

# Leveling the Playing Field

*Justice, Politics, and  
College Admissions*

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## Justifying Affirmative Action

In the decision that Justice Powell announced for the Supreme Court in *Bakke*, colleges and universities saw a green light to continue—or expand—their affirmative action policies. These policies could henceforth be couched in terms of diversity, an idea rooted in the very idea of liberal learning that underpins much of higher education. Although Justice Powell didn't quote him, John Stuart Mill, one of the philosophical giants, could easily have been enlisted as an ally. "The only way in which a human being can make some approach to learning the whole of a subject," wrote Mill in *On Liberty*, "is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner."<sup>1</sup> When Powell paid tribute to the "atmosphere of speculation, experiment, and creation" so vital to good education, he could have been paraphrasing Mill (although in fact he was quoting Justice Felix Frankfurter). When he praised the "Harvard plan," he delivered the perfect bouquet of aspirations, one every other selective university could claim for itself.

In 1996, as storm clouds began gathering over affirmative action, Neil Rudenstine, Harvard's president, offered up the Harvard plan once again as a guiding model, describing how

after the Civil War, Charles W. Eliot, president of Harvard from 1896 to 1909, expanded the conception of diversity, which he saw as a defining feature of American democratic society. He wanted students from a variety of "nations, states, families, sects, and conditions of life" at Harvard, so that they could experience "the wholesome influence that comes from observation of and contact with" people different from themselves. He wanted students who were children of the "rich and poor" and of the "educated and uneducated," students

“from North and South, from East and West,” students belonging to “every religious communion, from Roman Catholic to the Jew and the Japanese Buddhist.”

In Mill-like tones, Rudenstine continued:

Students benefit in countless ways from the opportunity to live and learn among peers whose perspectives and experiences differ from their own. . . . A diverse educational environment challenges them to explore ideas and arguments at a deeper level—to see issues from various sides, to rethink their own premises, to achieve a kind of understanding that comes only from testing their own hypotheses against those of people with other views.<sup>2</sup>

Rudenstine was writing on the heels of *Hopwood v. Texas*, a court decision calling into question diversity’s constitutional bona fides. Two years earlier, a federal district court had invalidated the admissions program at the University of Texas law school. The program didn’t fit within the four corners of Justice Powell’s theory of diversity in *Bakke*, said the court.<sup>3</sup> Now, in 1996, on appeal, the Court of Appeals for the Fifth Circuit went further and said that Powell’s theory was no longer law. Achieving diversity was *not* a compelling state interest.<sup>4</sup>

What had happened between 1978 and 1996? Why was “diversity” suspect as a legal basis for affirmative action? Could it be rehabilitated in the face of the *Hopwood* court’s adverse decision and more recent threats from yet other quarters?

## BLIND UNIVERSITIES

As institutions of higher education, colleges and universities are supposed to teach their students how to read carefully and think logically. However, when it came to *Bakke* and affirmative action, colleges and universities themselves didn’t read carefully, and they became spellbound by their own equivocations. Consider the casual effrontery of a law school that in 1992—the year Cheryl Hopwood, an aggrieved white applicant, began her legal proceedings against the University of Texas—had in place an admissions scheme hardly distinguishable from the two-track University of California–Davis medical school’s system found unconstitutional in *Bakke* fourteen years earlier! At the Texas law school, a “minority subcommittee” evaluated “minority” applications (applications from blacks and Mexican Americans) while all other applications were assessed separately.<sup>5</sup> In addition, the law school used a double standard. The index scores it set for “presumptive admits” and “presumptive denials” (based on undergraduate grades and LSAT results) were higher for nonminority than for minority applicants.<sup>6</sup>

The law school pleaded that using a dual system was more efficient than commingling all the applications together, and besides, it was only doing what most other selective law schools did.<sup>7</sup> Its plea failed. The district court judge held that the law school could continue giving a “plus” to applicants because of their race, consistently with the holding in *Bakke*, but was constitutionally off-base in failing “to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant’s own race.”<sup>8</sup> The case went forward on appeal, but even before the district court’s decision the law school abandoned its dual system as obviously indefensible.

Awaiting the law school at the appeals level was a rude shock. The Court of Appeals for the Fifth Circuit ruled that Justice Powell’s singular view in *Bakke* was “no longer binding precedent” and that diversity did *not* constitute “a compelling justification for governmental race-based discrimination.”<sup>9</sup> The law school, it asserted, couldn’t even use race as a “plus” in its admissions program.

Here was a seismic event that shook the pillars of affirmative action everywhere. Soon affirmative action plans at the University of Washington, the University of Georgia, and the University of Michigan landed in court.<sup>10</sup> Colleges and universities protested that they had relied on *Bakke* for two decades and that, despite *Hopwood*, it remained good law until the Supreme Court itself said otherwise. Federal courts differed on this question, some following *Hopwood*, some not.<sup>11</sup>

Was the reliance by institutions of higher education on *Bakke* perceptive and appropriate? This question arises because of the equivocation so common in current academic use of the word “diversity.” In *Bakke*, Justice Powell was clear that the diversity in which a college or university has an interest cannot be reduced to racial and ethnic diversity. The diversity encompassed by the Harvard plan, as updated by Neil Rudenstine, includes an extensive range of personal attributes and qualities that might spark learning by one student from another. Race and ethnicity are but two items on a very long list. Consider some of the talents, experiences, viewpoints, and backgrounds of applicants that might enliven the intellectual climate on campus:

- *Age*. How we look at the world varies considerably by age. Older students on campus might help diminish some of the self-absorption common to eighteen- to twenty-two-year-olds.
- *Region*. Though more so earlier in our history, even now people from different regions of the country possess somewhat different values and perspectives.
- *Political affiliation*. People divide deeply and sharply on matters of politics. Political views play an important identity-defining role in individual lives.

- *Nation*. This was one of the items mentioned in Charles W. Eliot's "expanded conception" of diversity at Harvard in the nineteenth century. Differences in national background underlie strikingly different outlooks on the world. An American student body with a fair representation of Pakistanis, Germans, Brazilians, Iranians, Kenyans, Australians, and Chinese will have many of its standard preconceptions and stereotypes unsettled.
- *Occupation*. Whether we labor with our hands or minds, use tools or concepts, work on teams or individually, occupation affects our values and outlooks. People with prior work experience bring something important to a pool of students just out of high school.
- *Historical experience*. People who have lived through economic collapse, war, natural disaster, or mass migration are deeply marked by their experiences and often possess different outlooks on life than people who have had more fortunate lives.
- *Religion*. People's religious (and philosophical) views shape their attitudes toward politics, education, community, justice, war, family, work, and the like. The college campus is an especially fertile venue for testing one's religious ideas.
- *Military service*. The experience of being a soldier shapes people's outlooks in both predictable and unpredictable ways.
- *Special aptitudes and skills*. Being an accomplished pianist, painter, cook, chess master, competition swimmer, or skydiver counts as a valuable addition to "diversity" because each of these exemplifies an excellence and models a vocation that can inform and inspire others.

