Affirmative Action: Past, Present, and Future

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I. INTRODUCTION

Affirmative action policy is even more divisive and unsettled today than at its inception more than thirty years ago. This is a remarkable socio-political fact. I know of no other public policy since the rise of the administrative state during the New Deal that has remained so intensely unpopular yet has survived so long.\(^1\) Equally remarkable, its current unpopularity coincides with strong support for ethnic diversity in all areas of public and private life and with unprecedented social progress by blacks\(^2\) and other minorities.\(^3\) This Article analyzes the true nature of this conflict, how it arose, why it endures, and the role that law has played in fomenting and perpetuating it—often and increasingly in the name of diversity.

I set the stage by defining affirmative action, distinguishing it from non-discrimination, and identifying the most important forms and policy domains where it appears. I then discuss the importance of context to a normative assessment of affirmative action and emphasize several developments that create a new context: immigration and intermarriage patterns, more fluid notions of identity, greater socioeconomic convergence of minorities with whites, and recent studies revealing the actual magnitude of college and professional school...
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admission preferences. In this new context, I argue, the ethno-racial categories on which affirmative action relies are losing whatever coherence and normative appeal they may once have had. Next, I develop the principal rationales and normative justifications offered by affirmative action's advocates, as well as the counter-arguments. I focus here on the diversity rationale, particularly in the domain of higher education, where it now assumes the central justificatory role. In an effort to understand how so unpopular a policy could have survived for so long, I describe the policy's political and regulatory past and how the public views it today. After reviewing what is known about the actual consequences of affirmative action, I consider two vital issues: what an America without it would look like, and whether attractive alternatives exist.

I conclude the analysis by explaining why race is a singularly and increasingly problematic principle of distributive justice in America. My own view, as will emerge, is that affirmative action, although well-intended, is hard to square with liberal ideals in general and the diversity ideal (properly understood) in particular. The benefits it confers are too small, too arbitrarily and narrowly targeted, and too widely resented to justify the costs that it imposes—its unfairness to other individuals, its propensity to corrupt and debase public discourse, its incoherent programmatic categories, and its reinforcement of the pernicious and increasingly meaningless use of race as a central principle of distributive justice rather than the other distributive principles, particularly merit, with which most Americans, whites and minorities alike, strongly identify. (Below, I analyze the highly contested ideal of merit as one of affirmative action's rationales.)

My chief concern here is not with the constitutionality of ethno-racial affirmative action, but with its wisdom as public policy. In my view—much too briefly stated—the Constitution should be interpreted to permit Congress to adopt a law preferring blacks so long as it does not violate the heightened constitutional protection that other racial minorities enjoy. At the time of the Fourteenth Amendment, after all, Congress did just that. Congress enacts laws every day that favor one group over another, laws that if rational are constitutional. That being so, Congress has the power to favor blacks at the expense of the white majority if it believes that this would be sound policy. Whether it can favor blacks over other disadvantaged ethno-racial minorities, as affirmative action sometimes does, is less clear.

Be that as it may, the question I address here is whether, assuming such a

4. *Infra* text accompanying notes 22-24 and Part V, Section B.

law would be constitutional, Congress (or a state legislature) should enact it. In explaining why my answer to this question is no, I pay special attention to the diversity rationale for affirmative action both because of my larger interest in how law manages diversity, and because diversity is the only broad rationale that the Supreme Court has not yet rejected. This rationale, I find, is too flimsy and poorly tailored to the relevant social facts to satisfy the constitutional standard for affirmative action now applied by the Court. But my larger point is that even if an ethno-racial preference could meet the Court's standard, it should not be adopted and that most proposals for reform would be impractical, ineffective, or make matters even worse.

Accordingly, I would bar government from using or mandating affirmative action, except perhaps as a carefully-tailored, time-limited remedy for the continuing effects of past bias in the kinds of situations where the Supreme Court has long permitted it. On the other hand, I believe that private institutions that want to use affirmative action for diversity or other purposes should be generally free to do so. In my vision of a diverse liberal polity, private entities organized primarily for purposes of fellowship or the promotion of group values should be able to implement those goals through membership or other policies so long as they do not violate the larger community's most fundamental normative commitments, including non-discrimination against racial minorities. Specifically, I would permit private affirmative action if the entity engaging in it publicly discloses the nature and magnitude of its preferences and does not discriminate against blacks and other minorities entitled to the highest level of protection under the Fourteenth Amendment.

No sensible person who carefully considers the evidence and arguments I marshal here can be wholly satisfied with either the status quo or the position I espouse. The cruel legacy of 250 years of slavery in America has proved more stubborn than even Frederick Douglass, a former slave and consummate realist, imagined. Affirmative action, for all its problems, promises to do something to repair this incalculable damage. This explains why thoughtful individuals like Orlando Patterson, Sanford Levinson, David Hollinger, Nathan Glazer, Derek Bok, and many others continue to support it even though, as I shall show, the empirical and normative premises of their own arguments have become harder and harder to sustain. Reasonable people can and obviously do differ about these premises and about the tradeoffs that any reformed policy would entail. My ambitions here are to dispel some of the misunderstandings that plague the debate, to clarify what is actually at stake, and to propose a better reconciliation

7. I say "perhaps" because deciding whether it is wise and just to do so would depend on a number of considerations that will appear in my analysis.
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of the conflicting social values.

II. DEFINITIONS, DESIGNS, AND DOMAINS

A. Definitions

By affirmative action, I mean a program in which people who control access to important social resources offer preferential access to those resources for particular groups that they think need special treatment. In this context, then, I use the terms “affirmative action” and “preferences” interchangeably. By affirmative action, I also refer to its typical programmatic forms—more or less systematic, continuous, bureaucratized, rule- or routine-governed, and often outcome-determinative. I also focus on ethno-racial preferences rather than those based on income, age, gender, or disability, although some of my arguments also apply to them. Unless the context indicates otherwise, I use race to include the ethnicities favored by affirmative action.

As the adjective “affirmative” suggests, I mean to distinguish affirmative action from a more passive practice, non-discrimination, in which the normative principle is simply to refrain from treating people differently on the basis of their race or other protected characteristics. The distinction between affirmative action and non-discrimination is clear and important both in politics and in principle, though not always in practice. In sharp contrast to affirmative action, non-discrimination is no longer a controversial norm in American society except among bigots and some extreme libertarians. The punctilio of public discourse severely condemns any hint of anti-black or anti-minority attitudes. As Alan Wolfe observes, “No credible public figure—literally none—seeks to bind white Americans closer together by means of rhetoric that sets them against blacks.” The public associates non-discrimination with the un-


13. Its psychological contours are doubtless complex and opaque. E.g., Linda Hamilton Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 Calif. L. Rev. 1251, 1329 (1998) (“When a person is color-blind, there is simply much he will not see.”).

14. PATTERSON, supra note 3, at 15-16 (“Viewed from the perspective of comparative history and sociology, it can be said, unconditionally, that the changes that have taken place in the United States over the last fifty years are unparalleled in the history of minority-majority relations.”).

versally-praised norm of equal opportunity, while it generally disparages preferences as a demand for equal outcomes or special treatment. Some strong egalitarians favor affirmative action precisely because they think it will equalize results, but most affirmative action proponents make a more limited argument—that it is essential to achieve genuine equal opportunity.

Both proponents and opponents of affirmative action define non-discrimination in ways they hope will draw on its greater legitimacy. Proponents claim that affirmative action, by leveling the playing field, is simply another form of non-discrimination. Opponents define non-discrimination to include greater outreach to minority communities in hopes of going beyond “old boy” networks and enlarging the pool of minority applicants who will then have an equal opportunity to compete for the prize on the basis of merit. Outreach, in this view, includes more minorities, vindicates the non-discrimination, equal opportunity, and merit principles, and leaves no one with a legitimate claim to the prize worse off—whereas preferences, quotas, and goals subject to sanctions violate all of these principles. This makes it easy, then, for affirmative action critics to support outreach.

Not so fast. In fact, greater outreach is neither cost-free nor neutral. In order to reach out, one must expend additional resources, targeting them on some groups and not on others and, as with affirmative action, increasing the probability that members of the target group will win the prize. If we dismiss this problem as de minimis because only limited resources are involved, we should nonetheless recognize that we are now on a slippery slope that could move us toward preferences of a more robust sort.

Evidentiary problems also propel us from non-discrimination toward preferences, especially when proof of intentional bias is required. Anti-discrimination enforcers need baselines or other indicia of bias to help them gauge its extent, the need for remedial measures, and the measures’ effects. They naturally prefer numerical benchmarks—in employment, for example, a group’s share of the working age population in the relevant labor pool—as a basis for inferring whether the employer discriminated against the group. In anti-discrimination programs, and also in voluntary affirmative action programs, these benchmarks may take the form and rhetoric of mere “goals” toward which firms should strive but that do not necessarily trigger sanctions if

Gerstle, American Crucible: Race and Nation in the Twentieth Century (2001)).

16. Malamud, supra note 9, at 1691; see also infra Part V, Section B.
17. E.g., Hollinger, supra note 10, at 101.
18. Even a rule merely requiring regulated companies to report the number of minorities who apply and who are hired is not impact-neutral, as it makes it more likely that the agency will investigate and impose sanctions. E.g., Stephen Labaton, Court Rules Agency Erred on Mandate for Minorities, N.Y. Times, Jan. 17, 2001, at A16. By the same token, giving dyslexic test-takers advantages such as additional time and spell-check programs may do more than merely equalize opportunity. E.g., Daniel Golden, Disabled Students Gain More Aid on Tests, WALL ST. J., Feb. 1, 2001, at B2 (settlement of lawsuit demanding accommodation for special education students).
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they are not met. The "not necessarily" is what pushes the anti-discrimination program down the slippery slope toward preferences. For legal and psychological reasons, soft, tentative goals tend to become harder, more rigid standards that raise a presumption of bias if not reached. The strength of the presumption, the kind of evidence that can rebut it, the effect of rebuttal on the burden of proof, and other technical issues are the province of an increasingly arcane anti-discrimination law. Goals that at their inception were merely precatory become more binding and consequential; they either mark "safe harbors" where firms meeting them can expect protection, or condemn those that do not meet them as at least prima facie illegal.\(^\text{19}\)

Although the government does not impose specific goals on private universities but exhorts them to set their own, admissions officers nonetheless feel external pressure and internal compunction to use preferences to meet the goals they set.\(^\text{20}\) Under these various pressures, three related distinctions—between non-discrimination and affirmative action, equality of opportunity and equality of result, and goals and preferences—blur at the edges. Some affirmative action advocates use this blurring to deny that the distinctions exist; others recognize the distinctions but define non-discrimination, equal opportunity, and goals in ways that imply greater normative and programmatic scope for affirmative action.\(^\text{21}\) In contrast, I view these distinctions as foundational (though again, blurry at the borders) and believe that they condemn affirmative action. Americans overwhelmingly agree, and they have organized a philosophy around these three distinctions.\(^\text{22}\) Public convictions, of course, may still be false; our history is replete with collective delusions—norms favoring racism and subordination of women, for example. All I claim here is that these distinctions matter to almost all of us.

Another principle, merit, is central to the foundational character of these distinctions.\(^\text{23}\) Although I discuss the merit principle at length below, I do not provide a categorical definition of it for one simple reason: decisionmakers who allocate a job, admission slot, or any other scarce resource on the basis of merit properly define it in their own ways. Merit's content is wholly contextual; it derives meaning only from one's particular conditions and purposes.\(^\text{24}\) We may criticize particular conceptions of merit in context; these critiques some-


\(^{20}\) Conversation with Derek Bok, former president of Harvard University (Aug. 11, 2001).

\(^{21}\) E.g., Iris Marion Young, Justice and the Politics of Difference 193-98 (1990).

\(^{22}\) See Part VI, Section B, infra.


\(^{24}\) Krieger, supra note 13, at 1291-1302.
times persuade the decision-maker to change its conception. This is why some colleges decided to recruit women and why others are abandoning standardized tests. Rather than dispute the prevailing definition of merit in a particular context, we may instead argue that the applicant satisfies it. To assess affirmative action, then, we must begin with the definition of merit on which it implicitly rests and proceed to analyze how well this definition serves the policy's purported rationales. This will be my approach.

B. Designs

Affirmative action programs are structured differently, depending on how they combine a number of distinct features. I note five of them here.

