmative action goals); *United States v. Paradise*, 480 U.S. 149 (1987) (permitting 1-for-1 promotion of black-to-white officers to eradicate the effects of past discriminatory hiring and promotion practices); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (sanctioning federal minority contractor set-aside program as a remedy for past discrimination); and various voting rights cases that precede *Shaw v. Reno*, 509 U.S. 630 (1993), *e.g.*, *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977) (sustaining racial redistricting pursuant to the Voting Rights Act of 1965 against an equal protection challenge).

¹⁰⁷ Fiss, *Groups*, *supra* note 16.

¹⁰⁸ 347 U.S. 483 (1954).

¹⁰⁹ *Id.* at 483.

¹¹⁰ *Id.* at 494.

¹¹¹ The “separate but equal” doctrine originated in the Court’s 1896 decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy* involved a challenge by a Negro citizen to a state statute prohibiting integrated passage on railways in intrastate travel. The Court upheld the statute on the rationale that so long as the accommodations were “separate but equal,” the law did “not necessarily imply the inferiority of either race to the other.” *Id.* at 544. The “separate but equal” doctrine governed equal protection jurisprudence from the Court’s decision in *Plessy* in 1896 until the Court’s 1954 ruling in *Brown I*, declaring “separate . . . inherently unequal.” *Brown I*, 347 U.S. 483, 495.

¹¹² 402 U.S. 1 (1971).

¹¹³ Between *Brown* and *Swann*, there was a series of equal protection cases challenging facially discriminatory statutes or other de jure or de facto discriminatory state action that did not implicate the distinction between the anti-

desegregated “with all deliberate speed,” compliance by school districts was spurious at best. When and where it did occur, the *de jure* desegregation efforts rarely resulted in *de facto* desegregated schools.¹¹⁵ The Charlotte-Mecklenburg school system typified these results; and notwithstanding implementation of a court-ordered desegregation plan during the 1968-1969 school year, the majority of Charlotte-Mecklenburg school district’s Negro students attended schools that were ninety-nine percent black.¹¹⁶ If the intent of *Brown I* was to eliminate *de jure* segregation in public schools, the intent of *Swann* was to “eliminate from the public schools all vestiges of state-imposed segregation,”¹¹⁷ or to eliminate *de facto* segregation. The remedies ordered to achieve this effect included: (1) racial balancing;¹¹⁸ (2) the altering of attendance zones, and (3) perhaps the most commonly cited remedy, busing.¹¹⁹ This extension of the Court’s constitutional jurisdiction, from declaring active segregation a violation of the Equal Protection Clause to affirming a remedial obligation to redress the lingering effects of past segregation, marked a subtle but significant expansion in the construction of the anti-subordination principle of equal

subordination and anti-discrimination principles. *See, e.g.*, *Turner v. City of Memphis*, 369 U.S. 350 (1962) (enjoining the city and airport from operating segregated eating and restroom facilities); *Griffin v. Maryland*, 378 U.S. 130 (1964) (invalidating state action to enforce segregation of state parks); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down a statute prohibiting habitual cohabitation of interracial unmarried persons); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding provisions of the Voting Rights Act of 1965 designed to preclude disenfranchisement of black voters); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating Virginia poll tax as a violation of the Equal Protection Clause in denying blacks’ right to vote); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a statute prohibiting interracial marriage); *but cf.* *Palmer v. Thompson*, 403 U.S. 217 (1971) (denying relief to Negro claimants challenging state’s decision to close public pools rather than operate pools on a desegregated basis). These cases struck down overt attempts to subordinate or perpetuate the subordination of blacks. The tension between the anti-subordination and anti-discrimination principles did not arise until after *Swann* began the movement toward affirmative relief not from the ongoing subordination of blacks, but from the lingering effects of past discriminatory actions.

¹¹⁴ *Brown II*, 349 U.S. 294, 301 (1955).

¹¹⁵ *Swann*, 402 U.S. at 13 (“Deliberate resistance of some to the Court’s mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.”).

¹¹⁶ *Id.* at 1.

¹¹⁷ *Id.* at 15. This reflects the Court’s use of the anti-subordination principle in construing the constitutional violation and shaping the contours of the constitutional remedy. This is in marked contrast to the use of the anti-discrimination principle, which merely abjures discriminatory conduct, but does nothing, or at least nothing race-conscious, to correct the ill effects of prior discriminatory conduct. *See* discussion *infra* Section III.B. The anti-discrimination principle is represented by the argument of the Mobile, Alabama, school board in the companion case to *Swann*, *Davis v. Bd. of Sch. Commissioners*, 402 U.S. 33 (1971). In *Swann*, the Court asserted both that “the Constitution requires that teachers be assigned on a ‘color blind’ basis” and “that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation.” *Swann*, 402 U.S. at 19 (citing *Davis*, 402 U.S. 33). The Court rejected both these contentions, favoring instead the anti-subordination argument that the Equal Protection Clause does indeed require that the Court “eliminate from the public schools all vestiges of state-imposed segregation” by exercising its broad and flexible remedial powers. *Id.* at 15.

¹¹⁸ It is notable that the Court is explicit in *Swann* in ordering “racial balancing” as an appropriate remedy to cure the lingering effects of segregation. *Swann*, 402 U.S. 1. Without expressly overruling its decision in *Swann*, the Court has more recently denounced “outright racial balancing” as impermissible under the Equal Protection Clause. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) [hereinafter *Parents Involved*].

¹¹⁹ *Swann*, 402 U.S. at 22–31.

protection.¹²⁰ It was this remedial impetus, given constitutional imprimatur, which spawned affirmative action.¹²¹ However, this affirmative pursuit of the remedial goals underlying equal protection was short-lived.

B. Anti-Discrimination

If the aim of the anti-subordination principle is to proscribe and redress oppressive, race-based government action, then the aim of the anti-discrimination principle is to proscribe the use of race as a legitimate basis for any government action. The remedial premise is the same, the means of achieving it merely changed. Now, rather than reasoning that “get beyond racism, we must first take account of race,”¹²² the Court began to reason that “the way to stop discriminating on the basis of race is to stop discriminating on the basis of race.”¹²³

This aim of eradicating race-conscious action has given rise to the alter ego of the anti-discrimination principle: colorblindness.¹²⁴ Although it is commonly argued that the colorblindness ideal of equal protection originated in Justice Harlan’s historic dissent in *Plessy v. Ferguson*,¹²⁵ the anti-discrimination principle did not present itself at odds with the anti-subordination principle until after the landmark case of *Brown I*, and even more notably after *Swann*.¹²⁶ In his 1975 tome, Alexander Bickel aptly described the growing rift between the anti-discrimination principle and the anti-subordination principle as follows:

The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation; discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic

¹²⁰ The Court reasoned that “[o]nce a right and a violation have been shown, the scope of [the] court’s equitable powers to remedy past wrongs is broad The task is to correct, by balancing of the individual and collective interests, the condition that offends the Constitution.” *Id.* at 15.

¹²¹ See discussion *supra* Section II.B for a history of affirmative action, the remedial theory underlying it, and its evolution.

¹²² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (Blackmun, J., concurring in part and dissenting in part).

¹²³ *Parents Involved*, 551 U.S. at 741–42.

¹²⁴ See generally John Marquez Lundin, *The Call for Color-Blind Law*, 30 COLUM. J. L. & SOC. PROBS. 407 (1997); Jennifer R. Byrne, *Toward a Colorblind Constitution: Justice O’Connor’s Narrowing of Affirmative Action*, 42 ST. LOUIS U. L.J. 619, 651 (1998) (defining colorblind constitutionalism as the protection of individuals regardless of race and requiring the same criteria in distributing benefits and burdens to all individuals regardless of race).