In short, to foster the "atmosphere of speculation, experiment, and creation" praised by Justice Powell, a great variety of traits, circumstances, and kinds of people are relevant.

Yet today when colleges and universities point to their offices of diversity affairs, write reports on their progress in achieving diversity, or set out to defend diversity against hostile courts, they are not talking about the items on this list. Their reports are not about the number of Japanese Buddhists on campus, or the number of rugby players, Young Socialists, Mormons, bluegrass fiddlers, award-winning pianists, military veterans, refugees from Bosnia, former 4-H members, dedicated mountain climbers, or ex-newspaper columnists. When they defend their programs, their focus is on *race and ethnicity*.

When the chancellor of UCLA remarked, after the Board of Regents of the University of California voted to abolish affirmative action, that his university "would not have achieved its current level of diversity without affirmative action," he was referring to the presence of ethnic and racial minorities on campus.<sup>12</sup> When the American Association for Higher Educa-

tion, alarmed at the *Hopwood* decision, issued a "Statement on Diversity" urging its members to defend diversity as a core ideal of higher education, it was urging them to help preserve the use of "race, ethnicity, and gender in admissions and scholarship decisions."<sup>13</sup> When Herma Hill Kay, then dean of the law school at the University of California, Berkeley, spoke of the "diverse educational experience" to which her institution was committed, she meant achieving entering classes with a "critical mass of blacks and Hispanics."<sup>14</sup>

In these and countless other examples, "diversity" is identified with "racial and ethnic diversity," a conflation Justice Powell explicitly warned against. Thus, although colleges and universities appealed to *Bakke* as the grounds for their affirmative action policies, they were not attentive to Justice Powell's actual conclusions. They equivocated in exactly the way Justice Powell decried.

Had the University of Texas law school truly been interested in diversity as defined by Justice Powell, it might have found Cheryl Hopwood a more attractive applicant. Despite her very high undergraduate grades and LSAT scores, the law school placed her on a wait-list, holding against her the fact that she had pursued her undergraduate education at "inferior" institutions (a junior college and California State University at Sacramento). Here are some "diversity items" the law school apparently had no interest in: Cheryl Hopwood was an older applicant with a work history as a certified public accountant; an academically accomplished student despite working twenty to thirty hours a week throughout college; active in Big Brothers and Big Sisters in California; a mother of a child with cerebral palsy; and married to a member of the Armed Forces.<sup>15</sup>

### A COMPELLING INTEREST: THE ANSWER SUPPLIED

In 1997, two rejected applicants, Jennifer Gratz and Barbara Grutter, brought suit against the University of Michigan—Gratz against the university's undergraduate College of Literature, Science, and the Arts, and Grutter against the law school. The two cases, *Gratz v. Bollinger* and *Grutter v. Bollinger*,<sup>16</sup> finally prompted the Supreme Court in 2003 to revisit the issue of affirmative action in the university.

The complaint in each case was the same: the university's affirmative action policies violated the Constitution. The university, mounting a vigorous defense, sought to locate its policies within the *Bakke* framework. Part of its initial strategy was to provide empirical confirmation that diversity—and by this it meant "racial and ethnic diversity"—is indeed a compelling university interest.

One of the university's expert witnesses was Patricia Gurin, a professor of psychology on its own faculty. Professor Gurin had done extensive surveys on racial and ethnic diversity and at trial she reported her findings and summarized other work along similar lines. "Racial diversity in a college or university student body," she argued, "provides the very features that research has determined are central to producing the conscious mode of thought educators demand from their students." Her surveys found that "students who had experienced the most diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."<sup>17</sup> She testified that "diversity is a critically important factor in creating the richly varied educational experience that helps students learn and prepares them for participation in a democracy."<sup>18</sup>

The university's law school likewise sought empirical confirmation of the educational benefits of diversity. A study by Richard Lempert and colleagues showed that the law school's graduates valued racial and ethnic diversity in the classroom.<sup>19</sup> In oral argument before the Appeals Court in *Grutter*, the law school's counsel went further, intimating that "ethnic diversity was *essential* to the achievement of . . . [the law school's] mission."<sup>20</sup>

The university was not alone in making such strong claims. Statements and studies by the American Council of Education, the American Association of University Professors, and the Association of American Universities echoed the same theme: a college without racial diversity in the classroom is considerably diminished in its ability to carry out its mission. "In determining their diversity policies . . . universities . . . must grapple with the following question: To what extent can students receive a meaningful education that prepares them to participate in an increasingly diverse society if the student body and faculty are not diverse?"<sup>21</sup> The question was rhetorical: *without* racial and ethnic diversity, the writers believed, students will receive an education significantly less meaningful.

These propositions won out in the Supreme Court. In *Grutter v. Bollinger*, one of two opinions handed down by the Supreme Court in June 2003, Justice Sandra Day O'Connor accepted the University of Michigan law school's diversity argument without qualification. Joined by the votes of four other justices, O'Connor lifted the cloud about the binding force of Justice Powell's *Bakke* opinion and eliminated its singularity. Although "some language" in prior Court decisions "might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action," she wrote, "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>22</sup>

O'Connor fully embraced Powell's tribute to educational diversity: "Nothing less than the nation's future [he had maintained] depends upon

leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” O’Connor went on to note, quoting further from Powell, that “in seeking the right to select those students who will contribute to the most ‘robust exchange of ideas,’ a university seeks to achieve a goal that is of paramount importance in the fulfillment of its mission.”<sup>23</sup> The University of Michigan had premised its affirmative action programs squarely on diversity, and, at least in the case of the law school, it had in O’Connor’s judgment used a sufficiently subtle thumb on the racial scales to meet all constitutional demands.