**Favored groups.** The standard favored groups, which David Hollinger calls the "ethno-racial pentagon," track the major Census categories: blacks, Hispanics, Native Americans, Asian and Pacific Islanders, and women. Other groups (e.g., Arabs and others of Middle Eastern descent) have demanded inclusion, and particular programs may include fewer or more groups. Some preferences cover the disabled and the economically disadvantaged; homosexuals, however, are seldom if ever covered even when non-discrimination laws protect them. Which groups should be covered and how they should be defined are highly controversial issues. Blacks and to a lesser extent Native Americans are always covered but consensus ends there. Even some proponents of preferences doubt that immigrants should be included.

**Kind of actions.** The program may direct or permit decision-makers to report data on the composition of their populations; engage in outreach and dissemination of information to the general public and members of the favored groups in particular; set goals and timetables; impose numerical quotas—or other things in between.

**Mandatory, voluntary, or prohibited.** Compliance with affirmative action may be voluntary, legally mandated, or legally prohibited. I use the term "voluntary" loosely here to mean an absence of legal sanctions for non-compliance, such as ineligibility for participation in public programs or subsidies. Programs mandated by legislation or regulation raise the most difficult legal and policy issues, of course, but voluntary programs like those in private higher educa-

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29. Even a law that prohibits most affirmative action may leave some limited space for using it. *But see Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 562-68 (2000) (Proposition 209 bars "targeted outreach").
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tion also raise some of them.

Kind and weight of preference. Preferences may affect individuals' eligibility for employment or housing, bids for contracts, college admission, or many other public and private advantages. Preferences may add weight to any beneficiary's claim or may instead function only as a tie-breaker when competing claimants are otherwise equally qualified.

Methodology, exemptions, and duration. Programs differ in how they measure membership in favored groups, rank claimants according to various eligibility or performance criteria, and so forth. Programs may exempt small businesses, permit religious institutions to employ only co-religionists, or include other special provisions. Most are open-ended, but some can be time-limited, becoming inapplicable once certain conditions are met (e.g., when a firm's minority employees reach a level equal to their share of the relevant population).

C. Domains

Federally-mandated affirmative action was first established in the employment area, and the scope of affirmative action in both public and private employment vastly expanded thereafter, as detailed below. It now covers much of the nation's workforce in both public and private employment, protects not only the ethno-racial pentagon but women and the disabled as well, and extends beyond recruitment and hiring decisions to include promotions, terminations, in-service training, and other workplace practices. The U.S. military establishment is the work setting where affirmative action has been particularly pervasive and arguably most successful. In public and private contracting, federal, state, and local law often imposes set-asides, quotas, and other preferences for minority contractors and sub-contractors.

Affirmative action operates in all parts of the educational system; no other domain practices and supports it so enthusiastically. Public education systems often mandate it to assign pupils to different schools and school districts and to


31. E.g., Aileen Cho, Uneasy Path for Diversity Effort in Building Industry, N.Y. TIMES, Apr. 8, 2001, at B6. For a detailed account of how these programs actually operated in New York, Detroit, and Atlanta during the 1990s, see TAMAR JACOBY, SOMEONE ELSE'S HOUSE: AMERICA'S UNFINISHED STRUGGLE FOR INTEGRATION (1998).

32. This enthusiasm, however, appears to conceal much faculty opposition. Stephen H. Balch, What Professors Really Think of Preferences, NAS UPDATE, Dec. 1996 (indicating widespread opposition); Carl Auerbach, The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975, 72 MINN. L. REV. 1233 (1988). Auerbach notes that law professors were strongly opposed to potent affirmative action for minorities in 1969 and 1975 responses to a survey by the Carnegie Commission. Only 9% of them favored strict goals and timetables for admissions, and only 7% favored such a program for faculty hiring. Id. at 1237 & n.10. A further 30% favored a less restrictive program of preferences in admissions. Id. at 1238 & n.14.
structure their programs in order to achieve and then maintain some ideal of ra-
cial or ethnic balance in the face of enrollment changes that might “tip” this
carefully-engineered balance and precipitate white flight. These assignment
policies have generated bitter political and legal conflicts in Boston, San Fran-
cisco, and many other cities. 33 Colleges and universities with selective admis-
sions criteria—a minority of institutions, but exercising disproportionate social
influence—use affirmative action to select students, balance residential units,
award financial aid, employ administrators, recruit and promote faculty, run
athletic programs, staff student organizations, award contracts, and conduct
other aspects of their institutional lives. A few states bar affirmative action in
college admissions, as we shall see, and others mandate it only for public in-
stitutions. Nevertheless, selective private institutions, including their alumni,
are among its most committed advocates. Affirmative action even extends to
shaping how university scientists conduct their research; a 1993 law requires
the National Institutes of Health to ensure that women and minorities are in-
volved in clinical studies as researchers and as subjects of research. 34

Banks and other lenders are required to use affirmative action in their pro-
grams, including mortgages, construction and auto loans, and the like. Under
the Community Reinvestment Act, financial institutions must, on pain of losing
their public charters, assure that their facilities and investments are located in
minority and low-income communities. Public housing projects are subject to
affirmative action requirements, and private developers receiving public credit,
funds, or other public assistance must assure that members of favored groups
enjoy equal access to their projects, sometimes including set-asides and quo-
tas. 35 The law’s efforts to diversify housing racially and economically is the
subject of a chapter in a forthcoming book. 36

Electoral districting is another affirmative action venue. 37 Federal courts
have interpreted the Voting Rights Act of 1965 and its 1982 amendments to re-
quire the states to draw electoral lines for legislative districts and other deci-

33. E.g., Amy Dockser Marcus, The New Battleground over Race and Schools: Younger Students,
case).

34. Sally L. Satel, Science by Quota, NEW REPUBLIC, Feb. 27, 1995, at 14. Satel cites an NIH es-
timate that the new law would necessitate multiplying the size of treatment studies by “a factor of 5 to
10 with a stultifying effect on budget . . . and, paradoxically, could hamper planned investigations of
racial/ethnic differences.” Id.

35. For an account of why affirmative action got off to a slow start in federal housing programs,
see Chris Bonastia, Why Did Affirmative Action in Housing Fail During the Nixon Era? Exploring the
“Institutional Homes” of Social Policies, 47 SOC. PROBLEMS 523 (2000) (detailing bureaucratic poli-
tics as impediment).

36. SCHUCK, supra note 6.

37. This is affirmative action, but with a difference. Here, unlike in most other affirmative action
domains, there is no “natural” or normatively compelling standard like merit to which one can compare
the preference. Line-drawers must use some more or less arbitrary criteria to do so; the question is how
much weight they may (or must) give to race. Richard H. Pildes, Principled Limitations on Racial and
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sion-making bodies so as to maximize the number of “majority-minority” districts, those with a sufficient concentration of the favored minority group that one of its members is very likely to win. 38 Since 1993, however, Supreme Court decisions have cast doubt on the extent to which districting may take race into account. 39 The situation is complicated by the fact that the Court seems willing to permit the line drawers to use partisanship, which for blacks has been a strong predictor of race. Growing evidence, however, suggests that at least 20% of whites vote for black candidates even in some Deep South states (which weakens any justification for packing so many blacks into majority-minority districts) and that packing them in this way has undercut their interests. 40 In the redistricting cycle that began in 2001, the Court’s mixed signals have sowed enormous uncertainty and confusion. 41

The Federal Communications Commission (FCC) has affirmative action programs governing the agency’s award of TV and radio broadcasting licenses. The agency extends its diversity requirements to programming content, the employment and investment practices of potential and existing licensees, and the financing of auction bids by potential licensees. Although the federal courts have sometimes invalidated FCC programs not authorized by Congress, 42 the agency, citing the need for more diversity in broadcasting, has pressed ahead with them anyway—with little success. 43 Indeed, on the very day that the FCC suffered a major defeat in court, 44 the U.S. Department of Commerce reported that the number of TV stations owned by minorities had dipped to the lowest level in more than a decade, while minority ownership of radio stations had risen marginally in the preceding two years, with industry consolidation and deregulation making further minority ownership gains more difficult. 45 The FCC’s programs, moreover, face rough sledding under the new agency leadership installed by President Bush. 46

39. The Court’s latest word on this subject is Hunt v. Cromartie, 532 U.S. 234 (2001) (upholding redistricting despite lower court finding that “race, not politics” determined boundaries).
42. In contrast, the Supreme Court, applying less than strict scrutiny, upheld an FCC preference program authorized by statute. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), overruled by Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (overruling the level-of-scrutiny point).
44. MD/DC/DE Broadcasters Ass’n v. FCC, 236 F.3d 13 (D.C. Cir. 2001).
45. Labaton, supra note 18; Stephen Labaton, Deregulation Called Blow to Minorities, N.Y. TIMES, Dec. 12, 2000, at C1 (summarizing studies).
46. Stephen Labaton, Bush Appoints Powell’s Son to Lead F.C.C., N.Y. TIMES, Jan. 23, 2001, at
The magnitude of FCC preferences is huge. By awarding licenses for the spectrum it controls, it confers enormously valuable economic rights on a very small number of individuals and firms. In recent years, it has awarded much of the spectrum by auctioning off licenses to the highest qualified bidder, and it has created programs to subsidize minority groups so that they can compete in the auctions as "designated bidders." This status gives them bidding credits such that they need pay the government only a fraction of the winning bid and can pay in installments over a long period at favorable interest rates. Combining both of these advantages enables the designated bidder to pay the government only 50% of its winning bid. Given the economic value of the licenses, these advantages are worth scores of millions of dollars to those who can use them.\(^4\)

Because the programming diversity rationale for preferences is so poorly supported by the evidence,\(^48\) even some who defend affirmative action in general have excoriated the FCC's preferences in particular. For example, Michael Kinsley, editor of Slate magazine, an avowed liberal, and supporter of some affirmative action programs, views the FCC's as especially farcical. Members of favored groups who get valuable licenses, for nothing or at a discount, are more or less free to resell them, at market rates, to white males or anyone else. The policy amounts to the simple anointment of black millionaires. And, because black-millionaire businessmen are such an obvious exception to the generalization that "black equals disadvantaged," these policies help to discredit affirmative action even in situations where the generalization makes more sense.\(^49\)

These abuses, moreover, extend beyond race-based affirmative action to FCC programs that give extremely valuable preferences to small minority-owned firms. Many large companies have helped to organize small ones with token minority leadership to front for them in bidding at auctions of wireless frequencies for which the large ones are legally disadvantaged or ineligible.\(^50\)
Finally, the law requires many private groups that receive government grants or contracts to engage in affirmative action. Much litigation has challenged the implementation of these programs. Courts, for example, have ordered labor unions to undertake affirmative action, sometimes even appointing special masters to supervise compliance. Private groups often press for affirmative action even when the law does not require it. The American Bar Association, for example, seeks to increase the number of minority judicial law clerks—surely among the most privileged young people in America.

III. THE IMPORTANCE OF CONTEXT

Should all of these domains (and others not mentioned here) be governed by the same principles, or should those principles instead differ depending on the particular domain at issue? This “meta-question” relates closely to the question of merit, which I discuss below. In his well-known book Spheres of Justice, philosopher Michael Walzer persuasively argues that a liberal society should aspire to a “complex equality” in which different domains (“spheres” in his parlance) are governed by different principles of justice depending on the social meanings and competing values implicated in each domain and the different balances that may be struck there among those values. Few affirmative action advocates, for example, would suggest that morality requires us to practice it in our own families, homes, or friendships. Parents looking for babysitters or people seeking professional services are seldom equal opportunity employers. On the other side, few opponents of affirmative action object on moral grounds to the traditional practice of ethnic ticket-balancing by political parties or to special efforts by urban police departments to recruit minority and female officers. People who take these views are not necessarily moral hypocrites or even logically inconsistent. They recognize that different principles are appropriate in different public and private domains by virtue of the distinct values that are morally relevant there.

Certain preferences engender little public controversy. Veterans’ preferences for civil service jobs, for example, have been in place for many decades and remain politically and legally secure despite the fact that they greatly disadvantage women who could not serve in the armed forces in significant numbers until very recently, but who wish to compete for those jobs. Many col-

54. For an exploration of this point in the context of affirmative action in higher education, see Akhil R. Amar & Neal Katyal, Bakke’s Fate, 43 UCLA L. REV. 1745 (1996).
55. The U.S. Supreme Court rejected an equal protection challenge to this system. Personnel Admin. v. Feeney, 442 U.S. 256, 279 (1979) (upholding a Massachusetts law considering veterans for
leges and universities give admission preferences to athletes, alumni children, and those from remote areas. However one views the merits of these practices (I am quite dubious about the first two), each is rationalized on the basis of particular contextual facts—veterans' sacrifices and interrupted careers, the capacity of college athletics and kinship to cement alumni loyalty, and the supposed value of geographic diversity—that have some normative weight relevant to one's overall evaluation of the practices.