¹²⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896). In his infamous dissent, Justice Harlan argued against the statute prohibiting integrated passage on intrastate railways by declaring, “in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizen. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.” *Id.* at 559. This refrain is now commonly invoked by anti-discrimination advocates to support a “colorblind”/anti-discrimination view of the Equal Protection Clause. See, e.g., William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984).

¹²⁶ Lawyers for the plaintiffs in *Brown I* argued for application of the colorblind standard of equal protection identified by Justice Harlan in *Plessy* to support their claim for desegregation. Now that the colorblind anti-discrimination principle is asserted in opposition to affirmative remedial efforts to cure the lingering effects of discrimination, the colorblind ideal has been repudiated by traditional civil rights advocates.

society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.¹²⁷

Thus the anti-discrimination principle, first articulated in *Plessy* to oppose the oppression of Blacks under segregation laws, was now being used to challenge the resulting remedial efforts. This shift was not only reflected in the scholarly literature, but also in the Court's own equal protection jurisprudence.

As affirmative action expanded aggressively post-*Swann*, the Court's equal protection analysis reacted with an equally swift retreat from the anti-subordination principle and towards the anti-discrimination principle. *Regents of the University of California v. Bakke*,¹²⁸ most often hailed for its formulation of the diversity interest in equal protection,¹²⁹ can be equally heralded for its acknowledgment of the emerging anti-discrimination principle of equal protection. The first case to consider affirmative action programs in a context where prior discriminatory conduct by the defendant institution was not in evidence, *Bakke* presented an opportunity for departure from the post-*Brown* era of enforcing an anti-subordination principle of equal protection.¹³⁰ The Court seized on this opportunity. Citing as the university's proffered remedial justification for the affirmative action program, "countering the effects of societal discrimination," Justice Powell, writing for the plurality, reasoned that the "purpose of helping certain groups . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."¹³¹ Articulating the crux of the anti-discrimination principle, Powell went on to cite "[f]airness in individual competition for opportunities . . . [as] a widely cherished American ethic,"¹³² and concluded that, "[t]he fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment."¹³³

This elevation of the individual rights of those persons disadvantaged by these remedial efforts over the rights of those groups of persons benefited became the centerpiece of the anti-discrimination principle. Although racial classifications have long been recognized as uniquely "suspect,"¹³⁴ and thereby subject to strict scrutiny,¹³⁵ the strict scrutiny analysis that developed under the anti-discrimination principle shifted the primary concern from remediating harm to blacks and other subordinated groups to minimizing

¹²⁷ ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975).

¹²⁸ *Bakke*, 438 U.S. 265. For a detailed discussion of the factual and legal background in *Bakke*, see discussion *infra* Section IV.A.

¹²⁹ See discussion *infra* Section IV.A.

¹³⁰ Distinguishing the facts in *Bakke* from those of *Swann* and the other *Brown II* progeny, the Court noted, "The school desegregation cases are inapposite. . . . Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification." *Bakke*, 438 U.S. at 300–01 (internal citations omitted).

¹³¹ *Id.* at 310.

¹³² *Id.* at 319.

¹³³ *Id.* at 320.

¹³⁴ *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹³⁵ *Id.*

harm to “innocent persons.”¹³⁶ The anti-discrimination principle has increasingly become the majority view of the Court on matters of affirmative action.¹³⁷ However, neither this principle, nor its analytic construct under strict scrutiny, is useful to inform our understanding of how to construe equal protection when the use of racial classifications is not remedial.¹³⁸

C. Remedial Principles Provide An Inadequate Equal Protection Framework for the Diversity Interest

Remedial principles provide an inadequate equal protection framework for the diversity interest. If the diversity interest recognized by the Court in *Bakke*,¹³⁹ *Metro Broadcasting, Inc.*,¹⁴⁰ and *Grutter*¹⁴¹ acknowledges a non-remedial aim, the anti-subordination and anti-discrimination principles are wholly inadequate to assess the legitimacy of that interest or define its constitutional limits. Viewing the diversity interest through the lens of modern diversity practice – that is, in view of the clearly defined aspirational aims of diversity – reveals that the remedial equal protection framework established by the anti-subordination and anti-discrimination mediating principles is misaligned with the theoretical structure and substantive content of the diversity interest.

IV. THE “DIVERSITY INTEREST”

The triumvirate of cases that form the basis of the “diversity interest” under equal protection are *Bakke*,¹⁴² *Metro Broadcasting, Inc. v. FCC*,¹⁴³ and *Grutter v. Bollinger*.¹⁴⁴ Each of these cases justifies the use of

¹³⁶ See *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 282 (1985) (striking down a layoff plan designed to remedy the effects of past discrimination because of the burden imposed on innocent persons).

¹³⁷ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (referring to the strict scrutiny standard as necessary to “define both the scope of the injury and the extent of the remedy necessary to cure its effects.”); *Adarand Constructors v. Peña*, 515 U.S. 200, 230 (1995) (adopting the *Croson* strict scrutiny standard for federal as well as state remedial uses of race, noting explicitly that “any individual suffers an injury when . . . disadvantaged . . . because of race, whatever that race may be.”); *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (referencing the necessary limit of racial classifications by “judicial determination that the burden [non-minorities are] asked to bear . . . is precisely tailored to serve a compelling government interest.”).

¹³⁸ I acknowledge that we are far from fully realizing this remedial purpose. However, that fact does not negate the existence of broader equality aims inherent in our Equal Protection Clause. Nor do I believe that pursuit of these broader equality aims is in conflict with continued pursuit of the remedial aims of equal protection. It should equally be noted that the inadequacy of this limited equal protection construct is also evident in equal protection cases construing issues other than race. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (gender), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (disability), *Romer v. Evans*, 517 U.S. 620 (1996) (sexual orientation), *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (illegitimacy), and *Lau v. Nichols*, 414 U.S. 563 (1974) (national origin). Each of these cases demonstrates the inadequacy of a mediating principle of equal protection, whether anti-subordination or anti-discrimination, that relies exclusively on a remedial race-based approach to equality.

¹³⁹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹⁴⁰ *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

¹⁴¹ *Grutter*, 539 U.S. 306.

¹⁴² *Bakke*, 438 U.S. 265.

¹⁴³ *Metro Broadcasting*, 497 U.S. 547.

¹⁴⁴ *Grutter*, 539 U.S. 306 (2003).

race-conscious action under the Equal Protection Clause by appeal to a “diversity interest.” Notwithstanding the rhetoric of diversity, the Court in each of these cases fails to fully recognize¹⁴⁵ and analyze the diversity interest in two critical respects. First, none of the three cases recognizes an interest in diversity wholly distinct from a remedial interest. Rather, in defending and sustaining the race-conscious actions at issue, the cases all erroneously conflate the aspirational justifications of modern diversity practice with the remedial justifications associated with affirmative action.¹⁴⁶

Second, when evaluating the contours of the diversity interest pursuant to the narrow tailoring element of the strict scrutiny standard, rather than tailoring that inquiry to the newly recognized diversity interest, the Court applies its remedial analysis as informed by the anti-discrimination principle of equal protection. It does so without any attention to or consideration of whether the analysis is appropriate for the diversity interest in view of its unique aspirational aims. This further compounds the problem of sorting out the distinction between the aspirational diversity interest and the remedial interest pursued through affirmative action.

In these cases, diversity is neither allowed to stand on its own as a principle of construction for equal protection (a compelling interest), nor is it given particularized treatment in the equal protection analysis (narrow tailoring). The result is a body of law that purports to establish an equal protection interest in diversity and define the contours of that interest, but manages only a limited recognition of the diversity interest, which it summarily proceeds to conflate with the traditional remedial equal protection interest in affirmative action.