For twenty-five years, *Bakke* had stirred controversy. For nearly a decade, the legality of university affirmative action plans had fallen under a darkening shadow. *Grutter* (with its companion case, *Gratz v. Bollinger*,<sup>24</sup> discussed below) should have set matters aright, one way or the other. In one sense it did: there is now no question about the legal justification of certain forms of racial preferences in higher education. Nevertheless, those who read Justice O’Connor’s opinion not only for legal closure but for intellectual clarity on the vexed question of racial preferences are bound to be disappointed. The coherence of the diversity argument as a defense of racial preferences is, if anything, more rather than less dubious after O’Connor’s treatment of it.

Future commentators, we believe, will discern in O’Connor’s opinion three different strands of argument. The first two are blurred together. The third makes a brief, unexpected appearance and then quickly disappears, but leaves behind critical implications. Here we set out the three strands as separable arguments.

The first strand in O’Connor’s opinion accepts the University of Michigan’s diversity defense on its face, without probing its merits.

The Law School’s educational judgment that . . . diversity is essential to its educational mission is one to which we *defer* . . . [she writes]. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.<sup>25</sup>

In other words, the Court simply accepts the university’s claim that it needs a “diverse” student body to carry out its educational mission, presuming the university’s “good faith” in making the claim.<sup>26</sup>

However unsatisfying this argument might be to the opponents of affirmative action, it at least has the merits of clarity and coherence. This virtue hardly attaches to Justice O’Connor’s second argument, which endorses the university’s diversity claims as sound and persuasive on their own terms.



This second argument, based on the university's various contentions about its "diversity" aims, is puzzling if not outright self-contradictory.

On the one hand, O'Connor hews to the conventional line about diversity. The law school, she writes, aims at a diversity that will "enrich everyone's education." There are many dimensions to diversity, to be sure, but the law school is especially committed to one of those dimensions, namely "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics, and Native Americans. . . . By enrolling a 'critical mass' of . . . [these students] the Law School seeks to 'ensur[e] their ability to make unique contributions to the character of the Law School.'" <sup>27</sup> The students thus admitted will supply "a perspective different from that of members of groups which have not been victims of such discrimination." They will make classroom discussion "livelier, more spirited, and simply more enlightening and interesting" in light of their backgrounds. "By virtue of our Nation's struggle with racial inequality," O'Connor concludes, black and Hispanic students "are . . . likely to have experiences of particular importance to the Law School's mission."<sup>28</sup>

On the other hand, O'Connor also endorses the proposition that there is no "minority perspective." According to one of the law school's trial witnesses whom O'Connor paraphrases approvingly, "when a critical mass of underrepresented minority students is present [in the classroom], racial stereotypes lose their force because nonminority students learn that there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."<sup>29</sup>

Can we have it both ways? Do the experiences of minority students with "racial inequality" give them a special viewpoint that would otherwise be missing from the law school classroom? If minority students exhibit a "variety of viewpoints" just as do white students, why on grounds of viewpoint diversity must a "critical mass" of them be enrolled?

O'Connor appears not to see how these two sides of her case for diversity stand in tension with one another. Indeed, she yokes them together in one final summation of the law school's position:

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on *any* issue." . . . To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having a particular professional experience is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which unfortunately, race still matters. The Law School has determined, based on its

experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.<sup>30</sup>

This passage hardly explains how diversity requires affirmative action. If the experience of being a racial minority in a society where race still matters "is likely to affect an individual's views," then minority students are likely to have viewpoints at some variance with those who lack this experience. Yet the law school "does not premise" its affirmative action on "any belief" about viewpoint predictability. In fact, the only asserted educational benefit of diversity described in this paragraph is a rather narrow and limited one: to confound any belief at the law school that there is a distinctive minority viewpoint! Otherwise, the absence of substantial numbers of blacks and Hispanics in the classroom would seem to shortchange no important dimension of any student's legal education.

Suppose we set aside these apparent contradictions and assume that minority students do bring perspectives to the study of the law that would otherwise be missing. Does this supposition support the University of Michigan's diversity defense of affirmative action? Would the absence of these minority perspectives seriously degrade the law school's education? The university insisted, and O'Connor seems to agree, that racial and ethnic diversity are essential to the law school supplying a good education. Yet if a legal education in a racially homogeneous setting is bound to be inadequate, it follows that the law schools at Southern University, Howard, and Florida A&M began to provide adequate legal education only after they began admitting white students. This is a rather stunning implication.

We will return to discuss further the relation of racial diversity to educational outcomes, but here we leave off describing Justice O'Connor's second argument to take up her third. The first two strands of O'Connor's defense of racial preference at the University of Michigan law school fall squarely within the bounds laid out by Justice Powell in *Bakke* twenty-five years ago. Toward the end of her opinion, however, a new argument appears. Impressed by the contention in the amici curiae brief by several former military officers that the "military cannot achieve an officer corps that is both highly qualified *and* racially diverse unless the service academies and ROTC . . . [use] limited race-conscious recruiting and admissions policies," and persuaded that a military with an officer corps entirely white, or nearly so, is now unacceptable in America, O'Connor concludes that all selective educational institutions should take measures to "remain both diverse and selective"—that is, selective *and* racially integrated.<sup>31</sup>

Selective universities, and law schools in particular, produce America's future leaders. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry," O'Connor writes, "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.”<sup>32</sup> An officer corps with only a smattering of racial and ethnic minorities would lack legitimacy. A state or national leadership stratum with only a smattering of racial and ethnic minorities would lack legitimacy. Thus, the institutions that develop leaders—military and civilian—must achieve racial and ethnic integration. If it takes racial and ethnic preferences to achieve integration, then such preferences are justified.

This legitimacy rationale bursts into the middle of O’Connor’s argument and then quickly disappears as O’Connor returns to the standard diversity defense of affirmative action. But the two rationales are fundamentally different. The legitimacy argument provides a reason for institutions that feed America’s leadership class to be integrated *even if* no student’s education is thereby enriched, *even if* the “robust exchange of ideas” on campus is not affected one way or another. We return to this issue shortly.

In any event, O’Connor draws her defense of affirmative action in the university to a close with a surprise. Unbidden by any party to the university litigation, or any amici, she sets a time limit on university affirmative action. “[M]indful . . . that [a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,” she writes, “race-conscious admissions policies must be limited in time.”<sup>33</sup>

The requirement that all race-conscious admissions programs have a termination point “assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.” . . . We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.<sup>34</sup>

O’Connor’s “expectation” looks less like anticipation than decree. It puts universities on notice: get rid of racial preferences by 2028.

One further conclusion follows from the *Grutter* and *Gratz* decisions. Universities must use preferences in subtle and discreet ways. While in *Grutter* O’Connor joined four justices in upholding the affirmative action program at the University of Michigan’s law school, in *Gratz* she joined four other justices in striking down the university’s undergraduate affirmative action program.