In assessing (and re-assessing) affirmative action, then, context matters. In reality, its policy context is being transformed in ways that greatly weaken its empirical, conceptual, and normative underpinnings. First, new patterns of immigration, intermarriage, and identity are completing the process that science long ago began—rendering affirmative action's ethno-racial categories ever more meaningless. Second, recent studies show that the preferences, at least in higher education admissions, have grown very large. Third, only a tenuous connection exists between being in a favored category and being socially disadvantaged enough to need preferential treatment at the expense of others with their own justice-based claims. Fourth, mounting evidence suggests that many of the policy's supposed benefits are exaggerated, imaginary, or even socially harmful, while its social costs are substantial. This section discusses the first of these changes; the others are considered subsequently.

Scientists have long discredited the notion of race that underlies affirmative action policy, and the latest DNA research provides further evidence, if any were needed, of its artificiality and incoherence. Science aside, centuries of immigration and miscegenation, and the recent rise in intermarriage rates by all groups, render the conventional racial categories ever more arbitrary. Indeed, the number of Americans who now consider themselves multi-racial and who wish to be identified as such (if they must be racially identified at all) is already so large—seven million in the 2000 Census, including nearly two million blacks (5% of the black population) and 37% of all Native Americans—that advocacy groups desperate to retain the demographic status quo mounted a state civil service ahead of nonveterans because its purpose was not to exclude women). President Roosevelt apparently opposed the preference as well but could not defeat it politically. SKRENTNY, IRONIES, supra note 9, at 41-42.

56. E.g., JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE (2001). The authors calculate that in 1999 at one school in their sample, legacies had even more of an advantage than “minorities” with the same SAT scores. Id. at 40-41. This was not generally true in the years covered by the Bowen-Bok study discussed infra at text accompanying note 80.

57. Including capital costs, inter-collegiate sport is seldom a money maker, and Shulman and Bowen find that large donors generally prefer to reduce emphasis on athletics. Andrew Hacker, The Big College Try, N.Y. REV. BOOKS, Apr. 12, 2001, at 52 (citing sources, including Shulman and Bowen).


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fierce political campaign to pre-empt a multi-racial Census category.\textsuperscript{60}

Although these mono-racial groups did not decisively win that battle—the Census allowed people to indicate more than one race but did not include a “multi-racial” category\textsuperscript{61}—they seem to be winning the war. In a grimly ironic aspect of the new demographic dispensation, the government adopted something like the one-drop rule that helped enslave so many mulattos and self-identifying whites before Emancipation. (As Malcolm X quipped, “That must be mighty powerful blood.”\textsuperscript{62}) In March 2000, the Office of Management and Budget issued rules providing that for civil rights enforcement purposes,\textsuperscript{63} any response combining one minority race and the white race must be allocated to the minority race.\textsuperscript{64} This, despite evidence that 25% of those in the United States who describe themselves as both black and white consider themselves white. Indeed, 48% of Hispanic respondents to the Census self-identified as white; another 42% said “some other race.” In a survey by highly-trained Census enumerators of Hispanic households that had failed to respond to the mail questionnaire, 63% considered themselves white and 29% said “some other race.”\textsuperscript{65} Almost half of Asian-white people and more than 80% of Indian-white people self-identified as white.\textsuperscript{66} This is the racial equivalent of an enduring sociological reality: almost 95% of Americans, including many who are poor by standard “objective” measures, consider themselves solidly working- or middle-class.\textsuperscript{67} Just as class warriors prefer to brush by this fact, administrators of affirmative action programs, who desperately need to race- and ethic-code in order to meet their targets or quotas, choose to ignore the “whitening” and “multi-racializing” of those whom we insist on treating as minorities.\textsuperscript{68}

No allocation rule can be neutral, of course; OMB’s rule effectively maximizes the size of minority groups and minimizes that of the white group. But where multi-racial individuals chose their own racial identities, the government’s allocation rules now decide this matter for them in order to preserve racial preferences. The new rules introduce other changes that will further com-

\textsuperscript{60} PETER SKERRY, COUNTING ON THE CENSUS? 51-54 (2000).
\textsuperscript{61} For a full explanation, see U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: OVERVIEW OF RACE AND HISPANIC ORIGIN (2001).
\textsuperscript{62} Quoted in AMITAI ETZIONI, THE MONOCHROME SOCIETY 30 (2001).
\textsuperscript{63} The Census has issued different allocation rules for purposes of legislative districting and other government decisions using such demographic categories. Nathaniel Persily, Color by Numbers: Race, Redistricting, and the 2000 Census, 85 MINN. L. REV. 899, 932 n.127 (2001) (brief discussion).
\textsuperscript{64} OFFICE OF MANAGEMENT AND BUDGET, BULLETIN NO. 00-02, rule #2 (March 2000). Responses including two or more minority races are allocated to the race on which a complainant claims discrimination was based. Id. It is not clear whether the Bush administration will retain these rules.
\textsuperscript{66} Steven A. Holmes, The Confusion Over Who We Are, N.Y. TIMES, June 3, 2001, at WK1 (discussing National Health Interview Survey data).
\textsuperscript{68} For an exploration of the implications of multi-racialism, see RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 154-78 (2001).
licate future race-coding by the government and hence by the many others who rely on these racial data for affirmative action and other purposes. By recognizing no fewer than 126 group combinations under the Census 2000 system, these rules encourage many other eager groups (Arab-Americans, for example) to demand their own specific listing in the Census form. The government will now find it harder to resist these demands than when the ethno-racial pentagon was its exclusive taxonomy.69

The number of actual and self-designating multi-racial individuals will surely grow rapidly in the future due both to intermarriage and to younger respondents’ greater propensity to intermarry and to self-identify as multi-racial. Sociologist Amitai Etzioni predicts that even if current trends do not accelerate, 14% of the population will identify as multi-racial by 2050.70 Forcing them into the increasingly arbitrary categories to which traditional racial classifiers tenaciously cling will spur them to seek even more fundamental changes in the ethno-racial pentagon, including a separate multi-racial category or perhaps even eliminating racial categories altogether, as a proposed initiative in California hopes to do. The government’s insistent pigeonholing, which clashes with the robust and, for Americans, compelling rhetoric and ideology of freedom of choice, will further erode the already weak public support for preferences. Some analysts wishfully think that the multi-racial phenomenon does not threaten the viability of the traditional civil rights programs that rely on racial data, both because the cohort of self-reporting multi-racials is relatively small and because OMB’s allocation rules further reduce their numerical significance.71 Although this may well be true for the immediate future, advocates of the ethno-racial pentagon have only a temporary reprieve. New demographics and identities mean that as time goes on, the government’s use of the standard racial categories as a pivot of social policy will become ever harder to justify logically and sustain politically.

The effort to control racial profiling by the police through the gathering of race-coded identity information, while aimed at discrimination and not affirmative action, reveals an important irony about the latter as well. Just when the accuracy, coherence, and social value of racial information are rapidly declining, the law is demanding more of it and using it more intrusively. State and

69. Kenneth Prewitt, Director of 2000 Census, Remarks at Brookings Press Briefing (Mar. 15, 2000) at http://www.brook.edu/comm/transcripts/20000315.htm. The color coding in Brazil, which is proposing to create racial quotas for universities, civil service jobs, and other areas, is likely to be far more complex and perhaps unworkable. Larry Rohter, Multiracial Brazil Planning Quotas for Blacks, N.Y. TIMES, Oct. 2, 2001, at A3 (over 300 terms for different skin colors and more elastic racial categories).

70. ETZIONI, supra note 62, at 26-27.

city police departments must now collect data on the race, ethnicity, or national origin of all drivers or other individuals whom they stop. In order to do so, the officer must decide what the motorists' race, ethnicity, or national origin are and then record the data for the profiling monitor—without asking them, much less allowing them, to self-identify. To a lament by the president of the Los Angeles Board of Police Commissioners (himself multi-racial) that "[w]ith all the racially mixed people in L.A., and Latinos coming in all shades, the data will be garbage in, garbage out," a Harvard law professor responds that "[w]e're not trying to get at truth, we're trying to get at bias."\textsuperscript{72} But the legitimacy of the search for bias has everything to do with what information the naturally confused police will record and how accurate it is. Of the other techniques that may be used to obtain the racial data, the least chilling is already in place: New Jersey taxpayers paid for all 2700 state troopers to receive mandatory "instruction on how to classify a motorist's race by judging 'skin color' and 'facial characteristics.'"\textsuperscript{73} In the name of racial justice, one supposes, every bad idea must be taken seriously and even subsidized, at least until the inevitable political backlash against this new policy erupts—perhaps in the form of a voter referendum that will ratchet up the political rhetoric, racial bitterness, and group alienation. In this way, we are told, America will somehow "get beyond racism"\textsuperscript{74} and enhance racial equality.

IV. THE SIZE OF AFFIRMATIVE ACTION PREFERENCES

When competing claims for scarce resources—jobs, admission to higher education, financial aid, public and private contracts, broadcast or other spectrum licenses, credit, housing, and the like—are weighed, how heavy is the thumb that affirmative action actually places on the scales? This question is important for at least two reasons. First, the larger the preference, the greater is its tension with the merit principle—and this is so however one conceives of merit. Indeed, a preference may be large enough to flatly contradict certain conceptions of merit, in which case preference advocates must invoke other rationales such as diversity that either reject or redefine those conceptions. It is one thing to use a preference merely as a tie-breaker between two equally qualified candidates, another to use it to enable a relatively unqualified one to win. (The tie-breaking case is very rare, as candid advocates of preferences will concede\textsuperscript{75}) Some might oppose the preference in both of these situations, of course, but most will view the tie-breaker case more favorably just as most will


\textsuperscript{73} Id.

\textsuperscript{74} The phrase was popularized by Justice Blackmun. Regents of Univ. of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in judgment and dissenting in part).

\textsuperscript{75} E.g., Issacharoff, \textit{supra} note 11, at 690.
support greater outreach and candidate pool-enlarging efforts more than they favor more demanding forms of affirmative action.\(^{76}\)

A second reason why the size of a preference matters is that the larger it is, the harder it is to deny or disguise the competing interests and values being sacrificed. This can be a decisive factor in the highly politicized environment of affirmative action debates.\(^{77}\) In fact, as we shall see, the preferences received by minority applicants in higher education are so large that their defenders have reached and passed a rhetorical tipping point. Rather than deny the preferences' size, they use this fact to argue that eliminating the preferences would re-segregate the institutions.\(^{78}\) I closely examine later this important argument for preferences later in the Article.\(^{79}\)

Measuring the size of a preference is more difficult in some domains than in others. I have already discussed the quantification of minority bidders' discounts in some FCC spectrum auctions, and I shall discuss later in the Article the efforts to determine what efficiency losses, if any, affirmative action imposes in particular work settings. The most extensive studies, however, have focused on higher education admissions where schools have traditionally used standardized tests to measure students' aptitude, preparation, and achievement. In 1998, William Bowen and Derek Bok, the former presidents of Princeton and Harvard, published a book-length study based on the academic records of more than 80,000 students who entered twenty-eight highly selective institutions (large public universities, private universities, co-ed liberal arts colleges, and women's colleges) in 1951, 1976, and 1989, augmented by some other data.\(^{80}\) Affirmative action, Bowen and Bok say, has little or no relevance outside of such institutions because the vast majority of undergraduate institutions accept all qualified candidates and thus have no need to prefer any group of applicants.\(^{81}\) On the other hand, a recent study suggests that the practice may be much more widespread, including some second and third-tier schools.\(^{82}\)

A large literature reviewing the Bowen-Bok analysis now exists. There is

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\(^{77}\) Issacharoff, supra note 11, at 675-76 (discussing effect on debate at University of Texas).

\(^{78}\) This point has been made by a number of commentators, including Malamud, supra note 9.

\(^{79}\) infra Part VIII.