This is not an argument in semantics. The Court in the diversity cases appears to be identifying motivations and analyzing equality claims that are fundamentally different than those motivations and claims addressed in the prior (and subsequent)¹⁴⁷ equal protection cases adjudicating remedial “affirmative action” programs. Yet, this attempt is not fully realized. It is thwarted by the Court’s inability to accommodate the theoretical and analytical transition from programs motivated by a remedial aim to programs motivated by a diversity interest. This failing, and the Court’s confused reasoning in these cases, is revealed when the cases are viewed through the lens of modern diversity practice.

A. *Bakke*

The first case in which “diversity” was recognized as a possible non-remedial justification for race-conscious action under the Equal Protection Clause was *Regents of the University of California v.*

¹⁴⁵ Prior to Justice Powell’s plurality opinion in *Bakke*, remedying discrimination and national security were the only interests recognized by the Court as sufficiently “compelling” to withstand the strict scrutiny analysis of equal protection. *Grutter*, 539 U.S. at 351–52 (Thomas, J., dissenting). For a discussion of the remedial interest, see discussion *supra* Section III.A. For a discussion of the national security interest, see *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁴⁶ Tanya Washington equally notes this analytic error in critiquing the *Grutter* Court’s reasoning by noting that “[t]he majority’s means-end mix up was compounded by its failure to enumerate and distinguish the character, motivations, and aspirations of the diversity rationale from those of remedial affirmative action.” Washington, *supra* note 13, at 983.

¹⁴⁷ For instance, *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), post-dates both *Bakke* and *Metro Broadcasting*. Nevertheless, *Adarand* addresses an affirmative action program with explicitly and exclusively remedial motivations that makes no claims otherwise on behalf of a diversity interest or any other non-remedial interest.

Bakke.¹⁴⁸ *Bakke* involved a challenge by Allan Bakke, a white male applicant, to the special admissions program maintained for the selection of disadvantaged minority students to the University of California at Davis Medical School, which reserved sixteen out of every one hundred positions for minority applicants. Notwithstanding the Court's finding that the special admissions program violated Bakke's right to equal protection,¹⁴⁹ Justice Powell's famous plurality opinion recognized that an admissions program could have as its purpose "obtaining the educational benefits that flow from an ethnically diverse student body."¹⁵⁰ Both the business and functional theories of diversity were articulated by the Court in *Bakke* to support this newly recognized "diversity interest," though not acknowledged in those terms.¹⁵¹

The medical school, the petitioner in *Bakke*, proffered a "business case" justification for diversity among medical school students, namely that diversity among the student body served to "improv[e] the delivery of health-care services to communities currently underserved."¹⁵² This justification was not dismissed by the Court for lack of persuasion, but for lack of evidence. The Court declared that the "Petitioner simply ha[d] not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens."¹⁵³

Justice Powell additionally noted, "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."¹⁵⁴ This, he argued, might "bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render

¹⁴⁸ *Bakke*, 438 U.S. at 311–12. The only other non-remedial rationale that has been acknowledged by the Court as sufficiently "compelling" to justify the use of race-conscious action under the Equal Protection Clause is national security. See *Korematsu*, 323 U.S. at 219.

¹⁴⁹ The plurality composed of Justices Powell, Stevens, Stewart, Rehnquist and Chief Justice Burger ruled that notwithstanding any compelling interest, the UC Davis Medical School's special admissions program for disadvantaged minority students was not narrowly tailored. *Bakke*, 438 U.S. at 315.

¹⁵⁰ *Id.* at 306.

¹⁵¹ The chronology of this recognition in 1978, when I have argued that these theories were not fully developed in modern diversity practice until the mid-1990's, is not a contradiction. I have acknowledged that the genesis of modern diversity practice dates to the 1960's, see *supra* note 8, but that it evolved substantially by the 1990's and thereafter developed rapidly because of the increased attention, both practically and empirically, associated with its proliferation in the corporate context. Precursor research regarding the practical benefits of diversity was largely confined to the social science literature. See Wise, *supra* note 66 (citing studies as early as 1961), and Carroll, *supra* note 76 (citing early CSR research dating back to the 1950's).

¹⁵² *Bakke*, 438 U.S. 265, 310 (1978). The business case has similarly been asserted in a number of lower court opinions on diversity. See, e.g., cases cited *supra* note 95.

¹⁵³ *Bakke*, 438 U.S. at 311. However, subsequent research has amply demonstrated that culturally competent delivery of health-care substantially improves medical outcomes for minority communities. As a result, while diversity of the medical profession remains an aim of medical schools, they have supplemented their attention to diversity in student admissions with academic instruction on cultural competence for all medical students as a way of improving the delivery of health care to minority communities. See *Tool for Assessing Cultural Competence Training*, ASS'N OF AM. MED. COLLS., <https://www.aamc.org/initiatives/tacct/> (last visited Feb. 6, 2012) (various resources on curricular instruction in cultural competence adopted by the American Association of Medical Colleges).

¹⁵⁴ *Bakke*, 438 U.S. at 313 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)).

with understanding their vital service to humanity.”¹⁵⁵ This reasoning correlates strongly with the cultural competence model of the business case for diversity.¹⁵⁶

Justice Powell also articulated a functional theory in espousing the benefits of diversity in higher education. He noted it is the function of a university to “provide that atmosphere which is most conducive to speculation, experimentation and creation.”¹⁵⁷ He went on to note that such an atmosphere “is widely believed to be promoted by a diverse student body.”¹⁵⁸ This is precisely the functional theory of diversity that underscores modern diversity practice.¹⁵⁹ Powell reasoned that pursuit of this “robust exchange of ideas” was “compelling in the context of a university’s admissions program.”¹⁶⁰

However, Powell’s plurality decision in *Bakke* failed to garner the support of a majority of Justices in its recognition of educational diversity as a compelling interest. The remaining four Justices comprising the majority on the issue of the permissibility of a race-conscious admissions programs in *Bakke* upheld the use of race as a remedy for societal discrimination, not for the benefit of educational diversity.¹⁶¹ Thus Justice Powell’s diversity rationale in *Bakke* was part of a plurality dominated by a remedial justification for the UC Davis Medical School’s race-conscious admissions program. It is evident from the opinions of the four Justices who joined Powell in this part of the plurality decision that they conceived of this admissions program, not as a diversity initiative, but as an affirmative action program. It was Justice Blackmun who cast the issue explicitly in terms of the anti-subordination principle when he argued,

In order to get beyond racism, we must first take account of race . . . [a]nd in order to treat some people equally, we must treat them differently. We cannot . . . let the Equal Protection Clause perpetuate racial supremacy.¹⁶²

Bakke, therefore, does not represent the Court’s full embrace of the diversity interest. Justice Powell’s diversity rationale in *Bakke* was not joined by a single other Justice. Instead, Justice Powell’s reasoning in

¹⁵⁵ *Id.* at 314.

¹⁵⁶ See discussion *supra* Section II.C.1.

¹⁵⁷ *Bakke*, 438 U.S. 265, 312 (1978) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)).

¹⁵⁸ *Id.*

¹⁵⁹ See discussion *supra* Section II.C.2.

¹⁶⁰ *Bakke*, 438 U.S. at 314.

¹⁶¹ Justices Brennan, White, Marshall and Blackmun joined Justice Powell in sanctioning race as a permissible factor in the admissions process generally, but reasoned instead that “Davis’ articulated purpose of remedying the effects of past societal discrimination [was] . . . sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.” *Id.* at 362.

¹⁶² *Id.* at 407 (Blackmun, J., concurring). Justice Brennan too cited an anti-subordination/remedial justification for his support of the race-conscious admissions program in *Bakke*, noting “[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice. . . .” *Id.* at 325 (Brennan, J., concurring). And Justice Marshall forcefully remarked, “[I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.” *Id.* at 387 (Marshall, J., concurring).

favor of the diversity interest in *Bakke* became emblematic of a possible expansion in equal protection doctrine that was not further realized until twelve years later, and not fully realized until twenty-five years later.