The undergraduate admissions office used a mechanical system similar to the one used by the University of Georgia, described in chapter 7. The office assigned numbers to various academic and nonacademic factors in an appli-

cant's file, and for the most part admitted all those applicants whose total scores were above a certain number while rejecting all those whose totals were below a certain number. In its system—which allowed a maximum of 150 points—"underrepresented minorities" were automatically given 20 points. By contrast, Michigan residency counted 10 points, legacy counted 4 points, an outstanding personal essay could count up to 3 points, and a stellar record of leadership could garner 5 points. The automatic assignment of 20 points for race or ethnicity meant that almost every minimally qualified minority applicant got admitted to a university very difficult for other applicants to get into.<sup>35</sup>

Writing in concurrence in *Gratz*, O'Connor found this mechanical point system badly tailored to promote the university's legitimate interest in educational diversity broadly understood. The point system stood in "sharp contrast to the Law School's admission plan," wrote O'Connor, "which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class."<sup>36</sup> The law school, O'Connor had already noted in *Grutter*, uses "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."<sup>37</sup> Race might count as a "plus," but the magnitude of the "plus" would vary from case to case, as other diversity considerations were taken into account. (Of course, the law school's admissions director was keeping tabs on the "daily reports" of admissions, with an eye on the racial and ethnic profile they displayed; and the number of minorities enrolled consistently fell within a well-defined range, 13 to 20 percent of each class.)

In defense of its undergraduate admissions system, the University of Michigan, like the University of Georgia, pleaded the impracticality of closely reading and individually assessing every application it got, but the defense was unavailing. Wrote Chief Justice Rehnquist for the Court: "The fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."<sup>38</sup>

The bottom line is that *Gratz* and *Grutter* together let universities and colleges continue giving racial and ethnic preferences, but only if the procedures they use are not crude and mechanical. And Justice O'Connor's "expectation" of a definite termination date puts higher education on notice that it had better find other ways to secure places for underrepresented minorities in the nation's selective institutions.

## THE LINK BETWEEN ENDS AND MEANS

Universities defend their use of racial and ethnic preferences by appeal to an educational goal—attaining the benefits of diversity. However, the connec-

tion between racial and ethnic preferences (the means) and the benefits of diversity broadly understood (the end) is quite loose. Nor is this slackness overcome by many of the extravagant claims universities make.

Consider again the University of Michigan's defense of its affirmative action programs. Its expert witness, Patricia Gurin, testified that racial and ethnic diversity is "a critically important factor in creating . . . [a] varied educational experience"; in another forum, she insisted that "racially and ethnically diverse student bodies [are] essential to providing the best possible educational environment for students, white and minority alike."<sup>39</sup> This is simply not a credible claim. There are too many possible settings and combinations of diversity that can lead to effective intellectual growth. Students benefit from a setting that is richly diverse, but not necessarily diverse in any particular way. Students at Wellesley, Dillard, Berea, Princeton, and Calvin College develop their ability to think critically and creatively and become more cosmopolitan in their outlooks. Yet these campuses do without some of the items on the Harvard plan's long list of "diversities." Calvin College does without atheists, Wellesley without males, Dillard without whites, Berea without upper-class urbanites, and Princeton without the children of the "uneducated"—one of Charles W. Eliot's desiderata. No one or two items on the long list of "diversities" is indispensable, and this is as true for race or ethnicity as for any other item.

Gurin's own theory and findings support this contention. Her theory holds that undergraduates just out of high school are especially susceptible to being provoked into "active thinking processes."<sup>40</sup> What she means is this. An eighteen-year-old, fresh from the comfortable bosom of family and neighborhood, comes to college with a set of unreflective prejudices and automatic cognitive responses. College confronts her with unsettling and discordant experiences. People and ideas don't fit within her neat categories. She is forced to *think* her way to views she previously took for granted, think her way in terms that seem persuasive to others of a different cast of mind—or abandon her old ideas and develop new ones.<sup>41</sup>

Of course, unsettling and discordant experiences by themselves don't guarantee desirable learning outcomes. The experiences must be managed in a way that makes intellectual discomfort tolerable and opens students to new ideas. Otherwise, such experiences may prompt students to retreat further into their comfortable prejudices.

Racial and ethnic diversity can serve growth in "active thinking" if managed properly. Gurin notes that 92 percent of the University of Michigan's white students and 52 percent of its African American students come from racially segregated backgrounds. Thus, the racially integrated campus setting confronts many students with "new and unfamiliar" classmates who are a "source of multiple and different perspectives" that generate "contradictory expectations."<sup>42</sup> Moreover, if we take Gurin's empirical findings at face value

(and some critics do not<sup>43</sup>), racial and ethnic diversity at the University of Michigan not only *can* but *has* produced positive educational outcomes.<sup>44</sup>

Such findings, however, do not establish that racial diversity is *essential* to a good educational experience. The linkage between racial and ethnic diversity, on the one hand, and students' cognitive growth, on the other, is not tight.

In her study, Gurin not only looks for "educational outcomes" but "democracy outcomes" as well. "One goal embraced by most colleges and universities, and certainly by the University of Michigan," she observes, "is to prepare people for active participation in our democratic society, which is an increasingly diverse society."<sup>45</sup> Now, racial and ethnic diversity on campus seem more closely connected to civic learning outcomes than to cognitive development in general. Even so, it would be a conceit for Gurin to insist the University of Michigan turns out better citizens than St. Anselm College,<sup>46</sup> the College of Wooster,<sup>47</sup> Spelman College,<sup>48</sup> or Florida A&M University.<sup>49</sup> Colleges and universities treat race and ethnicity differently than other items on the long list of "diversities" that might enrich the educational and civic experience of students. Yet, in the story they tell about this differential treatment, the relation between means and ends is quite loose.