\(^{81}\) Id. at 15; see also Thomas J. Kane, Racial and Ethnic Preferences in College Admissions, in THE BLACK-WHITE TEST SCORE GAP 431, 436 (Christopher Jencks & Meredith Phillips eds., 1998) (in a sample of 36,000 high school students from 1000 high schools, over 90% who applied to colleges in the bottom three-fifths were admitted).

litle disagreement about the actual magnitude of the preferences enjoyed by black applicants (the authors did not break out other minorities): by any objective standard, the preference is very large—one might say immense—although its precise magnitude probably cannot be determined.83 Bowen and Bok, who strongly support affirmative action, find a difference of almost 200 points in the average SAT total test scores of the black and white applicant groups in these schools. But the difference between the two applicant groups is even starker. First, the deficit for black applicants with respect to high school grade point average (GPA), the other major admission criterion, is even larger than for SAT scores. Thomas Kane, a researcher in this field, finds that black applicants to selective schools "enjoy an advantage equivalent to an increase of two-thirds of a point in [GPA]—on a four-point scale—or [the equivalent of] 400 points on the SAT."84 Second, at every SAT score level, the test, which has long been criticized as being culturally biased against blacks, in fact over-predicts their actual academic performance in college. The same is true of GPA scores.85

Another way to characterize the difference between the two groups is to compare their prospects for admission to the schools in the Bowen-Bok sample. Terrance Sandalow, a professor and former dean at the University of Michigan Law School, summarizes the Bowen-Bok data this way:

Thus, a black applicant with a score between 1400 and 1449 had nearly a 75% chance of admission, while a white with a comparable score had approximately a 40% chance. In the 1250-1299 range, the odds that a black applicant would be admitted remained at the 75% level, while the odds for white applicants dropped below 25%. The comparable percentages for applicants with scores between 1100 and 1149 were approximately 15% for whites and just under 50% for blacks. Viewing the same data from a slightly different perspective, the odds were approximately even that black applicants with scores between 1100 and 1199 would be admitted. The odds for whites did not reach that level until they had scores in the 1450-1499 range.

Sandalow does not mention a further finding—that with a score of 1500 or above, more than a third of whites were rejected while every single black gained admission.87 The University of Michigan, whose affirmative action program is detailed in a pending lawsuit,88 weighs race even more heavily than the

83. For one thing, we do not know the test scores of the white and Asian-American students in the Bowen-Bok sample who would have been admitted in place of the blacks who were admitted because of preferences. For another, Bowen and Bok only had adequate test score data for five of the twenty-eight institutions, though they believe that these are roughly representative of the larger group.

84. Kane, supra note 81, at 431-32.

85. For discussion and citations, see Terrance Sandalow, Minority Preferences Reconsidered, 97 Mich. L. Rev. 1874, 1877 & n.4 (1997). This fact is also acknowledged by Nathan Glazer, The Case for Racial Preferences, Public Interest, Spring 1999, at 45, 57, who is a prominent advocate of affirmative action for blacks.

86. Sandalow, supra note 81, at 1880-81 (citing to Bowen & Bok).

87. Bowen & Bok, supra note 80, at 27.

average school in the Bowen-Bok sample. At Michigan, the advantage of being black, Hispanic, or Native American is even larger than Kane's estimate; they receive the equivalent of a full point of GPA, and permits minority status to override any SAT score deficit. A recent study of forty-seven public institutions, moreover, found that the odds of a black student being admitted compared to a white student with the same SAT and GPA were 173 to 1 at Michigan, and 177 to 1 at North Carolina State.

These preferences continue, broadly speaking, at the graduate and professional school levels. Bowen and Bok document the encouraging fact that an identical percentage (56%) of black and white graduates of the institutions in their sample earned graduate degrees, and the percentage of blacks earning professional or doctoral degrees was actually slightly higher than for whites (40% vs. 37%). But because the black students' college grades and graduate- and professional-level admissions test scores are usually much lower, preferences strongly affect their admission to programs, especially at top-tier institutions. For similar methodological reasons, including the greater significance of financial aid factors, we cannot know the exact size of their preferences at this level with certainty, but it is surely very large.

The leading study of law school admissions in the early 1990s found that only a few dozen of the 420 blacks admitted to the eighteen most selective law schools would have been admitted to those schools absent affirmative action. And although a high percentage of blacks who graduate from these law schools eventually pass the bar examination, only 61% of black law graduates pass it the first time (compared to 92% of whites) and 78% pass it on the second or subsequent attempt (compared to 97% for whites). In short, over 20% of the blacks who take it never pass, almost seven times higher than the failure rate for whites.

It is true, of course, that institutions, especially selective ones, take other factors into account besides race, that some whites who are admitted have academic credentials that are no better or even worse than the blacks admitted un-

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90. Lerner & Nagai, supra note 82, at Figure 5.
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der preferences, and that if one compared the credentials of the blacks who were just barely admitted with those of the whites who were next in line for those slots, the credentials gap, while still significant, would be much smaller. It is also true that minority graduates of the selective institutions whose alumni have been studied, like the University of Michigan Law School, achieve high professional status, income, civic participation and leadership, and career satisfaction.

These studies, however, do not examine how these schools’ preferences affect the institutions and students that are lower down the academic food chain. The less selective institutions must admit many minorities who will have academic difficulty, are likely to fail the bar examination (some of them repeatedly), and may be marginal professionally. Because there simply are not enough academically qualified minorities to go around, Richard Sander notes, “the success of affirmative action at Michigan comes at the cost of making integrated education more problematic at weaker law schools.” This also means that any school that opts out of the preferences competition—for any reason—ends up with few or no black students, which of course just reduces racial diversity at those schools.

These large disparities in high school and college academic records and professional entry rates are profoundly disturbing and tragic measures of the persisting social disadvantages of blacks in American society. They reveal the inferiority of their earlier schooling, their desperate need to be better matched with or better prepared for the academic programs in which they enroll, and the deceptiveness of preferences’ ostensible inclusiveness. To many affirmative action supporters, these disparities, far from weakening the case for preferences, constitute the strongest argument in their favor by indicating how lily-white and Asian the student bodies at elite campuses would be without preferences. This “re-segregation” argument is certainly troubling—indeed, there is no wholly satisfying rebuttal to it—and I discuss it below.

My purpose at this point is not to make an overall assessment of affirmative action, but only to establish that the preferences it confers tend to be very large and thus are extremely valuable to the recipients and disadvantageous to their competitors. I discuss the magnitude of this disadvantage below when I consider how preferences affect those who do not receive them. To say, as Stanley Fish does, that a preference simply allows a decision-maker to “take

94. E.g., Anderson, supra note 89, at 286-87; Lempert et al., Methodological Queries, supra note 91, at 586.
95. BOWEN & BOK, supra note 80, at 37 (citing Wightman study of law school admissions).
96. Lempert et al., Law School, supra note 91, at 401.
97. Sander, supra note 91, at 562; see also id. at 561.
98. E.g., Issacharoff, supra note 11, at 675-76.
99. Infra Part VIII.
100. Infra Part VII, Section C.
minority status into consideration" within a pool of "qualified applicants" is to beg the key question: how far one can stretch the meaning of "qualified" and "consideration" before they lose their notional integrity.

V. RATIONALES AND COUNTER-RATIONALES

Affirmative action's supporters have advanced many different rationales for preference programs in light of a changing mix of ideological, tactical, and legal considerations over the course of more than three decades of public debate. Perhaps the most candid, powerful, and comprehensive defense of affirmative action is that by sociologist Orlando Patterson, who advances almost all of the rationales in one form or another. These rationales overlap to some extent, and any given advocate is likely to invoke more than one of them. Still, it is useful to distinguish among them according to their different claims. Because their opponents often counter these claims, I can consider both sets of arguments together. Some of the arguments against affirmative action, however, do not line up quite so neatly; they are more usefully discussed in Part VII on consequences. Because the case for affirmative action is strongest for blacks, though by no means limited to them, I shall discuss the rationales for race-based programs, unless otherwise indicated.

A. Restitution

Affirmative action is often justified as a means of compensating groups that have been victimized in the past by persecution and discrimination inflicted by the dominant majority. This rationale looks backward and is an argument for reparations. It is to be distinguished from another rationale, which I call "anti-caste" and discuss in Part V, Section C, that emphasizes the consequences today and in the future of past injustices. In this view, what connects past, present, and future is the bitter irony, if not arrant hypocrisy, of ruling out the use of race now when it is used to rectify egregious wrongs that were perpetrated in the past on that very basis. It is easy to understand why affirmative action advocates see opposition to this use of race as the cruelest kind of Catch-22. Their morally grounded skepticism deserves a serious answer, but it cannot be a simple one. It will take me the rest of this Article to provide it.

The restitution rationale applies with special force, of course, to blacks whose ancestors were brought to the United States in chains and suffered unspeakable degradation over many generations, including the era of Jim Crow that ended as recently as the 1950s and 1960s. Although these monstrous

102. PATTERSON, supra note 3, at 147-69.
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wrongs can never be truly or precisely rectified, the argument runs, the simple but compelling imperative of compensatory or corrective justice requires society to do what it can to restore the victims' descendants to the positions they would have occupied had the wrongs not been committed. Although this remedy is not really feasible as a practical matter, a program of affirmative action is. Distributive justice considerations, moreover, also justify such a restitution-oriented program both because blacks as a group are especially needy and because government has often been an active agent or a passive participant in their subordination.

Opponents of the restitution rationale counter with several arguments. First, the history of human communities is replete with great wrongs. Were we to take the project of restitution seriously, we could not stop with slavery but must also rectify the violence and destruction inflicted on Native Americans, their lands, and their cultures; the harsh subordination of the Chinese, Japanese, Irish, Jews, and many other immigrant groups; and the discrimination against women that severely limited their opportunities outside the home and their freedom within it.

Second, affirmative action programs cannot rectify past wrongs because their beneficiaries are not the victims; indeed, preferences can only commit new wrongs because the cost-bearers are innocent. Some program advocates insist that the notion of “innocent victim” that underlies such concerns is itself problematic and that today's whites are the unwitting, continuing beneficiaries of the crimes committed by white slaveholders and their segregationist successors. Opponents respond that it would be impossible to conduct the kind of complex causal analysis necessary to support any fair calculation of historical advantages and disadvantages that attributing them to broad racial groups would be egregiously crude, and that so gross an assessment could not satisfy even the most minimal demands of a very rough justice.

Third, even if these objections could somehow be met, some opponents say, the restitution rationale could at most justify affirmative action for the descendants of American slaves and perhaps Native Americans. It could never justify extending protection to immigrants, linguistic minorities like Hispanics, or

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105. For an exploration of the need principle, see WALZER, supra note 53, at 25-26.
106. Gratz v. Bollinger, 135 F. Supp. 2d 790, 796-801 (E.D. Mich. 2001). Although the University seemed to concede that it was “a passive participant,” id. at 801, the court found no evidence of this.
108. To cite just one of many complications, evidence suggests that discrimination against a group, while damaging in the short run, often strengthens their economic and perhaps social positions in the long run. PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 273-75 (1998) (reviewing evidence cited by Thomas Sowell).
geographic origin groups like Asians and Pacific Islanders. Yet tens of millions of immigrants become automatically eligible for preferences the moment they set foot in the United States, competing for preferences with blacks whose families have been in America since ante-bellum times. For example, a University of Michigan faculty study found that almost 20% of black faculty and more than half of Asian-Pacific Islander faculty were immigrants.\textsuperscript{109}

The U.S. Supreme Court has accepted a limited version of the restitution rationale, permitting or mandating affirmative action as a constitutional matter where it is shown that the actor has specifically engaged in identifiable past discrimination against a favored group, this discrimination continues to affect individual victims, and the preference is carefully tailored to remedy this particular wrong.\textsuperscript{110} In the context of elite professional schools that draw from a national, indeed international, pool of candidates, the required nexus between discrimination and preference can become quite attenuated and far-fetched.\textsuperscript{111}

B. Merit

Most affirmative action advocates challenge the fundamental assumption of its opponents that merit selection—as conventionally understood and as implemented—is a valid and compelling principle of distributive justice with respect to certain kinds of social goods. This challenge takes at least three forms; some advocates use all of them.\textsuperscript{112} First, they contend that accepted understandings of merit are arbitrary, unduly narrow, and unjustly disadvantage minorities. "Merit," Nicholas Lemann writes, "is various, not unidimensional. Intelligence tests, and also education itself, can't be counted on to find every form of merit. They don't find wisdom, or originality, or humor, or toughness, or empathy, or common sense, or independence, or determination—let alone moral worth."\textsuperscript{113} Stanley Fish adds that when disputes arise over merit, "the dispute is between different versions of merit and not between merit and something base and indefensible."\textsuperscript{114}


\textsuperscript{111} E.g., Issacharoff, supra note 11, at 681-82.

\textsuperscript{112} E.g., YOUNG, supra note 21, especially 192-225.

\textsuperscript{113} NICHOLAS LEMANN, THE BIG TEST 345 (1999).