B. *Metro Broadcasting, Inc.*

The Court's first opportunity to revisit Justice Powell's "diversity interest" came twelve years after *Bakke* was decided. *Metro Broadcasting, Inc.*¹⁶³ involved a challenge by majority-owned broadcasters to the FCC policies giving preference to disadvantaged minority enterprises in the granting and renewal of broadcast licenses.¹⁶⁴ The majority broadcasters alleged that these FCC "minority preference polices"¹⁶⁵ violated their right to equal protection.¹⁶⁶ In upholding these policies against challenge, the Court reasoned that

Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission . . . '[I]t is the right of viewers and listeners, not the right of broadcasters, which is paramount.' . . . Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values."¹⁶⁷

¹⁶³ *Metro Broadcasting Inc.*, 497 U.S. 547 (1990), *overruled by Adarand*, 515 U.S. 200 (1995) (holding all racial classifications, including those imposed by Congress or considered "benign" are subject to strict, rather than intermediate scrutiny).

¹⁶⁴ *Metro Broadcasting Inc.*, 497 U.S. at 547. Specifically, the two programs at issue in *Metro Broadcasting* were (a) a program awarding an enhancement for minority ownership in comparative proceedings for new broadcast licenses, and (b) the minority "distress sale" program, which permitted a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms. *Id.* at 552. The fact that these policies/programs were continually referred to throughout the opinion as "preferences" signifies them as more akin to affirmative action than to diversity. Although the distinctions between modern diversity practice and affirmative action highlighted here are theoretical, there are also many practical distinctions between the two. Perhaps one of the most significant practical distinctions is that affirmative action programs often operate as a naked racial preference (whether or not they are or were intended as such). See Mark Nadel, "Retargeting Affirmative Action: A Program to Serve Those Most Harmed by Past Racism and Avoid Intractable Problems Triggered by Per Se Racial Preferences," 80 ST. JOHN'S L. REV. 323 (2006). Whereas modern diversity practice is race conscious, but does not operate as a race preference. This distinction could explain the Court's clouded treatment of the diversity interest.

¹⁶⁵ *Metro Broadcasting, Inc.*, 497 U.S. at 552.

¹⁶⁶ The FCC policies, promulgated as they were pursuant to the authority of Congress, were challenged under the Fifth Amendment, rather than under the Fourteenth Amendment. This difference was critical to the ruling in *Metro Broadcasting*, because it resulted in the Court applying a purportedly more deferential intermediate scrutiny standard of review, rather than the traditional strict scrutiny standard applicable to race-conscious action by the States under the Fourteenth Amendment. Notwithstanding the critical difference this might have made in deciding the case, this distinction is immaterial for purposes of this analysis. As discussed *infra* notes 172–181, the Court's analysis here is indistinguishable from its analysis under strict scrutiny.

¹⁶⁷ *Metro Broadcasting*, 497 U.S. at 567–68 (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) and *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 265 (1978)).

A majority of Justices in *Metro Broadcasting, Inc.* adopted this “diversity interest,” making it the rule of law in that case.¹⁶⁸ The Court even clearly articulated the functional theory of diversity to support its rationale. In upholding the FCC minority preference policies, the Court credited the FCC rationale for the policy that, “[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience.”¹⁶⁹ The Court expressly analogized the benefit of broadcast diversity in *Metro Broadcasting, Inc.* to the student body diversity defended by Justice Powell in *Bakke*, noting “[a] broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogenous group . . . akin to Justice Powell’s conclusion in *Bakke* that greater admission of minorities would contribute, on average, ‘to the robust exchange of ideas.’”¹⁷⁰

In a closely related argument, the Court cited the cultural competence model of the business case to further justify diversity in broadcast programming, stating,

[M]inority ownership does appear to have specific impact on the presentation of minority images in local news, inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities. In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies.¹⁷¹

Yet the Court failed to rely exclusively on either of these diversity justifications to sustain the challenged policies. Instead, the Court grounded its “diversity interest” in a remedial perspective, noting that the policies at issue could “best be understood by reference to the history of federal efforts to promote minority participation in the broadcasting industry.”¹⁷² The Court recited at length the historic deficits minorities had suffered in their participation in the broadcast industry despite their growing representation among the population, including lack of experience and inadequate access to capital and information.¹⁷³ Despite acknowledging these remedial justifications for the policies, the Court reasoned that “the effects of past inequities stemming from racial and ethnic discrimination” were not the primary justifications for the policies.¹⁷⁴ Rather, it purported to accept that the promotion of diversity in programming was the primary justification and concluded that “such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies.”¹⁷⁵ This assertion is belied by the Court’s subsequent analysis of this “diversity interest.”

¹⁶⁸ Applying an intermediate level of scrutiny, the majority accepts diversity as an important governmental interest. *Metro Broadcasting*, 497 U.S. 547. This holding was later overruled by *Adarand*, 515 U.S. 200, which held that all racial classifications are subject to the strict scrutiny standard.

¹⁶⁹ *Metro Broadcasting, Inc.*, 497 U.S. 547, 556 (1990) (internal citations omitted).

¹⁷⁰ *Id.* at 579.

¹⁷¹ *Id.* at 581–82 (internal citations omitted).

¹⁷² *Id.* at 552–53.

¹⁷³ *Id.* at 593–94.

¹⁷⁴ *Id.*

¹⁷⁵ *Metro Broadcasting, Inc.*, 497 U.S. 547, 566 (1990).

Although the Court professed application of an intermediate level of scrutiny in *Metro Broadcasting, Inc.*, it is virtually indistinguishable in substance from the strict scrutiny analysis applied to the remedial interests asserted in the Court's prior or subsequent affirmative action cases. The essence of the strict scrutiny analysis developed under the remedial anti-discrimination principle is the attention to "narrow tailoring" through consideration of: (1) race-neutral alternatives, (2) undue burden on the interests of non-minorities, and (3) limited duration of race-conscious practices.¹⁷⁶ Each of these remedial considerations is analyzed by the Court in *Metro Broadcasting, Inc.* notwithstanding the fact that the Court was purporting to review actions whose primary purposes were not remedial but stemmed from a new and different "diversity interest," supported by a functional and/or business justification.

First, the Court looked at the available race-neutral alternatives to the FCC minority preference policies in *Metro Broadcasting, Inc.* and found that none was a suitable substitute for the race-conscious policies promulgated, which had been "adopted . . . only after long study and painstaking consideration of all available alternatives."¹⁷⁷ Second, the Court considered the burden of the FCC minority preference policies on non-minority broadcasters. Here, the Court's reasoning in justifying this purported diversity interest is indistinguishable from its analysis of the remedial interest in affirmative action. Expressly analogizing the FCC minority preference policies to the "Nation's dedication to eradicating racial discrimination," the Court reasoned that "innocent persons may be called upon to bear some of the burden of the remedy."¹⁷⁸ Betraying the diversity interest further, the Court went on to reason, "when effectuating a limited and properly tailored *remedy to cure the effects of prior discrimination*, such a sharing of the burden by innocent parties is not impermissible."¹⁷⁹ Lastly, in addressing the duration of the FCC minority preference policies, the Court acknowledged:

Congress and the Commission have adopted a policy of minority ownership not as an end in itself, but rather as a means of achieving greater programming diversity. Such a goal carries its own natural limit, for there will be no need for further minority preferences once sufficient diversity has been achieved.¹⁸⁰

Notwithstanding Justice Stevens' concurring statement in *Metro Broadcasting, Inc.* that he joined the Court in endorsing diversity as a "future benefit, rather than [a] remedial justification,"¹⁸¹ this future benefit is belied by the Court's explicit application of a remedial narrow tailoring standard to that aspirational interest.