One way to tighten the connection between racial preferences and institutional mission is to incorporate racial representation directly into the mission. Thus, in 1987 the "Michigan Mandate," adopted by the University of Michigan, committed the school to becoming "a national and world leader in the racial and ethnic diversity of its faculty, students, and staff."<sup>50</sup> Racial and ethnic "inclusiveness is not merely a policy . . . [for the university], it is an integral part of . . . [its] mission and . . . vision for the future."<sup>51</sup>

Of course, unless this goal of "inclusiveness" itself serves some further goal, the university would be guilty of what Justice Powell and Justice O'Connor called "discrimination for its own sake."<sup>52</sup> What independent goal, then, does this subgoal of "inclusiveness" serve? The Michigan Mandate offers a number of candidates. The university wants to serve "as a model for higher education and a model for society-at-large. We are convinced that our capacity to serve our state, our nation, and our world . . . [depends] on our capacity to reflect the strengths, perspectives, talents, and experiences of all peoples—all of America's rich diversity of races, cultures, and nationalities—in everything we do."<sup>53</sup>

Unfortunately, here the equivocations we have noted concerning "diversity" are back. *All* of America's rich diversity of races, cultures, and nationalities are not reflected in the university's narrowly focused affirmative action policy. The imprecision in the mandate—and in the University of Michigan's more recent efforts to defend itself in court—are revealed in the statement of resolve offered by Lee Bollinger, president of the university when Jennifer Gratz and Barbara Grutter filed suit:

We believe these lawsuits threaten the ability of the University to bring together students from a wide array of backgrounds to create the richest possible environment for education and learning. We cannot let the University of Michigan be thwarted from playing a leadership role—as we believe a leading public university must—in building a tolerant and integrated society.<sup>54</sup>

The two sentences point in quite different directions. The first indicates diversity in the broader sense we have discussed at length. The second gestures toward something else. Consider two phrases from the second sentence: “public university” and “integrated society.” They suggest a version of the legitimacy argument that Justice O’Connor briefly rehearsed in *Grutter*. Since the university is the flagship public campus of Michigan, and since, from Michigan’s point of view, it is important that its future leadership class be more racially and ethnically integrated, the university plays its role by assuring that its graduates include racially and ethnically underrepresented populations. The university does so by using racial and ethnic preferences (when necessary).

There is no anomaly in building a “representational” dimension directly into the university’s mission. That is to say, there is no anomaly in the university’s building into its mission a commitment to educating specific populations. The university already does so. Like all state universities, it gives preference to applicants from its own state.<sup>55</sup> The university exists to benefit the citizens of Michigan and to educate their children. It benefits the state by training those who will occupy future roles in Michigan as teachers, business managers, civic leaders, municipal and state officials, political representatives, directors of cultural institutions, and suppliers of professional expertise (medical, legal, engineering, and the like). If this civic stratum, in Justice O’Connor’s words, would lack “legitimacy” without including a reasonable proportion of racial and ethnic minorities, then the university must ensure their inclusion by assuring a reasonable integration of its student body.

Call this the *integration argument*. It justifies universities in using racial and ethnic preferences much more straightforwardly than the diversity argument. There is no slack between means and ends. For the good of the state, the university must graduate integrated classes. To achieve integrated classes, it must employ racial and ethnic preferences. Therefore, it is justified in giving such preferences.

In the midst of her recitation of the standard diversity shibboleths in *Grutter*, Justice O’Connor draws back the curtain on a much more convincing rationale for affirmative action, one that elicits a moment of passion in her opinion before disappearing among the debris of “distinctive minority viewpoints” and “no distinctive minority viewpoints,” diversity “pluses” whose weights vary unpredictably and diversity “pluses” whose weights uncannily display a standing pattern.

In the integration argument, means and ends go hand in hand.<sup>56</sup> Moreover, the means are not hostage to fickle social science findings. If Patricia Gurin had *not* found that racial diversity enhanced the development of complex thinking in students, would the University of Michigan have been prepared to shut down its affirmative action program? Surely not.

## MORAL PRINCIPLES

It might be thought that we have labored too long at narrow and arcane legal matters when the real issues have to do with the moral standing of affirmative action. It is certainly true that molding arguments so they fit into legal formulas such as “compelling interest” is limiting; and there is no reason why a defender of affirmative action should feel satisfied with the heavy reliance on precedent adopted by the courts. Nevertheless, behind the legal formulas lie more substantive issues. For example, it is commonplace to point out that universities give all sorts of preferences—for example, preferences for athletes and for the children of alumni. Why, then, should people make such a big deal when universities give modest preferences to blacks? The answer: *race is different*. When the Supreme Court insists that racial classifications must be given “strict scrutiny” and measured against a test of “compelling state interest,” this is its formulaic way of making that point. Even the Brennan bloc in *Bakke* emphatically joined this view. Putting into the hands of any public authority the power to make distinctions on the basis of race is dangerous business given our country’s history of racial oppression. That power cannot be casually deferred to, and it cannot be justified in the same way we would justify a public department’s power to set the age for driver’s licenses or a public university’s power to set criteria of academic eligibility.

This unique history of racial oppression necessarily hovers over any argument for or against affirmative action. Even those who invoke lofty principles implicitly summon a story of cause and effect tied to our past. Justice Clarence Thomas provides an instructive example, as he tried but failed in *Adarand v. Peña*, a 1995 case, to show racial preferences to be wrong as a matter of principle alone, irrespective of context. He declared:

I believe there is a “moral [and] constitutional equivalence” . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. . . . That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.<sup>57</sup>

The “principle” in our Constitution, however, says nothing about making distinctions on the basis of race. Rather, it commands the states to extend to



all within their jurisdictions the “equal protection of the laws.” How does Justice Thomas get from *this* principle to the colorblind principle? He gets there by appealing to a set of assumptions about social and psychological processes:

There can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called “benign” discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race. These programs stamp minorities with the badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are “entitled” to preferences.<sup>58</sup>

It is alleged *facts*, not principle, that dominate this passage, as Thomas appeals to unintended consequences, inevitable resentments, and unfortunate dependencies. It is the same set of purported facts that dominates his scathing dissent in *Grutter*.<sup>59</sup> In place of principle, Thomas substitutes speculative sociology (made plausible, of course, by both the remote and recent histories of race in our country). But speculative sociology is just that: speculative. There might well be adverse unintended consequences of affirmative action programs, such as attitudes of superiority and resentment among whites or feelings of stigma among blacks. Would such effects add up to a case against affirmative action? Not unless they swamped its many positive effects. There is convincing evidence that affirmative action is, on the whole, a positive good both for campuses and for its beneficiaries. For example, the careful study done by William Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, provides an important glimpse at how the positives and negatives add up in a number of selective colleges—and the balance favors affirmative action.<sup>60</sup> We describe these findings at the end of this chapter.