\textsuperscript{114} FISH, supra note 101, at 30.
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Like Lemann and Fish, defenders of preferences particularly object to notions of merit that rely heavily or exclusively on certain kinds of mental and physical tests or that demand certain academic, experiential, and other traditional credentials. This argument for redefining merit may invoke efficiency as well as fairness values. The claim is that those who administer conventional merit standards ignore or reject many individuals who, were merit properly defined, would be found to possess it and thus would perform the task perfectly well.\(^{115}\) By excluding them, more radical advocates say, the supposedly race-neutral merit standard in fact operates as a “white-people’s affirmative action” program.\(^{116}\)

Second, some argue that what we conventionally think of as merit is actually a composite of different ingredients, some of which have little or nothing to do with the kinds of virtues that society should reward with material or status advantage. Ronald Dworkin, for example, condemns the notion that what he calls “wealth-talents” (which would include scholastic aptitude or achievement) should be rewarded because they are praiseworthy attributes. “What counts as a wealth-talent,” Dworkin writes, “is contingent in a hundred dimensions .... Luck is, anyway, by far the most important wealth-talent in this catalogue—being in the right place is often more important than being anything else at all ....”\(^{117}\) Even apart from luck, he argues, it is hard to justify conferring such social advantages on those whom such contingencies happen to favor. In short, merit is not an appropriate principle of distributive justice for the social rewards that wealth-talent receives.

Third, advocates of racial preferences maintain that conventional merit standards are routinely violated by other preference practices that bear little or no relation to any defensible conception of merit and that exhibit few if any of affirmative action’s virtues. I have already noted some examples in higher education—lower admissions standards for athletes, legacies, and geographic diversity—but exceptions to the merit principle also abound in other areas like employment, where governments and private firms often recruit, hire, and promote through veterans’ preferences, old boy networks, nepotism, and favoritism.\(^{118}\) And as journalist Michael Kinsley has noted (with barely-disguised glee), the Republicans endorse even race-based affirmative action when it suits

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115. E.g., Patterson, supra note 3, at 155-65.
118. E.g., Glenn C. Loury, One by One from the Inside Out: Essays and Reviews on Race and Responsibility in America (1995); Shipler, supra note 30, at 506.
Finally, some defenders of preferences do not so much challenge traditional notions of merit as they argue pragmatically that the likely alternatives to preferences would be even worse. In Jeffrey Rosen's view, for example, state universities' programmatic responses to the ending of preferences coupled with continuing political pressures to keep minorities on flagship campuses threatens to "turn the leading state universities into remedial academies.... [A]ffirmative action represents a lesser compromise of meritocratic standards than the alternatives that are almost certain to follow its elimination. . . ." I discuss alternatives below in Part IX.

A willingness to disregard or redefine the merit principle, then, knows no ideological and partisan boundaries. Does this bespeak a context-sensitive flexibility in the notion of merit, as Fish maintains, or is it just hypocrisy? The answer is—it depends. Universities, employers, and other decision-makers are in the best position to define and measure merit in whatever terms they deem most relevant to their own institutions because they must bear most if not all of any efficiency losses and other costs arising from any errors in definition or measurement. Thus, what outsiders may view as arbitrary and hypocritical exceptions to the merit principle presumably advance the institutions' broader interests. In this sense, these "exceptions" can be seen as part of a defensible, institution-specific conception of merit. A preference for legacies and athletes, for example, may maximize the alumni contributions and loyalty that in turn support the institution's academic mission. By the same token, a preference for racial minorities may reflect the institution's belief that their presence will somehow enrich campus life. If so, the merit principle remains inviolate, although its precise definition depends on the particular social context in which it is invoked and the mix of values that the institution seeks to promote.

This conception of merit is more than just window-dressing. A university president may well believe that admitting athletes, legacies, and minorities who do not meet the school's highest academic standards would nonetheless advance its overriding academic and social missions. Indeed, many university presidents do take this view. For myself, I could not reach this conclusion without strong evidence that admitting them was both necessary and sufficient to advance that mission without eroding those standards. My sense—based partly on the academic and fiscal success of elite schools that abandoned single-sex admissions over initial alumni opposition, and partly on the scandalously low academic standards for athletes on many campuses—is that such evidence would be lacking.

119. Kinsley, supra note 49, at 65 ("Republicans, who were slow to approach the C.B.E.O. [color-blind equal opportunity principle] in the 1960s, have often charged past it in the years since. If color blindness is a virtue, hypocrisy is in this case the tribute virtue pays to vice.").
121. E.g., JOHN FEINSTEIN, THE LAST AMATEURS: PLAYING FOR GLORY AND HONOR IN DIVISION I COLLEGE BASKETBALL (2000) (neglect of academics in college basketball programs); SHULMAN &
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does not exist and that most of the special treatment for athletes and legacies bears no relation to a defensible conception of merit. Evidence of the contribution of minorities to campus life does exist, however, and I discuss it below in Section G of this Part.

In defining the academic mission, I personally place a very, very high weight on intellectual achievement. I say "very, very high," not exclusive; I might also give points to applicants who play in the school orchestra, come from rural backgrounds or foreign countries, or exhibit unusual leadership abilities. Doubtless others, mindful of their own institutions' distinctive goals and traditions, would strike these balances somewhat differently, and variations of this kind are to be encouraged. An institution's choice should only be considered hypocritical (as opposed to arguably misguided) when it violates the institution's proclaimed values or when the institution does not demand hard evidence to justify departures from those values, as may well be the case with some universities' athletic programs. The important point is not merely that, as Lemann and Fish rightly argue, different institutions (and the people within them) can plausibly define merit in different ways, but also that the integrity of those definitions depends partly on the underlying facts. In Part IX, Section G, I combine this point and my defense of diverse institutional identities to justify allowing private entities, but not public ones, to adopt ethno-racial preferences under certain defined conditions and in certain contexts.

Defenders of traditional merit make several dignity-based and consequentialist arguments against preferences. One of them counters Dworkin's contingency argument, contending that it assigns insufficient importance to the role that individual efforts play in academic and other success. Such efforts should be rewarded both on efficiency and fairness grounds; those rewards send socially desirable signals to others in the community. If society deems the rewards excessive, it can best reduce them by taxing the excess, not by disparaging a principle that helps motivate socially valuable activity. Once this merit principle is abandoned or discredited, it cannot readily be restored or replaced. No alternative principle, in this view, is as socially functional or morally attractive as merit.

Another argument against preferences holds that departures from traditional merit tend to demean and stigmatize the program's beneficiaries—including those who would have qualified under the traditional merit standard. Since preferences' categorical nature prevents others from telling which members of the favored group were hired or admitted on the basis of merit and which on the

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BOWEN, supra note 56; Robert Lipsyte, Backtalk: The Devil and an Angel Envision a Revolution in College Sports, N.Y. TIMES, Feb. 4, 2001, at 11 (effort of beleaguered female professor at University of Tennessee to curb academic abuses by scholar-athletes and athletic department).

basis of the preference, observers assume the worst. (This assumption, of
course, might itself be considered discriminatory but it may instead reflect a
non-discriminatory aversion to risk.) In a reverse twist on the economic theory
explaining why “lemons” are hard to detect in the market, a preference tends
to reduce the returns to true merit. A similar argument of this kind notes that
many who take advantage of preferences will perform poorly or fail, further
stigmatizing the group and demoralizing the individuals. Stanley Fish’s ri-
poste to the stigma argument is worth quoting:

Some beneficiaries of affirmative action will question their achievements; others
will be quite secure in them; and many more will manage to have low self-esteem
no matter what their history. Affirmative action is a weak predictor of low self-
esteeem, and even if there were a strong correlation, you might prefer the low self-
esteeem that comes along with wondering if your success is really earned to the low
self-esteem that comes from never having been in a position to succeed in the first
place. At any rate, low self-esteem is at least in part the product of speculation
about it.

I consider these and some other consequentialist arguments in more detail in
Part VII.

C. Anti-Caste

Most advocates of affirmative action seek to justify it as a powerful tool for
dismantling what they view as a racial caste system in which blacks continue to
be subordinated not just by individual racist attitudes, but also and more im-
portantly by intractable hierarchical and institutional structures that a more pas-
sive, slow-moving non-discrimination principle cannot effectively dislodge.
In contrast to the backward-looking restitution rationale, the emphasis on
eliminating tenacious caste structures is more forward-looking and remedial.
However labeled, this rationale aims at promoting integration with the goal of
genuine democratic participation on the basis of equality.

Indeed, even today when defenders of affirmative action use diversity
rhetoric in order to avoid legal pitfalls, the heart of the case for affirmative ac-
tion is unquestionably its capacity to remedy the current effects of past dis-
crimination. One advocate, the former chancellor of the University of Califor-
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nia at Berkeley, likens a university without affirmative action to a form of educational apartheid "almost as pervasive and insidious as the strictest segregation in South Africa." Others, less hyperbolic, believe that affirmative action on campus "may well be . . . the best long-term remedy for the private beliefs and behavior that perpetuate the effects of racial caste."128

Somewhat subtler is Orlando Patterson's argument for affirmative action, based on the small number of blacks in the workplace relative to whites. Since there are on average more than six white employees for every black one, Patterson contends, even non-racist employers will likely promote whites more often than blacks, especially if they think that whites will "fit in" better with a predominantly white work force. When one adds to this "the fact that Euro-American workers have a hard time taking orders from Afro-American supervisors," affirmative action is the only way to break the statistically-driven and sometimes vicious circle.130

Advocates who rely on the anti-caste rationale contend that the intractability of these social structures—what Martin Duberman calls racism's "terrifying agility"—demands special and energetic interventions to dismantle them. Perhaps conceding that affirmative action is problematic in certain respects, they nonetheless insist—in the spirit of Justice Harry Blackmun's claim that "[i]n order to get beyond racism, we must first take account of race"132—that the imperative of true integration and the prospect of genuine equality are overriding ends and that affirmative action is the only practical way to achieve them. For constitutional support, they point to Reconstruction-era legislation, contemporaneous with the Fourteenth Amendment's adoption, that seemed to establish racial preferences for the freedmen.133

The political leaders of minority groups clearly view affirmative action as a rallying point, a basis for group solidarity, that can galvanize the ethnically-defined organization of minorities into an effective political force.134 This tactic succeeded in extending the scope of affirmative action from public sector to private sector, from hiring to promotion, from college admissions to graduate and professional school admissions, and in other dimensions,135 while institutionalizing it more firmly than its supporters could possibly have predicted at its

129. Amar & Katyal, supra note 54, at 1779 (quoting Kenneth Karst).
130. PATTERSON, supra note 3, at 161-62.
133. Supra note 5.
134. PATTERSON, supra note 3, at 65-66.
inauspicious inception. Indeed, some use these anti-caste arguments to justify giving preferences even to middle-class blacks.

Opponents counter with several arguments. None of these counter-arguments denies America’s dark history of racial caste. All of them, however, emphasize changes that cast doubt on the merits of affirmative action today. Some, for example, point to the stunning political, economic, and social advances by blacks both individually and as a group, concluding that special preferences are no longer warranted (if they ever were), especially in light of their social costs. Some cite the historical experience of immigrant groups that also suffered harsh racial and other discrimination but still managed to advance without the benefit of these kinds of affirmative action programs. Others argue that any caste effects today are based more on class or cultural practices than on race, or more on spiritual than economic deprivation. Still others, like Cass Sunstein, who strongly supports the struggle against caste, concede that racial preferences often fail and prefer “race-neutral alternatives.”

Affirmative action advocates do not concede these points. They note, correctly, that many substantive inequalities remain and contend that affirmative action’s social costs are minimal. Immigrants, they say, came to America voluntarily and optimistically, not in chains and in trauma, and they insist that slavery’s acids continue to corrode the foundations of the black family and of black culture even six or seven generations after Emancipation.

D. Leadership Cadre

A variant of the anti-caste rationale is the claim that affirmative action is effective in producing a cadre of black professionals who can form a nucleus of group leaders and serve as role models for other members of the group, especially the young who need to have high aspirations and confidence that others

136. Affirmative action’s political origins are discussed infra in Part VI, Section A.
138. Patterson details this progress, supra note 3, at 17-51, although he still favors continuing affirmative action for fifteen years, then to be transformed into class-based programs, id. at 147-69. I discuss this further in Part IX, Section E. See also STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 183-202 (1997) [hereinafter BLACK AND WHITE].
139. E.g., THOMAS SOWELL, MIGRATIONS AND CULTURES: A WORLD VIEW (1996). I have explored some of the complexities of this comparison. Schuck, supra note 2.
140. E.g., PATTERSON, supra note 3, at 147-203.
142. SUNSTEIN, supra note 126, at 181.
143. For a recent review of these inequalities, see ANGELA GLOVER-BLACKWELL, STEWART KWOKH, & MANUEL PASTOR, SEARCHING FOR THE UNCOMMON GROUND: NEW DIMENSIONS ON RACE IN AMERICA (forthcoming 2002).
144. See, for example, text accompanying notes 102-106, 126-131 supra.
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have succeeded despite their common legacy of group disadvantage. This rationale, which has its skeptics,\(^\text{145}\) applies most strongly to the domain of higher education, which of course is an important training ground for leaders. Studies on how well such programs perform this function have been chewed over by proponents and opponents of affirmative action alike.