¹⁷⁶ See, e.g., *United States v. Paradise*, 480 U.S. 149, 171 (1987) (identify narrow tailoring analysis as comprised of consideration of ". . . efficacy of alternative remedies, flexibility and duration of relief . . . and impact of the relief on the rights of third parties.").

¹⁷⁷ *Metro Broadcasting*, 497 U.S. at 548.

¹⁷⁸ *Id.* at 596 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280–81 (1986)).

¹⁷⁹ *Id.* at 597.

¹⁸⁰ *Id.* at 596.

¹⁸¹ This conflict was not lost on Justice Kennedy, who argued in his dissent that "efforts to compensate for racial inequalities . . . are not premises that the Court even appears willing to address in its analysis. Until the court is candid . . . and open about defending a theory that explains why the cost of [the minority preference policies] is worth bearing and why it can consist with the Constitution, no basis can be shown for today's casual abandonment of strict scrutiny." *Id.* at 636–37 (Kennedy, J., dissenting).

C. *Grutter*

The final case in the Court's triumvirate of "diversity cases" is *Grutter v. Bollinger*.¹⁸² *Grutter* was an essential reprisal of the issue raised in *Bakke*, wherein the race-conscious admissions policy of the University of Michigan Law School was challenged under the Equal Protection Clause by a white applicant denied admission.¹⁸³ Relying on Justice Powell's plurality opinion in *Bakke*, the University of Michigan defended its admissions policy exclusively on the ground that it was necessary to attain the educational benefits of diversity.¹⁸⁴ Twenty-five years after the fractured ruling in *Bakke*, a majority of the Court, led by Justice O'Connor, "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."¹⁸⁵ This singular justification for the race-conscious admissions policy in *Grutter* offers the Court an opportunity to depart from the "mixed motive"¹⁸⁶ rationale that complicated and undermined the reasoning in both *Bakke* and *Metro Broadcasting, Inc.* Yet the opinion in *Grutter* is equally fraught with "mixed motive" rhetoric that undermines the Court's attempt to fashion a pure diversity interest in its equal protection jurisprudence. As with the other cases, the Court begins with some acknowledgement and analysis of the various theories of modern diversity practice. Importantly, in addition to justifying the diversity interest by reference to the business case and functional theories, *Grutter* was the first case in which the Court justified the diversity interest by reference to a pluralist theory.¹⁸⁷

Building on the precedent of *Bakke*, Justice O'Connor began in *Grutter* with the functional theory to support the asserted interest in student body diversity. Citing to the empirical evidence generated in the intervening years since *Bakke*, the Court noted that "diversity . . . has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."¹⁸⁸ The Court further explained that the functional benefit obtained by student body diversity is that "classroom

¹⁸² *Grutter v. Bollinger*, 539 U.S. 306 (2003). Diversity has been raised in subsequent cases, but has not generated any significant new analysis by the Court since *Grutter*. See *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved*, 551 U.S. 701 (2007).

¹⁸³ In a companion case, *Gratz v. Bollinger*, 539 U.S. 244 (2003), a white applicant also challenged the race-conscious admissions policy of the University of Michigan's undergraduate program.

¹⁸⁴ *Grutter*, 539 U.S. at 320 (noting "respondents assert only one justification for their use of race in the admissions process: obtaining the educational benefits that flow from a diverse student body" (internal quotations omitted)). Owing to the intervening equal protection cases rejecting the interests in remedying societal discrimination (*Richmond v. Croson*, 488 U.S. 467 (1989)) and the "role model" theory to support race-conscious policies (*Wygant v. Jackson Bd. of Educ.*, 476 U.S. 265 (1986)), the University of Michigan offered neither of these interests, which were offered in *Bakke*, to support their race-conscious admissions policy.

¹⁸⁵ *Grutter*, 539 U.S. at 318.

¹⁸⁶ This term was developed in the Title VII context. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (acknowledging that Title VII condemns acts motivated by a mixture of legitimate and illegitimate considerations, not merely those motivated solely by illegitimate considerations).

¹⁸⁷ It is not surprising that it was not until *Grutter* that the pluralist justification was raised in support of the diversity interest. As noted above, the corporate social responsibility/pluralism argument was also the last to be developed in support of modern diversity practice and is a relatively recent addition. See discussion *supra* Section II.C.3.

¹⁸⁸ *Grutter*, 539 U.S. 306, 308 (2003).

discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”¹⁸⁹

The business case, also addressed in each of the previous diversity cases, was a paramount justification for the diversity interest in *Grutter*. In one of the most oft-quoted passages from her majority opinion, Justice O’Connor noted that “[the] benefits [of diversity] are not theoretical, but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”¹⁹⁰ Reflecting a more refined understanding of the “business case,” the Court even accepted a cross-cultural competence justification for the student body diversity interest asserted in *Grutter*, which had been rejected in *Bakke* for lack of evidence.¹⁹¹ Specifically, the Court in *Grutter* reasoned that the University of Michigan Law School’s race-conscious admissions policy “promotes ‘cross racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”¹⁹²

But the major development between *Bakke* and *Grutter* was the emergence of the pluralist theory in support of the diversity interest. Justice O’Connor offered a pluralist theory in defense of the race-conscious admissions policy in *Grutter* by forcefully arguing for the diversity interest as follows:

[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity . . . Ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective. . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.¹⁹³

Justice O’Connor went on to reinforce the point that inclusive participation was not merely an educational obligation but a civic one as well, stating:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.¹⁹⁴

Grutter went further than either of the previous “diversity cases” in articulating and analyzing the diversity interest from a non-remedial perspective and establishing it as a distinct justification for race-conscious action under the Equal Protection Clause. In this regard, *Grutter* reflects the progression in the

¹⁸⁹ *Id.* at 323 (internal citations omitted).

¹⁹⁰ *Id.*; See generally Brief for General Motors, *supra* note 50, and Brief for 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516), 2003 WL 399056.

¹⁹¹ See discussion *supra* Section IV.A.

¹⁹² *Grutter*, 539 U.S. at 323.

¹⁹³ *Id.* at 324–25 (internal citations omitted).

¹⁹⁴ *Grutter*, 539 U.S. 306, 324–25 (2003).

Court's equal protection analysis of the diversity interest and lays the foundation for its further development.

Nevertheless, the *Grutter* Court was not immune from reflexive reliance on the traditional remedial analysis that characterized the *Bakke* and *Metro Broadcasting, Inc.* decisions. Succumbing to this analytic trap, the Court again applied the narrow tailoring standard developed in the context of remedial affirmative action cases to this proffered diversity interest. This inattention to the distinction between the diversity interest recognized by the Court and the narrow tailoring analysis applied to that interest is particularly puzzling in view of the Court's express acknowledgment that "context matters when reviewing race-based governmental action under the Equal Protection Clause."¹⁹⁵ Justice O'Connor went on at length about this nuanced approach, noting at one point that "strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced . . . for the use of race in that particular context,"¹⁹⁶ and later observing that "the narrow tailoring inquiry . . . must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."¹⁹⁷ Notwithstanding this, O'Connor went on to apply the strict scrutiny standard of narrow tailoring developed to fit the interest in remedying past discrimination in the affirmative action context, rather than constructing a standard of narrow tailoring to fit the interest in student body diversity in public higher education.