Carl Cohen, a professor at the University of Michigan and a long-time critic of affirmative action, also appeals to principle. “Worthy aims cannot justify racially discriminatory devices. Racial discrimination is wrong; it always was and it always will be wrong.” But *why* is racial discrimination always wrong regardless of its purpose? Cohen follows in Justice Thomas’s footsteps by quickly shifting ground: the “advantages given [in affirmative action] to persons of some races but not others do great damage—to the University as a whole, but especially to those who were supposed to have been helped.”<sup>61</sup> Once again the real issue for Cohen is one of purported fact. How is the university damaged and how is it improved by affirmative action?

How are those persons affirmative action is supposed to benefit really hurt and how are they helped? How do the benefits stack up against the costs? These questions can't be answered from the armchair.

Jennifer Gratz felt aggrieved because she was denied a place at Ann Arbor while affirmative action recipients with less stellar academic records were admitted. However, suppose the university had granted affirmative action preferences on the basis of class, not race. Suppose Jennifer Gratz had been displaced not by a black from Detroit but a poor white from Saginaw. The material injury to Jennifer Gratz's interests would have been exactly the same: she would have had to settle for attending the University of Michigan at Dearborn. Yet neither Carl Cohen nor Justice Thomas would have mounted the barricades for Jennifer Gratz in that case. Nor would she even get her foot in the courthouse door to voice her grievance. There is no principle of law, constitutional or otherwise, that prevents a public authority from classifying some people as "economically disadvantaged" and extending them special benefits. If it wanted to, the University of Michigan could explicitly reserve 5 percent of its freshman class to students whose parents make less than \$20,000 a year. It wouldn't even have to compare the applicants in this group with all other applicants; it could openly run a two-track system.

The difference between the two scenarios is race. Race is special. Not because of principle, however, but because of history—American history. Race opens wounds and raises suspicions. Race is dangerous, inflammatory, subject to abuse. This is why the Supreme Court says, reasonably, that it must subject every racial classification made by public authority to a "searching scrutiny."

The point of this searching scrutiny, according to Justice O'Connor, is "to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."<sup>62</sup> On this account, contrary to the animadversions of Justice Thomas and Carl Cohen, good intentions and worthy ends *do* count. What disables a racial classification is that its real motive is to promote an illegitimate prejudice or stereotype.<sup>63</sup> Courts must make sure by very close scrutiny that the good intentions and worthy aims racial preferences avowedly serve aren't masks for something sordid and impermissible. One way courts exercise this scrutiny is to see how closely the design of a preferential program actually fits its purported intentions or aims.

Does affirmative action serve good purposes and produce net good effects? That is a central question. Still, it can't be the only one, readers may insist. Affirmative action demands a principled basis, not just a utilitarian calculation. But what is the relevant principle?

## “TREAT PERSONS AS INDIVIDUALS”

A critical part of Justice Powell's opinion in *Bakke* focused on the proper interpretation of the principle of equality expressed in the Fourteenth Amendment. The right to equal protection of the laws conferred in that amendment is an *individual right*, declared Powell. It belongs to each person regardless of her color. From this principle of individualism Powell inferred another in the context of college admissions: the *right to be treated as an individual*. The virtue of the Harvard plan, in his mind, was that it treated each applicant as an individual, whereas the medical school's policy simply excluded Bakke and other white applicants from competing for certain slots.

This same idea runs throughout the Court's opinions in *Gratz* and *Grutter*. The system of racial preferences used in *Grutter* survived because it still allowed for the individualized assessment of all applicants, while the system in *Gratz* failed because its mechanical assignments undercut individualized assessment.

*To be treated as an individual*: this principle surely resonates favorably in most readers of this book. But what does it mean? What does it imply about law and public policy?

These questions aren't easily answered. Take a commonplace example. When the state classifies people under the age of sixteen as ineligible for driver's licenses, it does not treat them as individuals. Plenty of fifteen-year-olds have physical skills and driving judgment as good as any sixteen-year-old. But they are treated simply as members of a class and denied the opportunity to prove their worthiness to drive. The social utility of classifications such as this one justifies their ubiquity.

In some contexts, however, social usefulness isn't good enough; it cannot justify being treated merely as a member of some class. What special features mark out these contexts? Two suggest themselves: where a person's most basic interests are involved, and where her standing as a citizen, and, more crucially, as a person, are at stake. A precocious fifteen-year-old is inconvenienced by having to wait a few months to apply for a driver's license. A person accused of a crime and facing loss of her freedom faces an entirely different set of costs. In such cases most people would agree that social utility must give way to individualized assessment. Even if it were socially beneficial to round up and jail certain kinds of people (vagrants and drifters, say, or people with certain psychological profiles), our law and morality require that no individual be deprived of her liberty except for a crime she has actually committed.

Similarly, one's standing as a citizen and as a person cannot to be traded off for some social gain. Were basic civic and social standing not inviolate, a political majority might happily disenfranchise a hated minority, or legally segregate it into a ghetto that marks its members as inferior human beings.

The burden on a man who has to walk an extra twenty feet in the courthouse to a restroom designated "men" is negligible; the burden on a man who has to walk an extra twenty feet to a restroom designated "colored" is crushing and cruel. It is *meant* to be—it is meant as a public endorsement of the proposition that the colored man is less of a person than the noncolored, not fit to urinate in the other's proximity.

Thus, in some contexts, "to be treated as an individual" is a moral imperative. However, although the recent *Grutter* and *Gratz* holdings made "individualized treatment" an apparent touchstone principle, in fact it has no independent force in those cases. Suppose the University of Michigan's undergraduate college *never* assigned any points for race or ethnicity. It would never have been hailed into court. It would be legally free to continue using its mechanical point system, even if it assigned nonacademic points in ways that gave a considerable leg up to some groups of students (for example, to residents of Michigan's upper peninsula or to children of alumni). What makes "individualized treatment" seem salient in these cases is the presence of race. And not just the mere presence of race. There must be some danger of stigma, social exclusion, official hostility, or other assault on basic dignity or civic standing, not as side-effect but as intended outcome. Contemporary affirmative action, we submit, poses no such danger.

These remarks require many qualifications and elaborations. Even so, they sketch the contours likely to be found in any plausible, fully worked out account of the principle "Treat persons as individuals." Any account will have to allow for many classifications of "convenience," where people are treated as members of legally established categories and no more. Such classifications overstep their limits when they infringe on individuals' fundamental interests or have as their purpose the disenfranchising of citizens or the humiliation of classes of persons. In short, any attractive account will track portions of the argument Justice Brennan offered in *Bakke*. Purpose, as Justice O'Connor allows, will be central to legitimating suspect classifications. And, as Justice Harlan forcefully underlined in *Plessy*, discerning a vicious and hateful purpose behind racial classifications is not a taxing assignment.