Proponents point to the Bowen-Bok data on the career achievements of blacks admitted to the selective schools in their sample during the affirmative-action era, graduates whom the authors characterize as "the backbone of the emergent black . . . middle class."\(^\text{146}\) The Bowen-Bok data clearly establish that the vast majority of the individuals who graduate from baccalaureate and post-baccalaureate programs to which they were admitted through affirmative action do enter the middle class, participate in community life, and presumably function as role models for young blacks.\(^\text{147}\) A further argument in this vein is that the presence of minority group members in visible roles of leadership and influence is conducive, if not essential, to the legitimacy of social and political institutions. For minorities to accept their outcomes as minimally just or at least acceptable, they must view these institutions as inclusive and procedurally fair. Being tried by minority judges, for example, may advance that goal. They must perceive that they are not merely invisible servants of the regime but are, along with their fellow citizens, its masters as well. A related, though slightly different, argument, which is particularly applicable to affirmative action in public universities and other public programs, is that minorities pay taxes for these mobility-enhancing public services, entitling them to fair representation in those programs.\(^\text{148}\)

This, then, is the core of the leadership cadre rationale for affirmative action. There are at least three reasons, however, to doubt how much of this mobility and participation are due to affirmative action. First, the propensity to participate and lead in the civic sphere reflects factors that are usually evident in high school and that therefore presumably increase the chances that individuals will be admitted to the selective institutions in the first place, with or

\(^{145}\) Christopher Lasch, for example, opposes affirmative action because, among other reasons, it would strengthen the dominant position of the middle class, further estranging it from lower-income people. Christopher Lasch, The Revolt of the Elites and the Betrayal of Democracy 79, 137 (1995).

\(^{146}\) Bowen & Bok, supra note 80, at 116.

\(^{147}\) The Bowen-Bok data do reveal a substantial, persistent, and unexplained earnings gap between white and black male graduates of the sampled institutions, though not for females. See also Sandalow, supra note 85, at 1908-10 (discussing possible explanations). And some studies do find performance differentials. E.g., John R. Lott, Does a Helping Hand Put Others at Risk?: Affirmative Action, Police Departments, and Crime, 38 Econ. Inquiry 239 (2000). On the other hand, a study of Michigan Law School's white and minority graduates shows their earnings, arguably a proxy for performance, to be quite comparable. Lempert et al., Law School, supra note 91, at 447-53. But see Sander, supra note 91 (discussing response rate, cohort, aggregation, and other methodological considerations).

\(^{148}\) Issacharoff, supra note 11, at 684-88.
without the boost of affirmative action. Second, the vast majority of the black students admitted to these institutions (86%) are already from middle- and upper-class families (although they are still poorer than their white peers), a background that correlates with both participation and leadership. Third, absent affirmative action, these students would presumably have attended other institutions that graduate many more blacks than the ones in the Bowen-Bok sample do, blacks who succeed both professionally and civically. Indeed, a striking fact is that historically black colleges, which account for only a sixth of total black college enrollment, produced 43% of the 1995 Congressional Black Caucus, 39% of black officers in the U.S. Army, and a quarter of black MacArthur “genius” grantees in the last two decades. Although these successful graduates were educated some time ago, their alma maters are now more intensively recruiting and often enrolling the most outstanding black students, many of whom could gain admission to predominantly white institutions through affirmative action programs. The same is true of the non-flagship campuses of public university systems, where most of the direct affirmative action beneficiaries would end up, absent affirmative action. In short, the vast majority of those admitted to select institutions would presumably have succeeded, participated, and been leaders anyway even without the preferences.

E. Market Failure

Some analysts of an economistic bent emphasize that affirmative action can be justified as a response to a defect in the markets for labor, college admissions, credit, and other goods. Their argument is that a decisionmaker who rationally relies on group stereotypes—because the savings in search and other

149. As Sandalow puts it, “It is entirely predictable . . . that African-American students at those institutions will, in their later lives, be actively involved in civic organizations. The importance of attending a selective college lies elsewhere, not in leading students to engage in civic activities, but in enhancing the quality of their efforts.” Sandalow, supra note 85, at 1909-10.
150. BOWEN & BOK, supra note 80, at 48-49. Stephan and Abigail Thernstrom question the causal assumption of the leadership cadre rationale. Rather than these schools creating a black middle class, they say, the black middle class sends its children to these schools. THERNSTROM & THERNSTROM, BLACK AND WHITE, supra note 138; see also Stephan Thernstrom & Abigail Thernstrom, Racial Preferences: What We Now Know, 107 COMMENTARY 44, 44-50 (1999) [hereinafter Racial Preferences] (reviewing the Bowen-Bok study).
151. LERNER & NAGAI, supra note 82. Some of these other institutions, it now appears, also use preferences. Id.
152. Thernstrom & Thernstrom, Racial Preferences, supra note 150, at 49. These colleges educate 15% of black college students and produce 30% of all black graduates. DARIEN A. McWHIRTER, THE END OF AFFIRMATIVE ACTION 150 (1996). For an argument that these institutions may now be unconstitutional, see Mark Strasser, Plessy, Brown and HBCUs: On the Imposition of Stigma and the Court’s Mechanical Equal Protection Jurisprudence, 40 WASHBURN L.J. 48 (2000).
154. E.g., Jack Citrin, Scores Do Measure Talent, Berkeley Professor Insists, SAN JOSE MERCURY NEWS, Mar. 4, 2001; see infra text accompanying note 383.
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information costs in doing so exceed the costs of missing some qualified members of the stereotyped group (false negatives, as it were)—is not internalizing the full social costs of her discrimination. Those costs include the demoralization of excluded, but qualified, group members, underinvestment by stereotyped group members in education and other qualifications that would disproportionately benefit them and society, and so forth. Affirmative action, in this view, is a way of obliging decisionmakers to bear the full costs of these externalities and thus to make economically efficient choices. But even if some externality adjustment were desirable, the one effected by affirmative action is, as we shall see, far too crude, costly, and inefficient in its own right to rectify the problem.

F. Institutional Pragmatism

Some have defended affirmative action as a necessary, prudent resolution of the competing values to which certain institutions are committed. Focusing on elite universities, for example, law professor Samuel Issacharoff, echoing Nathan Glazer, argues that affirmative action represents a point of compromise in the contradictory missions of the elite universities. They serve as both the guardians of a meritocratic vision of achievement and as the guarantors of opportunity so that the elites of the society may be replenished from the diverse groups that have built this country. Affirmative action grows out of the frustration with the apparent intractability of this country’s inability to achieve these twin objectives with regard to black Americans. It is a pragmatic and oftentimes messy accommodation of two of the central values of higher education. Issacharoff’s plea for granting institutions some discretion in deciding how to balance competing considerations that are peculiar to them is convincing, at least for private institutions. And his description of the moral and political impulses motivating many proponents of affirmative action is surely correct. But as we shall see, it is not an accurate account of how most Americans and even most racial minorities view affirmative action; their opposition to it as a matter of principle thus discredits the compromise he defends. Furthermore, his pragmatic judgment rests on certain premises: that affirmative action is necessary to create black mobility, that the preferences are “modest,” that they only “operate on the margin of established selection criteria,” that they have “an end-point that will prevent affirmative action programs from becoming institutionalized as a racial spoils system,” and that they do not have other negative consequences that might affect the prudential balance. My analysis casts se-

156. Issacharoff, supra note 11, at 682.
157. See discussion infra in Part IX, Section F.
158. Issacharoff, supra note 11, at 690-92.
rious doubt on all of these premises.

G. Diversity

The institutional pragmatist will often seize on diversity as a more satisfying, more substantive rationale for affirmative action. Its appeal is readily apparent. Even more obvious, however, are its flaws—so obvious, in fact, that many of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.¹⁵⁹

Until the late 1990s, when federal courts began striking down affirmative action programs in public institutions of higher education as unconstitutional reverse discrimination, advocates had focused their arguments more on the restitution, anti-caste, merit, leadership cadre, market failure, and institutional pragmatism rationales for such programs than on diversity. These other rationales were more attractive to the advocates because they seemed morally compelling, remedial, and based on the demands of justice. Diversity, in contrast, was essentially a functional rationale whose force depended on a number of plausible but controvertible empirical propositions. Equally problematic, this functional account of diversity was geared less to how affirmative action benefitted the victims of past discrimination than to how it benefited other institutions or people (e.g., students and faculty), including many who may have either participated in that discrimination or been advantaged by it.¹⁶⁰ Functional arguments for diversity suffer not only from this distasteful aspect, but also from the distinct possibility, which I develop below, that these arguments fail according to their own functional criteria. Arguments supporting preferences because of diversity's supposed effects may turn out to discredit them if and when those effects do not materialize.¹⁶¹

In fact, the diversity rationale should be seen as little more than a rhetorical Hail Mary pass, an argument made in desperation when all other arguments for preferences have failed. It is no secret that proponents turned to this rationale in earnest only when a series of adverse court rulings beginning in 1989 cast serious constitutional doubt on other legal arguments for preferences. By 1998, voters in California and Washington State had adopted laws barring affirmative action in state programs.¹⁶² Casting about for a safe harbor, defenders of pref-


¹⁶⁰. For this reason, some have seen the diversity rationale as a diversion from the anti-caste project. E.g., Barbara Phillips Sullivan, The Gift of Hopwood: Diversity and the Fife and Drum March back to the Nineteenth Century, 34 Ga. L. Rev. 291, 298 (1999).


¹⁶². California's Proposition 209, passed in the November 1996 election, dismantled affirmative action in public education and public employment; Washington State's Proposition 200, passed in the
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references seized upon the diversity justification offered by Justice Powell in 1978 in his plurality opinion for the Supreme Court in the Bakke case. There he stated that "a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education" and observed that "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."

Today, Michael Selmi explains, "diversity has quite clearly become the most heralded of all justifications for affirmative action." In large part, this is because relying on diversity rather than discrimination places affirmative action programs on more solid legal and perhaps political grounds. It is the rare case in which a university will have engaged in systematic discrimination against a particular group recently enough and in other particulars that a court may accept as sufficient to justify a race-conscious measure. It is rarer still that a university defending a plan will be willing to assert its own past discrimination as justification for affirmative measures.

The diversity rationale, in contrast, entails a fresher, more "future-oriented vision." As law professor Eugene Volokh says, "it ascribes no guilt, calls for no arguments about compensation. It seems to ask simply for rational, unbigoted judgment . . ." Judge Alex Kozinski adds that "everyone likes diversity, so long as it falls within a fairly narrow ideological range." And depending

November 1998 election, yielded a similar outcome.

163. Terrance Sandalow observes that "the importance of racial diversity in the educational process has become something of a mantra in higher education circles in the years since Justice Powell's pivotal opinion in Bakke." Sandalow, supra note 85, at 1905. Sanford Levinson likens this to a game of "Simon Says" in which the Court tells the players that "Simon says, 'Start talking about diversity—and downplay any talk about rectification of past social injustice . . .'." Levinson, supra note 159, at 578.


166. Id. at 733; see also id. at 729 nn.152-153 (citing sources). As the successful lawyer in Hopwood points out, "if the [University of Texas] Law School with its notorious past cannot rely on historical discrimination as a predicate for preferential admissions, then no institution of higher learning . . . can rely on a remedial rationale for affirmative action." Michael S. Greve, Hopwood and its Consequences, 17 PACE L. REV. 1, 6 (1996).


169. Quoted in Chen, supra note 58, at 815.
on how diversity is defined, preferences for middle-class minorities might fall within the rationale, possibly facilitating public acceptance of the policy.\textsuperscript{170}

The diversity rationale attracts supporters, especially in higher education, for another reason. Whether or not professors agree with Kenneth Karst that the conventional affirmative action categories are good proxies for the kinds of diversity that enrich teaching, learning, and social interactions in and outside the classroom,\textsuperscript{171} and whether or not they are persuaded by the non-diversity arguments for affirmative action, most of them are profoundly uncomfortable at the thought of teaching a class or being on a faculty containing only whites and Asians. (Whether this also troubled professors in the days before preferences helped put racial minorities in their classrooms is less clear.) As we shall see in Part VIII, this “re-segregation” nightmare might well occur at the more elite private institutions absent preferences. I am such a teacher at such an institution and experience the same anticipatory discomfort.