Signaling this shift in the Court's analysis from an aspirational interest to a remedial one, Justice O'Connor noted in *Grutter* that while the University of Michigan's admissions policy "[did] not restrict the types of diversity contributions eligible for 'substantial weight' in the admissions process," the policy did "reaffirm the Law School's longstanding commitment to 'one particular type of diversity,' that is, 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been *historically discriminated against* . . . *who without this commitment might not be represented* in our student body in meaningful numbers."¹⁹⁸ Thereby classifying the admissions program as a system that included "racial preferenc[es]," Justice O'Connor applied the standard three-part test for narrow tailoring utilized in the remedial context. Justice O'Connor evaluated the University of Michigan Law School's admissions policy for its consideration of race-neutral alternatives, undue burden on non-minorities, and limited duration.¹⁹⁹ Acknowledging the Law School's "good faith" consideration of race-neutral alternatives,²⁰⁰ individualized consideration of applicants notwithstanding the consideration of race,²⁰¹ and concession

¹⁹⁵ *Id.* at 327.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 333–34.

¹⁹⁸ *Id.* at 308 (emphasis added).

¹⁹⁹ *Id.* at 332–35. Justice O'Connor did borrow some elements from Justice Powell's narrow tailoring standard in *Bakke*, see discussion *infra* p. 45. She evaluated both whether the program operated as a rigid quota or as a more flexible, individualized standard and whether it considered factors beyond race in achieving diversity. *Id.* at 326–30. However, she quickly abandoned that line of reasoning and reflexively turned to the remedial equal protection analysis. *Id.* at 331–35.

²⁰⁰ *Grutter*, 539 U.S. 306, 339 (2003).

²⁰¹ *Id.* at 334, 341.

of a durational limit,²⁰² the Court upheld the Law School's race-conscious admissions policy, but not without distorting the nature of the diversity interest from an aspirational end to a remedial one.

Reviewing these diversity cases through the lens of modern diversity practice reveals that the Court has not gone as far as it professes in acknowledging a compelling interest in "diversity," at least not as an interest that is entirely independent of the remedial interest in redressing past discrimination. Nor has the Court clearly defined the diversity interest it has recognized in relation to the end it seeks to achieve. In each of the three diversity cases, the Court has variously recognized the business case (particularly cultural competence), functional, and pluralist/corporate social responsibility theories of diversity as plausibly animating the "diversity interest," but has failed to explicitly adopt any of these theories as the legitimately compelling end that diversity seeks to achieve.²⁰³ Moreover, the Court has compounded this failure to independently recognize or explicitly define a compelling interest in diversity by evaluating the diversity interest according to the narrow tailoring standard constructed for remedial racial classifications. In view of the function of the narrow tailoring standard as a test of fit between means and end,²⁰⁴ the use of a remedial fit test for the aspirational diversity interest is inexplicable.

V. UNCOVERING A NEW STRICT SCRUTINY STANDARD

The Court's application of the remedial narrow tailoring analysis in the *Metro Broadcasting, Inc.* and *Grutter* opinions betrays the very purpose of the strict scrutiny standard. The remedial test of narrow tailoring, developed pursuant to the anti-discrimination principle of equal protection, focuses the narrow tailoring inquiry on limiting the scope of the remedy. This focus is misplaced. When the end sought is aspirational, the focus of narrow tailoring is more appropriately on ensuring the efficacy of the means chosen. The ill fit between the Court's remedial analysis and the aspirational diversity interest is evident in the analytic contradictions and distortions of both *Metro Broadcasting, Inc.* and *Grutter*.

A. The [Mis]fit Between the "Diversity Interest" & Remedial Equal Protection Analysis

1. Race Neutral Alternatives

In evaluating the preference policies for disadvantaged minority enterprises in *Metro Broadcasting, Inc.*, the Court looked to whether the FCC had considered race-neutral alternatives before approving the race-conscious policy in support of the diversity interest.²⁰⁵ Not only did the Court find that the FCC had considered race-neutral alternatives, but it also found that the FCC "established minority ownership preferences only after long experience demonstrated that race-neutral means *could not* produce adequate broadcasting diversity."²⁰⁶ This was not the "good faith" consideration of race-neutral alternatives the Court accepted in *Grutter*.²⁰⁷ The FCC had engaged in numerous efforts over many years to achieve

²⁰² *Id.* at 342.

²⁰³ Justice Thomas emphasized this failure in his *Grutter* dissent, referring to the "diversity interest" recognized by the majority as "more a fashionable catchphrase than . . . a useful term," noting the ambiguity of the Court's use of the phrase by observing that the Court's rationale "implies that both 'diversity' and 'educational benefits' are components of the . . . compelling state interest," and finally stating that "'diversity,' whatever it means, is . . . not an end of itself." *Id.* at 354–55 (Thomas, J., dissenting).

²⁰⁴ See Fiss, *Groups*, *supra* note 16.

²⁰⁵ *Metro Broadcasting, Inc.*, 497 U.S. 547, 584 (1990).

²⁰⁶ *Id.* at 589 (emphasis added).

²⁰⁷ *Grutter*, 539 U.S. 306, 339 (2003).

programming diversity by race-neutral means and found them all ineffective²⁰⁸ to “[s]afeguar[d] the public’s right to receive a diversity of views and information over the airwaves.”²⁰⁹ The Court thus acknowledged that “[o]nly in this [race-conscious] way would ‘the American public [gain] access to a wider diversity of information sources.’”²¹⁰ The Court’s analysis of the race-neutral alternatives in *Grutter* similarly reveals that race-neutral alternatives can never prove effective in achieving diversity ends.

In assessing the sufficiency of race-neutral alternatives in *Grutter*, the Court criticized the race-neutral “lottery system” and “decreasing the emphasis . . . on undergraduate GPA and LSAT scores” as ineffective to achieving the end of diversity, noting that the former would require a “dramatic sacrifice of diversity” and that the latter would sacrifice “academic quality.”²¹¹ In particular, the lottery system was criticized for its inability to allow the university to “make th[e] kind of nuanced judgment . . . necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”²¹² The Court’s acknowledgement that race-neutral means could not be effective to achieve the particular diversity ends sought in either case reveals the inadequacy of this inquiry to appropriately define the contours of race-conscious actions taken in pursuit of a diversity end. Thus, consideration of this factor is misplaced in the narrow tailoring analysis of the diversity interest.

2. Burden on Non-Minorities

With regard to the burden on non-minorities—the second element of the remedial narrow tailoring test—the Court’s analysis in *Grutter* reveals itself to be inadequate too, as a measure of the fit between race-conscious means and a diversity end. In explaining this limitation on the scope of the race-conscious means, the Court in *Grutter* described the purpose as ensuring that the remedy does not “unduly burden individuals who are not members of the *favored* racial and ethnic groups.”²¹³ It stands to reason that if there are no *favored* racial and ethnic groups, this inquiry is meaningless in evaluating the race-conscious actions. Yet this is the precise acknowledgement made by the Court when it recognized that the Law School’s race-conscious admissions policy “considers ‘all pertinent elements of diversity,’ [and] it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.”²¹⁴ The Court acknowledged, “What is more, the [Law School] actually gives substantial weight to diversity factors besides race . . . [and] *frequently* accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants . . .

²⁰⁸ *Metro Broadcasting*, 497 U.S. at 584–89. The FCC’s efforts to enhance broadcast diversity by race-neutral means spanned the period of 1946–1978. *Id.* Some of its efforts included instructing broadcast licensees to “discover and fulfill the tastes, needs, and desires of his community or service area,” *id.* at 585, “promulgat[ing] equal employment opportunity regulations,” *id.* at 586, establishing formal “ascertainment” rules requiring broadcast licensees to respond to the needs and interest of “minority and ethnic groups” within the community of license, *id.* at 587, and even devising a “community leader checklist” with whom licensees could engage to meet the ascertainment requirements, *id.* at 587–88. All of these race-neutral efforts failed to produce sufficient programming diversity.

²⁰⁹ *Id.* at 567.

²¹⁰ *Id.* at 591 n.43 (quoting H.R. REP. NO. 97-765, at 45) (second alteration in original) (emphasis added).