### "DO NOT DISCRIMINATE"

Another principle at stake in the affirmative action debate is the principle of nondiscrimination. It is a widespread American belief that the operations of public institutions should honor this principle. But what does the principle mean? Some insist that affirmative action itself directly contravenes the principle, while others say that the refusal to use affirmative action is what vio-

lates it. We can't begin to decide who is right until we know what discrimination is.

In the *Gratz* litigation, the district court allowed several University of Michigan minority undergraduates to become parties to the case as student-intervenors. The student-intervenors argued separately in defense of the university's affirmative policy. They eschewed *Bakke's* diversity rationale, arguing instead that the university's affirmative action program served its "compelling interest in remedying . . . [its own] past and current discrimination against minorities."<sup>64</sup> What constituted the current discrimination? The student-intervenors pointed to a "hostile racial environment" on campus and to university admissions policies that have an adverse impact on minorities.<sup>65</sup>

One reason the student-intervenors in *Gratz* proffered a remedial defense of the University of Michigan's affirmative action policy is that they see discrimination everywhere. Discrimination's story, they feel, has to be told again and again.

It is not hard to see the force of this view if we share the concept of discrimination used by the student-intervenors (and by a great many others who support affirmative action). Practices that transmit patterns of inequality, they believe, constitute discrimination. Given how deeply legally enforced racial segregation was embedded in our social system, and how long it lasted, the inequalities it produced continue to be reproduced every day by almost everything we do as a society. It could not be otherwise. The student-intervenors and their allies have plenty of evidence on their side.

But something is missing in the student-intervenors' concept (or, anyway, the concept we are imputing to them for expository purposes). Recall the statutory notion of discrimination we discussed in chapter 8. In 1971, the Supreme Court construed Title VII of the Civil Rights Act to forbid any practice or policy of a firm producing adverse impact and not justified by "business necessity." We can generalize this concept as a broad moral understanding of discrimination. It has two parts. The first part recognizes how facially neutral practices constantly reproduce racial inequality. The second part condemns those practices unsupported by "necessity" of some sort, where "necessity" is understood as "reasons of a very strong sort." What's missing in the student-intervenors' view of discrimination is the second part, which lets some reasons justify practices that reproduce racial inequality and thereby renders them not discriminatory. To the student-intervenors, social practices that reproduce racial inequality are discriminatory, period.<sup>66</sup> No justifying reasons are sufficient to balance the scales. Thus, the student-intervenors and others sympathetic to their view see discrimination everywhere and are baffled that other people of good will do not.

This account may not do justice to the student-intervenors' view, so let us offer a slightly altered version. The broad moral concept of discrimination

we introduced counts all practices that adversely affect blacks as discriminatory unless the practices are supported by *strong enough reasons*. The idea of “strong enough reasons” is vague. It defines a continuum. Individuals at one end are extremely parsimonious in what they count as strong enough reasons and individuals at the other end are more generous. We can then say that the student-intervenors’ view lies at the very parsimonious end of the continuum. While some people, for example, count the use of SAT and AP scores in admissions decisions as sufficiently related to legitimate university objectives, others do not. According to the latter, if using these screens adversely affects minorities (and they do), then don’t use them. If the screens are closely related to what universities view as academic merit, then change the notion of merit. If the screens predict academic success, then change the idea of success.<sup>67</sup> And if universities don’t change, this is further proof that discrimination is everywhere, pervasive and enduring.

By extreme contrast to the view of the student-intervenors, some people don’t locate themselves on any part of the continuum determined by our broad moral concept of discrimination because they reject the very idea of “nonintentional discrimination.”<sup>68</sup> To them, “discrimination” means purposefully giving to or withholding from a group defined by race or ethnicity some good or benefit. Thus, affirmative action preferences count as discrimination, in their view, because such preferences explicitly and purposefully use a racial or ethnic classification. Yet these people would not see university practices that, as an unintended by-product, weigh more heavily against minority groups as discriminatory, no matter how easy it would be to substitute less burdensome practices.<sup>69</sup>

In short, the parties in the affirmative action debate are separated by wide gulfs. According to the concept of discrimination we have described, institutional practices that adversely affect minorities are discriminatory unless supported by strong reasons. But even people who accept this general view may disagree sharply about how strong the reasons have to be to justify adverse effects; the degree of adversity matters too. Further, some people reject this concept altogether, believing that a discriminatory practice must be intentional. Thus, invoking the “principle of nondiscrimination” won’t move the debate forward when people can’t even agree on its meaning or scope of application.

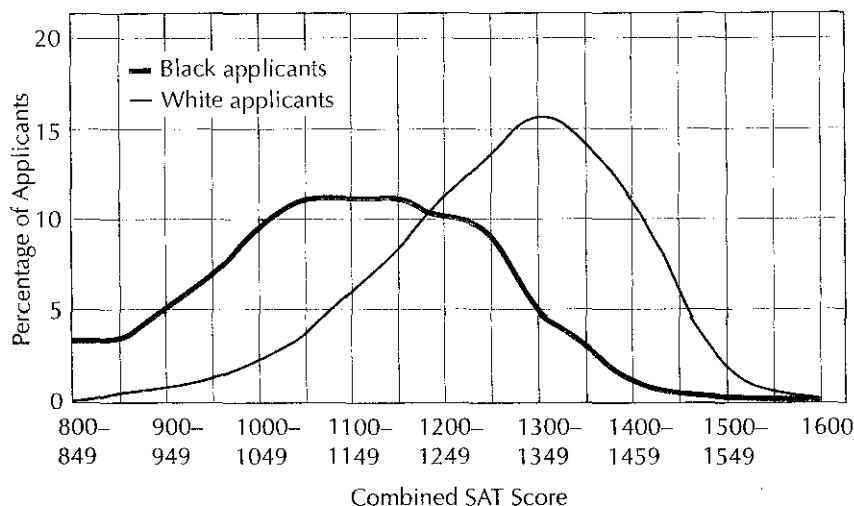
The affirmative action argument involves principles, to be sure. But appealing to principles isn’t, and can’t be, a substitute for detailed and thorough argument because the meaning of the principles at stake is as contested as the policies they are meant to subsume.

## A LAST WORD ON AFFIRMATIVE ACTION

If highly selective colleges want to enroll a decent percentage of African American students, putting the racial thumb on the admissions scale is an

efficient means to that end. It allows these colleges to “cream” the college applicant pool, admitting those black students most likely to succeed.