What is the source of this discomfort? Here, I enter the realm of speculation (or more precisely, introspection), although survey evidence does shed some light. College and university professors tend to be ideologically and politically far more liberal, Democratic, statist, and secular than other Americans.\textsuperscript{172} More to the point, professors tend to be knowledgeable about and sensitive to the historical injustices inflicted on blacks by slavery, Jim Crow, and the legacy of racism in America, and to support affirmative action and other remedial and egalitarian policies.\textsuperscript{173} It is not cynical, I think, to add that tenured professors have little or nothing to fear personally from affirmative action for students or faculty. Indeed, it benefits them by eliminating the discomfort they would feel in classes and faculty meetings without non-Asian minorities, and they bear few of the program’s costs.\textsuperscript{174} Many genuinely believe that the benefits of

\begin{itemize}
  \item \textsuperscript{170} Malamud, supra note 137, at 953 (“[T]he diversity rationale makes it unnecessary to answer the hardest question about . . . affirmative action: the question of when it is time to stop.”).
  \item \textsuperscript{171} Kenneth L. Karst, Law’s Promise, Law’s Expression: Visions of Power in the Politics of Race, Gender, and Religion 105-07 (1993) (emphasizing “enacted narrative” of “doing things together over a period of time”).
  \item \textsuperscript{172} Based on a 1993-94 survey of 710 law faculty at the top 100 law schools and the AALS data from the 1996-97, 80% of law faculty are Democratic or lean Democratic (compared with 46% of the working population). Although about 15% of full-time working women are Republicans, only 0.5% of women law professors are Republicans. James Lindgren, Measuring Diversity, tbl.2 (January 1, 1999) (unpublished manuscript, on file with author).
  \item \textsuperscript{174} I say few of the costs, not none. Some of their students who receive preferences are less well-prepared academically and thus harder to teach. Institutions may pressure faculty not to fail minority
\end{itemize}
ethno-racial diversity justify preferential admissions. Their reactions are perfectly predictable and understandable, and I share some of them.

What independent weight should these professorial feelings carry in the affirmative action debate? Not much, in my view. For the diversity rationale to justify affirmative action in higher education, it must do so because of the genuine diversity benefits that flow to students and faculty, especially those in the favored groups. The diversity rationale means that the benefits relevant to a diversity assessment must be the educational and social advantages that interactions among diverse students and faculty supposedly produce. The benefits from allaying the anxieties of white faculty members who are already highly privileged in so many respects should not count heavily (or perhaps at all) because such benefits bear only the most tenuous relation to the values that underlie the diversity rationale, properly understood.

What, then, are the benefits—from a diversity perspective—that should count in favor of preferences in higher education admissions? To answer this question, we must first address three other closely-related ones. What does diversity mean in this context? What is it about a group that accounts for its diversity-value?\(^{(1)}\) (Groups, after all, are what diversity-based affirmative action programs are all about.) And what diversity-value do the groups favored by affirmative action create?

1. Diversity’s Meaning

Diversity, like equality, is an idea that is at once complex and empty until it is given descriptive and normative content and context.\(^{(16)}\) Unfortunately, most discussions of diversity and the diversity rationale for affirmative action do not explain what it actually means, much less which groups with what kinds of attributes create diversity-value.\(^{(17)}\) Nevertheless, the ways that affirmative action programs are designed and defended leave little doubt that program advocates almost always mean racial diversity, with little regard to the many anomalies, evasions, and confusions that attend most race discourse in America.\(^{(18)}\)
This preoccupation with race by proponents of the diversity rationale is also anomalous because other attributes are also predictive of one’s experiences, outlooks, and ideas. According to a still-unpublished study by lawyer-sociologist James Lindgren of the demographic correlates of viewpoint differences, political affiliation accounts for the largest cleavages, with religion and race producing cleavages of similar magnitude. The failure of diversity-based affirmative action programs to base preferences on religion is among the most revealing facts about them. (Alas, this immense failing extends as well to most of the other debates over multi-culturalism.) The programs’ lack of interest in our rapidly-growing religious diversity casts some doubt on the bona fides, or at least the coherence, of the diversity rationale as now implemented and may reflect the unusual religious composition of university faculties.

A priori (which is how programs select the groups to be preferred), doesn’t the perspective of a Muslim or fundamentalist Christian applicant have at least as much diversity-value as that of a middle-class black or Hispanic? Sanford Levinson, an affirmative action supporter, puts this point another way: “One sometimes gets the feeling that ostensible defenders of ‘diversity’ and

occurred since colonial times and is common today, producing a very large number of mixed-race individuals; even recent immigrants are included; Hispanics are not a racial group and Asians are a composite of many ethnic, religious, linguistic, and national-origin groups with little or nothing in common with one another, and indeed histories of deep conflict.

This last, however, is not the reason why pressures are growing to exclude Asians from diversity programs. The usual grounds for doing so are that Asians are already well represented on university campuses, their average family income is relatively high, they would qualify for admission on a race-neutral basis, and giving them preferences would leave few slots left for more deserving minorities, notably blacks. Not surprisingly, these grounds are disputed by Asian groups complaining that such “model minority” stereotypes overlook the many disadvantages these groups face. E.g., Chris Hedges, Fighting a Happy Image of Self-Sufficiency, N.Y. TIMES, Mar. 6, 2001, at B2 (Asian Americans for Equality group in New York City).


Volokh argues that religious preferences under a diversity rationale would be unconstitutional for the same reason that he thinks racial preferences are—even though the lack of religious diversity at many schools is “at least as severe as the lack of racial diversity.” Volokh, supra note 168, at 2072.

HOLLINGER, supra note 26, at 120.

SCHUCK, supra note 6.

Indeed, Volokh contends that affirmative action that covers race while not covering religion casts doubt on the integrity of this use of the diversity rationale and thus would also be unconstitutional. Noting this conflict between the core principles of anti-discrimination law and of affirmative action law, he asks the law, “How exactly does what you praise differ from what you damn?” Volokh, supra note 168, at 2076.

James Lindgren’s survey of law professors during the 1990s indicates that nearly 27% were Jewish, and another 26% profess no religion, compared with 2% and 8%, respectively, in the full-time working population. Protestants accounted for 32% and Catholics for 14%, compared with 60% and 26%, respectively, in the full-time working population. James Lindgren (unpublished manuscript, on file with author).

Some argue that because test score differences between religious groups are not as great as between racial ones, affirmative action for the former are unnecessary to assure diversity; it will take care of itself. E-mail from Nathan Glazer (Aug. 24, 2001) (on file with author). But even if this were true as to students, it cannot explain why university employment preferences, particularly in faculty hiring, show no interest in religious diversity.
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‘multiculturalism’ have no real idea of how truly diverse and multicultural the United States has become, fixated as they are on the ‘traditional’ racial and ethnic cleavages within this country.” Levinson’s use of scare quotes around “traditional” reminds us how much more complex and numerous these cleavages are than those presupposed by diversity-based affirmative action programs. This complexity also underlies David Hollinger’s critique of the official ethno-racial pentagon. And if we want to stick with simple but perspective-relevant cleavages, why not diversify the student body through preferences according to political party affiliation?

2. Diversity-Value in General

Just how many blacks or members of other favored groups must be present in order to establish the requisite diversity? Because the value of diversity surely depends on various factors, any sensible answer must be context-specific. Unfortunately, law and practice offer a wholly reductionist answer to the question. They simply count the number of group members in the relevant community (or their percentage of the community total) and demand proportional representation, at least as a default but often, in effect, as the final answer. Defining the relevant community—that which will be used in making the proportionality assessment on which the legal obligation will directly turn—almost always entails highly controversial judgments, if not arbitrary empirical and normative ones. The relevant baseline for judging proportionality, for example, can only be defined in terms of a number of elusive, hard-to-measure, and internally competing parameters including group definition, geography, qualifications, attitudes, applicant pool, and others. Rhetoric aside, the task of actually administering affirmative action requires, ironically, that a program first combine many complex determinations that as a practical matter it can only make through almost comically arbitrary judgments, and then come up with a bottom-line number that is certain to be breathtaking in its simplicity and abstraction from context.

This, emphatically, is not what Justice Powell had in mind in his Bakke opinion, although in other respects it is not altogether clear what he did have in mind or how binding his opinion is as precedent. In Bakke, he insisted that

186. Levinson, supra note 159, at 603 n.120.
187. HOLLINGER, supra note 26, at 177-78.
188. Amar and Katyal see the need for a “critical mass.” Supra note 54, at 1777. See also Chen, supra note 58, at 883-84 (justification of “comfort level” for minority students “conflates diversity with the distinct and doctrinally unsound role model rationale”).
189. E.g., Chen, supra note 58, at 825-26 (reviewing the caselaw).
190. E.g., Christopher A. Ford, Administering Identity: The Determination of “Race” in Race-Conscious Law, 82 CALIF. L. REV. 1231 (1994); Levinson, supra note 159, at 599-601.
simple numerical quotas could not be used to achieve diversity; institutions must instead look at the individual as a whole and her potential to contribute effectively to educational diversity. Institutions that invoke diversity, Powell added, must also pursue non-racial diversity. Both factors led him to condemn the Davis system that precluded whites from competing for the set-aside slots and to praise Harvard’s because race was only a tie-breaking factor. More recently, the Supreme Court held, as Powell had argued in Bakke, that all race-based preferences are subject to strict scrutiny, the most demanding constitutional test.

The diversity that Powell seemed to have in mind was not the pure ethno-racial diversity that affirmative action programs now prize. The fact that affirmative action programs have bureaucratized diversity does not mean that it is a hollow ideal unworthy of society’s aspiration. It does mean, however, that these programs may in fact be pursuing a spurious or formalistic kind of diversity. Indeed, for institutions that must process thousands of applications for relatively few slots in a very limited period of time, it could hardly be otherwise. As a practical matter, diversity admissions can mean little more than color-coding and color-counting in service of a pre-determined color-targeting.

3. Diversity-Value in Particular

How, then, does a favored group in fact confer diversity-value on a community? A group can only create diversity-value if it possesses certain desired qualities qua group. It seems to follow that a group can only do this if those qualities inhere in all members of the group (else the group should be re-

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192. This issue is analyzed in Johnson v. Board of Regents of the University of Georgia, Nos. 00-14340 & 00-14382, 2001 WL 967756, at *9-12 (11th Cir. Aug. 27, 2001).
194. Some programs purport to do so. Tien, supra note 128, at 243-44 (stating that Berkeley’s admissions policy “assures that our doors are open to low-income, older, immigrant, disabled, special talent,” and geographically diverse students).
196. For a careful—but for the reasons presented here and others, unconvincing—argument that affirmative action in higher education meets this test, see Goodwin Liu, The Diversity Rationale as a Compelling Interest, 33 HARV. C.R.-C.L. L. REV. 381 (1998).
198. Kirk Kennedy, Race-Exclusive Scholarships: Constitutional Vel Non, 30 WAKE FOREST L. REV. 759, 774 (1995); see also McWhirter, supra note 152, at 152.
199. E.g., Issacharoff, supra note 11, at 678-79 (describing the process at the University of Texas).
200. Not everywhere. According to Bowen and Bok, America’s most selective institutions reject about 25% of black applicants with SAT scores between 1400 and 1500. Bowen & Bok, supra note 80, at 27.
defined to exclude those who lack them). To affirm that a quality inheres in a racial group, however, is to "essentialize" race in a way that is not true when one selects for, say, rural background, which is not a proxy for anything but itself. Racial essentialization utterly contradicts liberal, egalitarian, legal, scientific, and religious values (at least in the "Abrahamic" (i.e., Jewish, Christian, and Muslim) traditions). These religious values hold that all individuals are unique and formally equal regardless of genetic heritage, and that their race causally determines little or nothing about their character, intelligence, experience, or anything else that is relevant to their diversity-value. Indeed, for employers to use racial stereotypes in this way would be flatly illegal—even if the assumptions underlying the stereotypes were true. (As Eugene Volokh says, "It's hard enough to persuade people to give up their irrational prejudices; it's harder still to persuade them to give up their rational ones."

The best that can be said of advocates' using diversity in this way is that they have "reproduced the most gross and invidious of popular images of what makes human beings different from one another" for a putatively benign purpose. They are propagating a socially inflammatory stereotype that, even when fairly accurate, invites decision-makers to violate people's claims to be judged as individuals, not as members of ascribed groups. On a parity of reasoning, legitimating the use of this proxy might equally justify racial profiling by police if it were intended to fight crime and were tolerably accurate.