²¹¹ *Grutter*, 539 U.S. 306, 340 (2003).

²¹² *Id.*

²¹³ *Id.* at 341 (quoting *Metro Broadcasting, Inc.*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting)(emphasis added)).

²¹⁴ *Id.*

who are rejected.”²¹⁵ It further characterized the Law School’s policy as an “individualized inquiry into the possible diversity contributions of all applicants” that does not “mak[e] an applicant’s race or ethnicity the defining feature of his or her application.”²¹⁶ Based on these acknowledgements, it is inaccurate to characterize the admissions policy as one that favors any racial or ethnic group and the inquiry into the burden that such a policy would place on non-favored groups is entirely misplaced here.

3. Limited Duration

Finally, the remedial narrow tailoring analysis considers the durational limits of race-conscious measures. The rationale here is not only that “[e]nshrining a permanent justification for racial preferences would offend [the] fundamental equal protection principle,”²¹⁷ but also that “such a goal carries its own natural limit.”²¹⁸ In *Metro Broadcasting, Inc.*, the Court reasoned that “there will be no need for further minority preferences once sufficient diversity has been achieved.”²¹⁹ In *Grutter*, the Court reasoned that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” First, this reasoning is inconsistent with the Court’s acknowledgement with regard to the first prong of the narrow tailoring test that race-neutral means simply could not be effective in achieving the diversity interest recognized in both cases as compelling.²²⁰ Moreover, unlike a remedial goal, which once achieved cannot justify continued use of race-conscious measures,²²¹ the diversity interest may in fact entail both achieving and maintaining diversity. Presumably, the interest in “[s]afeguarding the public’s right to receive a diversity of views and information over the airwaves [that is] an integral component of the FCC’s mission,”²²² recognized by the Court in *Metro Broadcasting*, is an interest to be both achieved and maintained. Similarly, a University’s interest in attaining “the educational benefits that flow from a diverse student body,”²²³ or developing “the skills needed in today’s increasingly global marketplace,”²²⁴ or “cultivat[ing] a set of leaders with legitimacy in the eyes of the citizenry”²²⁵ are interests to be both achieved and maintained. It is both logical and reasonable to presume that remedies entail finite goals. It is less logical and not altogether clear that the aspirational goals of diversity are as finite or circumscribed.

²¹⁵ *Id.* at 338 (emphasis added).

²¹⁶ *Id.* at 337, 341.

²¹⁷ *Id.* at 342.

²¹⁸ *Metro Broadcasting, Inc.*, 497 U.S. 547, 596 (1990).

²¹⁹ *Id.*

²²⁰ See discussion *supra* note 163. The diversity interest was more specifically recognized in *Metro Broadcasting* as “at the very least, an important governmental objective” in view of the intermediate scrutiny applied in that case. *Id.* at 567.

²²¹ See, e.g., *Parents Involved*, 551 U.S. 701, 721 (2007).

²²² *Metro Broadcasting*, 497 U.S. at 567.

²²³ *Grutter*, 539 U.S. 306, 343 (2003).

²²⁴ *Id.* at 330.

²²⁵ *Id.* at 332.

Diversity does not purport to be remedial in its aims, nor do the justifications for diversity recognized by the Court in these cases presume such a remedial purpose. To the contrary, the Court's reasoning in these cases seems to acknowledge the aspirational aims of the diversity interest and accept them as legitimately compelling to withstand constitutional challenge. Nevertheless, in the absence of a clearly articulated diversity interest and an analytical framework capable of accommodating a non-remedial aim, the Court simply is ill-equipped to analyze the diversity interest on its own merits. Rather than recognizing that the diversity interest aspires to a business case, functional or pluralist end, and fashioning an appropriate analytical construct to assess these interests, the Court relies on the familiar remedial principles and constructs that have dominated the equal protection analysis. Here too, modern diversity practice offers meaningful insight and analogy for our equal protection jurisprudence.²²⁶

B. The Right Fit: Adopting the Powell Test of Strict Scrutiny

The Court should have acknowledged that the diversity interest recognized in *Bakke*, *Metro Broadcasting*, and *Grutter* was not merely a different instrumental strategy for achieving the same remedial end recognized in prior equal protection cases, but that some different compelling interest, wholly separate and distinct from the remedial interest, was being expressed.²²⁷ Instead, the Court merged these novel and unique theories of diversity with old remedial justifications causing the rationale for the diversity interest to hinge not merely on the business case, or the functional or pluralist theories, but also to rest on remedial considerations such as remedying societal discrimination,²²⁸ curing the historic deficit of minorities in broadcasting,²²⁹ and the admission of students from historically underrepresented groups.²³⁰ This “mixed motive” analysis masks the independent constitutional significance of the diversity interest by subordinating its aspirational aims. If the Court had instead acknowledged that the diversity interest is not dependent on the remedial interest for its constitutional legitimacy, it might also have realized the need to develop a corresponding analytical construct to evaluate the appropriate contours of the diversity interest. In particular, the remedial narrow tailoring analysis constructed to evaluate the fit between race-conscious means and remedial ends is unsuited to the task of evaluating the fit between race-conscious means and diversity end. It is simply not suited to the context. It does not operate effectively to “examin[e] the importance and the sincerity of the reasons advanced . . . for the use of race in [this] particular context.”²³¹

Instead, Justice Powell's opinion in *Bakke* offers a useful model of the strict scrutiny analysis well-suited to the interest in diversity. It is notable that *Bakke* was decided prior to the development of

²²⁶ If, as suggested by V.F. Nourse and Sarah A. Maguire, the tragedies of history “present learning opportunities if they suggest a different way of addressing old problems,” V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 957 (2009), then this failure represents an opportunity to learn how equal protection jurisprudence should operate to effectively accommodate the diversity interest that we should not miss.

²²⁷ See Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 69 (2004). Although Karst does conflate the term diversity with affirmative action, he does astutely acknowledge that “[t]he goal articulated in *Grutter* . . . does not look back to . . . offer a remedy but [r]ather, . . . looks to our national future.” *Id.*

²²⁸ *Bakke*, 438 U.S. 265, 362 (1978).

²²⁹ *Metro Broadcasting, Inc.*, 497 U.S. 547, 593–94 (1990).

²³⁰ *Grutter*, 539 U.S. 306, 333 (2003).

²³¹ *Id.* at 327.

the multi-factor narrow tailoring test announced in *United States v. Paradise*,²³² and subsequently applied in *Metro Broadcasting* and *Grutter*, which would preclude Justice Powell's reflexive reliance on that standard. The approach Justice Powell takes in considering whether the UC Davis admissions policy is narrowly tailored to serve the unique interest in student body diversity represents a useful departure from the narrow tailoring analysis constructed for remedial interests, and returning to that standard in future diversity cases can help provide an analytical construct better suited to the diversity interest. Justice Powell's narrow tailoring standard also has three essential elements: (1) whether the means chosen is the only effective means of achieving diversity;²³³ (2) whether the interest in diversity is broader than an interest in mere racial and ethnic origin;²³⁴ and (3) whether consideration is individualized, notwithstanding the weight accorded to diversity.²³⁵ This test of narrow tailoring, unlike the remedial narrow tailoring test, is actually tailored to the interest asserted. It represents a nuanced approach to the equal protection analysis when the interest is other than a remedial interest. It properly focuses the inquiry on the efficacy of the method chosen to achieve the aspirational goal(s) of diversity, rather than on the scope of the remedy necessary to cure the harm.