Why do very selective colleges need to put the thumb on the scale? We saw what happened at UCLA and Berkeley when state law and Regents’ policy barred color-conscious admissions. In *The Shape of the River*, their study of affirmative action, William Bowen and Derek Bok show with great clarity the causes and effects glimpsed only dimly in the bare data from the two California universities. One figure from their book, reproduced here, graphically illustrates the problem.



Bowen, William G., and Derek Bok; *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*. Copyright © 1998 by Princeton University Press. Reprinted by permission of Princeton University Press.

The two lines in this figure represent the distribution of SAT scores of applicants at five selective schools.<sup>70</sup> The darker line shows the scores of black applicants, the lighter line those of white applicants. The two lines together illustrate in dramatic fashion the problem of the “right tail.” When a Stanford or a Williams chooses a freshman class, the farther to the right it moves along the SAT scoreline, the fewer black students there are to select from, until they vanish altogether. Moreover, this figure could stand in for other credentials as well. Whether it is SAT scores, grades, strength of high school curriculum, or special academic and artistic achievements, when colleges look for “super credentials,” black students almost disappear from the pool. To get significant numbers of them into the freshman class, these schools must take race into account. In 1989, at the five schools reflected in the figure above, about 25 percent of the white applicants and 42 percent of the black

applicants were admitted. The white students who matriculated had average SAT scores 170 points higher than the black matriculants.<sup>71</sup>

The differences in scores (and other credentials) among the 1989 cohort studied by Bowen and Bok showed up in performance. On average, the black students did not attain college class rankings, grades, or graduation rates on a par with the white students. Nevertheless, they graduated at very high rates (more than double the rate of black college students in general);<sup>72</sup> went on to professional or graduate schools in very substantial numbers;<sup>73</sup> succeeded in the work world, earning incomes that would make most of us sick with envy;<sup>74</sup> and subsequently reported high satisfaction with their lives.<sup>75</sup> Both black and white students valued their interracial experience on campus, counting it a "plus" in their schooling.<sup>76</sup>

Bowen and Bok were able to estimate for all twenty-eight institutions they studied the effect of using a race-blind policy in admitting the 1976 cohort: 700 black matriculants would have been replaced by 700 white matriculants. Of those 700 black students who gained admission via the thumb on the scale, 225 went on to attain professional or doctorate degrees; 70 are now doctors, 60 lawyers; over 300 are leaders of civic activities; their average earnings in the mid-1990s exceeded \$71,000 a year; two-thirds were very satisfied with their undergraduate experience.<sup>77</sup>

Now, it would be a fallacy to infer that without affirmative action this cohort of 700 successful and civic-minded individuals would have followed substantially less rewarding paths. Graduating from one of the twenty-eight institutions studied in *The Shape of the River* is not a sine qua non of becoming a successful professional and a civic leader. Nevertheless, the Yales, Amhersts, Oberlins, and Stanfords of this country do feed a substantial segment of the American elite. As David Wilkins has found, 47 percent of black partners in the major law firms around the country are graduates of Harvard or Yale law school, and fully 77 percent are from eleven elite law schools.<sup>78</sup> The matriculants at these law schools are more likely to come with baccalaureates from Yale, Amherst, Oberlin, or Stanford than from Kansas State, LSU, Ohio University, Montclair State, or the University of Akron. Highly selective colleges and universities propel students into segments of the American elite they are less likely to enter otherwise.

Flagship campuses and state law schools play a similar role. To enter the top legal and political ranks in Kentucky, there is no substitute for graduating from the University of Kentucky law school; to enter the same ranks in Tennessee, you had best come from the University of Tennessee or Vanderbilt. Graduating from the University of Michigan law school facilitates entry into Michigan's leadership community with an ease not duplicated by degrees from other institutions.<sup>79</sup> Boalt Hall (Berkeley) and UCLA law school are vital sources of members of California's best law firms. Something important is lost to Kentucky, Tennessee, Michigan, and California if these schools graduate virtually no blacks.



The social good produced by affirmative action is the creation of highly trained, very competent black (and other minority) graduates with entrée into the circles of leadership that set the cultural, moral, and legal tone in our country and its various communities. We are persuaded that this social good is real and not merely conjectural, and that it clearly outweighs the small diminution of chances of admissions that whites suffer as a consequence of affirmative action.

Of course, affirmative action may come with costs. One cost is a slight decline in a white applicant's chance of being admitted to a selective school. Bowen and Bok estimate that in five selective institutions for which they have particularly good data, race-blind admissions would have reduced blacks as a portion of the 1989 entering class from 7.1 percent to 2.1 percent; and it would have increased the likelihood of any white applicant's getting admitted from 25 percent to 26.5 percent.<sup>80</sup> Affirmative action at the five institutions, then, reduced the chance of acceptance for white applicants by 1.5 percentage points. Although any decrease in chances of acceptance is a cost, individually and collectively a reduction of this size is not an onerous burden. Because affirmative action across the board—and not only in especially selective schools—is a relatively modest affair, white students as a whole are not shouldering a large cost.

Affirmative action could conceivably have other costs as well. It might roil campuses in racial acrimony; it might produce in its beneficiaries an illegitimate sense of entitlement, as Justice Thomas feared, or encourage in whites a sense of resentment or superiority, or stigmatize its beneficiaries in some way.<sup>81</sup> So it might. We must weigh affirmative action on the scales of good and bad consequences. Against some of Justice Thomas's fears, we juxtapose those several hundred black partners at the nation's very best law firms, who undoubtedly help to undermine any complacent sense of superiority in the whites with whom they interact. Similarly, the presence of blacks in a state's elite circles surely serves to remind whites that their communities are racially diverse and that constituencies other than their own matter. Still, circumstances on some college campuses could render affirmative action toxic. If so, the campuses ought to fix their affirmative action policies or abandon them.

Bowen and Bok's rosy picture might not hold true for institutions significantly different from the very select ones they studied, but one piece of impressionistic evidence stands out. We never hear of minority students tearing up and rejecting the admissions letters they get from outstanding schools. Of course, they all may labor under a delusion, believing that affirmative action had nothing to do with their acceptances and that therefore they have no reason to fear the stigma or other baleful effects predicted for its beneficiaries. (Nor do we hear of legacies refusing the leg up because of such fears.) More likely, they consider the benefits of going to a selective college to outweigh any cost from being—or being perceived as—an "affirmative action baby."<sup>82</sup>