The conclusions reached by the Court in *Metro Broadcasting* and *Grutter*, upholding the use of race-conscious measures in support of diversity, were right notwithstanding application of the wrong narrow tailoring standard. The concern is not the outcome in these cases, but the potential effect of their compromised reasoning on the development of our equal protection jurisprudence. These cases failed to recognize a palpable shift in our equal protection jurisprudence that occurred with the introduction of the "diversity interest." This shift moved our equal protection jurisprudence from an exclusive focus on the past to a more modern construct that points the way toward the future. There are several ways that adopting the Powell narrow tailoring standard would aid in the development of the diversity interest and correct the flawed reasoning of both *Grutter* and *Metro Broadcasting*, notwithstanding the right results in those cases.

C. Applying the Powell Test to *Metro Broadcasting* and *Grutter*

1. Replacing Race-Neutral with "Broader than Race"

Replacing the inquiry into race-neutral alternatives with an inquiry of whether the diversity pursued is "broader than race" does not change the outcome in either case, but it does reconcile the diversity interest with the narrow tailoring standard. In both *Metro Broadcasting* and *Grutter*, this inquiry was in conflict with the Court's acknowledgement that the diversity interests at issue could not be achieved by race-neutral means. The proper inquiry, therefore, is not whether race-conscious means are necessary (they clearly are), but whether the interest pursued is in more than racial diversity. Accepting, for instance, the functional theory of diversity proffered in both *Metro Broadcasting* and *Grutter*, modern diversity practice demonstrates that the benefit of functional diversity extends beyond racial difference.²³⁶ To test the fit between this end and the means chosen to achieve this end, therefore, requires that the means chosen reveal an interest in more than racial diversity. Both the FCC in *Metro Broadcasting* and the University of Michigan Law School in *Grutter* demonstrated that racial diversity was

²³² *Paradise*, 480 U.S. 149, 171 (1987).

²³³ *Bakke*, 438 U.S. at 315.

²³⁴ *Id.*

²³⁵ *Id.* at 318.

²³⁶ See discussion *supra* Section II.C.2.

but one facet of enhancing broadcast diversity²³⁷ and obtaining the educational benefits of diversity, respectively.²³⁸ Whereas the focus on race-neutral alternatives reveals little about the legitimacy of race-conscious actions taken in pursuit of diversity ends (except that they are always necessary), an inquiry of whether the diversity pursued is broader than race reveals the legitimacy of the means chosen in relation to a functional end.²³⁹

2. Shifting Focus From Burden on Some to Individualized Consideration for All

Refocusing the inquiry from the burden on non-minorities to individualized consideration acknowledges the need for protection of individual rights without casting the issue as one of unequal treatment in the context of diversity.²⁴⁰ Although “innocent persons may be called upon to bear some of the burden of . . . remed[ial]”²⁴¹ racial classifications, there are not similarly burdened classes of persons when diversity is the aim. This was aptly demonstrated in *Grutter* when the Court acknowledged that not only are “nonminority applicants who have greater potential to enhance student body diversity [selected] over underrepresented minority applicants,” but also that “frequently . . . nonminority applicants [are accepted] with grades and test scores lower than underrepresented minority applicants . . . who are rejected.”²⁴² The net result of this policy is that sometimes a minority applicant is benefitted vis-à-vis some burdened nonminority applicant or, conversely sometimes a nonminority applicant is benefitted vis-à-vis some burdened minority applicant. It does not, however, result in categorical benefit to minority applicants and categorical burden to nonminority applicants.²⁴³

²³⁷ For instance, the FCC ascertainment rules in support of broadcast diversity also required that licensees canvass the members of the listening public who could receive the station’s signal “to ascertain the . . . interests of . . . [the] community” and “to devote a ‘significant proportion’ of a station’s programming to community concerns.” *Metro Broadcasting, Inc.*, 497 U.S. 547, 586 (1990).

²³⁸ The Court noted that “[t]here are many possible bases for diversity admissions,” and that the university “actually gives substantial weight to diversity factors besides race.” *Grutter*, 539 U.S. 306, 338 (2003).

²³⁹ For example, applying this test to the race-conscious school assignment plan in *Parents Involved*, which classified students crudely as either “white or nonwhite” or “black or ‘other,’” reveals that the narrow diversity targeted belies any purported interest in achieving the educational benefits of functional diversity. *Parents Involved*, 551 U.S. 701, 710 (2007).

²⁴⁰ The claim here is not the same as that made by Fiss. See Fiss, *Another Equality*, *supra* note 90 (arguing that the anti-subordination principle of equal protection acknowledges the harm of remedial racial classifications to non-beneficiaries, but does not endow this harm with constitutional status). Rather, the claim here is that there is no categorical group harm to non-minorities when the interest is diversity, rather than remedial.

²⁴¹ *Metro Broadcasting, Inc.*, 497 U.S. at 596 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 281 (1986)).

²⁴² *Grutter*, 539 U.S. at 338, 341.

²⁴³ Justice Powell in *Bakke* described such a constitutional use of race as follows:

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. . . . This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a ‘plus’ on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed

Reference to modern diversity practice is again instructive. The cultural competence theory of the business case posits that the diversity of the nation is expanding rapidly, as is globalization.²⁴⁴ In this context, notions of “minority” and “nonminority” are fluid and context specific.²⁴⁵ In contexts where racial and ethnic “minorities” represent a numeric “majority,” for instance, diversity upends the presumed balance of burden and benefit. Insofar as diversity is concerned, therefore, the inquiry into burdens and benefits reveals only the fact that there is some distribution of each on all applicants in varying combinations across a multitude of contexts. By contrast, a focus on individualized consideration assures that individual rights are preserved, which is the concern of equal protection.

3. Reconciling Limited Duration and Aspirational Ends

Finally, the notion of limited duration—albeit a hallmark of the restraint on the permissible use of remedial racial classifications under our equal protection analysis—must also be defined in context. Limited duration in the context of a remedial purpose means when the harm has been redressed. Limited duration in the context of the diversity interest means when race-conscious means are no longer the most effective (or necessary) means of achieving the ends sought. The twenty-five year duration identified in *Grutter* as the time when “minority applicants with high grades and test scores [would have] increased” bears no rational relationship to the educational benefits of functional diversity. As acknowledged by the Court in *Grutter*, there are minorities with high grades and test scores who are both admitted and rejected (sometimes in favor of non-minorities with lower grades and test scores who would better contribute to educational diversity). The fact of greater or fewer minorities with high academic credentials is not indicative of any individual applicant’s ability to contribute to diversity vis-à-vis another applicant. Nor is a quantitative increase in the number of well-credentialed applicants, minority or non-minority, relevant to the “individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”²⁴⁶ It may not be the case that race-conscious means are necessary to pursue diversity ends indefinitely. But the measure of necessity is neither an arbitrary durational limit nor a function of progress in achieving redress for past discrimination. Rather, the use of race-conscious means to pursue diversity ends should be limited by their necessity in achieving the ends sought.

VI. CONCLUSION

Modern diversity practice can serve as a useful guide for understanding and articulating the diversity interest as we develop our modern equal protection jurisprudence. First, the diversity interest must be defined in relation to its own unique aspirational ends, not in relation to the remedial goals of affirmative action. Second, a new analytical construct must be developed to accommodate these unique aspirational ends and evaluate the fit between means and ends in a way that is suited to the context of diversity. Modern diversity practice has revolutionized the private sector by leveraging the diversity of

fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Bakke, 438 U.S. 265, 317–18 (1978).

²⁴⁴ See discussion *supra* Section II.C.1.

²⁴⁵ Justice Powell himself noted this reality in *Bakke* when he observed that “the United States ha[s] become a Nation of minorities” and that therefore “[t]he concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments. *Bakke*, 438 U.S. at 292–95.

²⁴⁶ *Grutter*, 539 U.S. at 340.

our nation. Viewing the diversity interest through the lens of modern diversity practice can help evolve our equal protection jurisprudence to acknowledge the realities of diversity, affirm its unique significance to our modern construct of equal protection, and develop standards that are appropriately suited to its aspirational ends.