This, then, brings us to the third question: what diversity-value does a favored group actually confer? Affirmative action programs attempt to finesse the essentialism difficulty by assuming certain facts that might make the use of race as a proxy more defensible. They assume, first, that black students bring to campus histories and viewpoints that are unique to and universal among black students even though those histories and viewpoints are not racially or genetically hard-wired into them. They then assume that all of these students have the common experience of growing up black in America and the special perspectives that go with that experience—what Yale Law School dean Anthony Kronman calls value-diversity. Educational institutions and their black members, they further assume, should help non-blacks to comprehend this experience, and campus diversity can strengthen the foundations of good citizenship.

201. "All" may be too strong. If only a small percentage of a group's members lack the desired quality, it may still be worthwhile to confer the benefit on all members in order to avoid the administrative costs of identifying the few who lack it.


203. HOLLINGER, supra note 26, at 32. For a lively and passionate development of this idea, see JIM SLEEPER, LIBERAL RACISM 1-21 (1997).


Finally, they assume that race can serve under these circumstances as a rough but serviceable proxy for both diversity-value and value-diversity. Although Sanford Levinson doubts that anyone “is so stupid as to believe that all (or even most) members of any given group necessarily have similar opinions on a variety of important issues,” most defenses of preferences based on viewpoint diversity seem to reflect precisely this belief. Levinson makes a more limited claim—that the presence of blacks and other groups on campus fosters some educational values in certain contexts while having less effect in others.

The Bowen-Bok study strongly defends these assumptions. Using broad-question surveys conducted in 1995-97, it asked these cohorts of former students how they assessed their experiences on racially diverse campuses. Large majorities—especially among blacks and in the more recent cohorts—that it was important or very important in life “to work effectively and get along well with people from different races and cultures,” and that their college educations helped to cultivate this ability to a significant degree. Bowen and Bok also found that the more blacks in an entering class, the more likely that white students in that class would know two or more blacks well; that 56% of white students said that they knew two or more blacks well; and that the percentage who did so increased with the school’s selectivity. These interactions occurred, moreover, even though black students represented fewer than 10% of the students in the schools studied. Relying on a “contact theory” holding that increased contact among racial groups should decrease prejudice, a theory with uncertain empirical support, Bowen and Bok develop a model to predict how this would change if admissions were instead race-neutral. Finding that the 56% figure would fall by several percentage points, they conclude that “the drop in interactions would certainly be substantial.” These findings ostensibly support the notion that affirmative action cultivates interracial socialization skills that both white and black students value and that they enhance by attending racially diverse institutions.

This conclusion, which is also supported by a study done to support the University of Michigan’s legal defense, has been challenged from at least six

206. E.g., Amar & Katyal, supra note 54, at 1773-76 (but insisting that programs meet certain other criteria); Paul Brest & Miranda Oshige, Affirmative Action for Whom?, 47 STAN. L. REV. 855, 862 (1995).

207. Levinson, supra note 159, at 577.

208. Id. at 592-608.

209. Selmi, supra note 165, at 725.

210. The evidence is summarized id. at 724 n.141.

211. BOWEN & BOK, supra note 80, at 236; see also id. at 220-27, 231-40.

212. For a development of this argument with respect to workers, see Cynthia L. Estlund, The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law, 1 U. PA. J. LAB. & EMP. L. 49 (1998).

directions. The first is empirical; a recent review of existing survey data shows that most students and faculty place little weight on ethnic diversity as a cause of positive educational outcomes, and its regression analysis of peer group racial composition effects finds no positive effect on any of the eighty-two outcome variables used by the American Council on Education.\textsuperscript{214}

The second challenge is comparative. Stephan and Abigail Thernstrom, prominent critics of the Bowen-Bok study and authors of an earlier analysis of American race relations that strongly opposed affirmative action,\textsuperscript{215} point to a 1997 national survey in which 86\% of white adults reported having black friends, and to a 1994 survey in which 73\% said they had "good friends" who were black.\textsuperscript{216} To the Thernstroms, the Bowen-Bok findings justify a different inference: "By these standards, the elite schools are hardly in the proud vanguard of progress. To the contrary, they are lagging woefully behind."\textsuperscript{217} Interestingly, the Bowen-Bok and Thernstrom data on college-age and adult friendships both overlook the increasing interracial friendships among youngsters even before they reach college,\textsuperscript{218} which would suggest that the college experience may be less central to such friendships than either camp supposes.

A third challenge examines how the education process actually works on campuses. Sandalow maintains that any experiential differences between white and black students "are simply irrelevant to most of what students study in the course of their undergraduate careers. The irrelevance of those differences is perhaps most obvious in the study of mathematics and the natural sciences, but it is no less true of most of the humanities and the social sciences."\textsuperscript{219} Sandalow goes on to consider the argument, crucial to the diversity rationale, that blacks are likely to advance different ideas unfamiliar to whites. His reply accords precisely with my own experience:

\begin{footnotesize}
\textsuperscript{214} Wood & Sherman, supra note 164, at Part IV.
\textsuperscript{215} THERNSTROM & THERNSTROM, BLACK AND WHITE, supra note 138, at 386-492.
\textsuperscript{216} Themstrom & Thernstrom, Racial Preferences, supra note 150, at 47; see also PATTERSON, supra note 3, at 45 (57\% of blacks claimed to have a good Euro-American friend "to whom they felt they could really say anything they thought"). Patterson emphasizes that workplace contacts matter more to friendships than neighborhood ones, noting a recent study in "hypersegregated Detroit" finding "a level of personal friendships with people from the other group that was wholly inconsistent with the dismal accounts of hypersegregation being reported by spatially oriented scholars." Id. at 44-46.
\textsuperscript{217} Themstrom & Thernstrom, Racial Preferences, supra note 150, at 47.
\textsuperscript{218} E.g., D'Vera Cohn & Ellen Nakashima, Crossing Racial Lines, WASH. POST, Dec. 13, 1995, at A1 (newspaper poll indicating that more than three-quarters of Washington-area 12- to 17-year olds say they have a close friend of another race); Corey Takahashi, Selling to Gen Y: A Far Cry from Betty Crocker, N.Y. TIMES, Apr. 8, 2001, at WK3 (in 1997, 57\% of teens who dated said they had dated interracially and another 30\% had no objection to doing so). But see Gary Orfield & Dean Whital, The Civil Rights Project, Harvard Univ., Diversity and Legal Education: Student Experiences in Leading Law Schools, at http://www.law.harvard.edu/groups/civilrights/publications/lawsurvey.html (Aug. 1999) (blacks and Hispanics admitted to elite colleges had more interracial contacts in high school than whites did).
\textsuperscript{219} Here Sandalow cites to none other than Derek Bok, when president of Harvard University. Sandalow, supra note 85, 1906 & n.78.
\end{footnotesize}
Even though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by white students. Black students do, at times, call attention to the racial implications of issues that are not facially concerned with race, but white and Asian-American students are in my experience no less likely to do so.\(^{220}\)

To some scholars, however, Sandalow’s empirical observation is beside the point because only racial preferences can secure minority students their “free exercise of race.”\(^{221}\) Mary Anne Case even suggests that barring racial preferences “may work a denial of equal protection to some [students] for whom race is a particularly salient characteristic.”\(^{222}\) But although race is surely quite salient for some students, the admissions office almost never asks about their ideas or points of view, much less how salient race is to them, so this rationale seems even weaker and, insofar as it is based on a gross stereotype, pernicious.\(^{223}\) Outside the classroom, of course, race-based experiential differences might encourage empathy and openness to diversity of all kinds.\(^{224}\) On the other hand, those differences might promote greater conflict.\(^{225}\)

The diversity rationale, as deployed by some of its advocates, masks a deeper confusion about the diversity-value arising out of social interactions. In this view, which Justice Stevens has avowed, diversity demonstrates to people that despite our superficial differences, we are really all alike under the skin.\(^{226}\) This proposition is clearly true in many respects—recall, for example, the DNA evidence on the similarity of our genetic endowments—but the diversity-value that the diversity rationale invokes is supposed to grow out of decidedly different viewpoints that diverse people are said to bring to these interactions. If we take the rationale seriously, then similarity under the skin may confer negative, not positive, diversity-value. The very logic of this rationale dictates that we should seek differences under the skin since those differences constitute the payoff to diversity. At the very least, those who espouse pieties like Justice

\(^{220}\) Id. at 1906-07. If I may indulge in a personal anecdote, I once stated in a seminar discussion of affirmative action that any experienced, conscientious teacher, regardless of her race, could and would get on the table any of the arguments that ought to be there, including ideas normally associated with racism or other analogous experiences not personally experienced by the teacher. One of my best students responded, “Yes, but you wouldn’t say it with the same conviction or affect as one who had experienced it personally.” This is a point I had to concede, as Sandalow does: “At times, the importance of what is said depends less upon the idea expressed than upon the identity of the speaker and the manner of expression.” Id. at 1907; see also Levinson, supra note 159, at 596-97 (race and ethnicity may be good proxies for probability of interest and knowledge about an issue).


\(^{223}\) McWhirter, supra note 152, at 151.

\(^{224}\) Sandalow, supra note 85, at 1906-07; see also Orfield & Whitla, supra note 218.

\(^{225}\) Issacharoff, supra note 161 (manuscript at 24, on file with author) (citing studies of effects of workplace diversity).

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Stevens' should be clearer about what they mean.

Two other challenges contend that the schools with diverse student bodies are not fully realizing the pedagogical possibilities this diversity creates,²²⁷ and that students admitted on diversity grounds may suffer special burdens from having to serve in a "representative" capacity²²⁸—although Bowen and Bok find that low-scoring students admitted to elite schools later express great satisfaction with their college experiences.²²⁹ Finally, the dismayingly evidence of persistent racial self-isolation on campuses, including those with affirmative action, also raises questions about the interracial socialization thesis. Orlando Patterson, who supports affirmative action, ruefully concedes that "no group of people now seems more committed to segregation than Afro-American students and young professionals."²³⁰ Jack Citrin, an opponent, believes that the 250-point gap in SAT scores created "a caste system" at Berkeley:

Intellectual Balkanization with large ethnic differences in majors and grades was the outcome of Berkeley's version of affirmative action. Underrepresented minorities did not often major in subjects such as philosophy, mathematics and chemistry, while they were heavily clustered in such areas as sociology and ethnic studies.

Of the Berkeley freshman admitted in fall 2000 [without affirmative action], by contrast, 14.9 percent were members of underrepresented minority groups, but the ethnic gap in test scores was slashed by more than one-third. The smaller number of minority students admitted are more competitive with their peers than previously, a necessary start to ending the academic caste system.²³¹

After carefully interrogating the diversity rationale for racial preferences, then, one is left with serious doubts about its coherence and persuasiveness. There is something to it, surely, but not much. Recognizing this problem, some advocates seek to re-conceptualize diversity as something else. In philosopher Elizabeth Anderson's view, for example, diversity is really "another way of talking about integration," a way that can link diversity to the advocates' "core social justice and democratic concerns."²³² In the same spirit, Robert Post sees


²²⁸. Malamud makes the point in the workplace context: The diverse candidates must do their jobs, be role models, and teach the rest of the workforce how the world looks from their diverse perspectives. They can never be at peace in the same way as those whose right to be on the job is socially constructed as based on their pure individual merit.

²²⁹. BOWEN & BOK, supra note 80, at 193-98.

²³⁰. PATTERSON, supra note 3, at 157.

²³¹. Citrin, supra note 154. This emphasis on differences in academic preparation, program, and performance, however, neglects the psychological and other factors that surely contribute to this separation.

²³². Anderson, supra note 127 (manuscript at 24). Anderson imaginatively argues that diversity, so re-conceived, can satisfy the Supreme Court's "compelling interest" and "narrowly tailored" tests for
diversity as the seedbed of "a democratic public culture." But this discursive move is really an effort to change the subject; it defends racial preferences not as a way to enrich the experiences of students and teachers but as a remedy for social inequalities and generalized discrimination. That the Supreme Court has expressly and repeatedly prohibited this justification, of course, is not a conclusive argument against it; the Court, after all, is notoriously fallible. My point, rather, is that the diversity rationale is weak even in its own terms.

VI. THE POLITICS OF AFFIRMATIVE ACTION

The political dynamics of affirmative action policy have been much studied in recent years. Like any other policy domain, the competition of interests and ideas that swirl around it is complex, often opaque, and issue- and program-specific. The politics of affirmative action, moreover, have evolved in the four decades since President John F. Kennedy first mandated it. The issue became particularly volatile in the mid-1990s when Republicans gained control of Congress and the more individualistic jurisprudence of Reagan- and Bush-appointed judges took hold. In this section, I very briefly sketch this tangled history, review the evidence on public attitudes toward affirmative action, and then seek to explain what is an intriguing political puzzle: the policy's long survival in the face of persistent opposition by both the general public and many leading politicians.

A. Political History

Affirmative action as a policy directive first appeared in the 1935 National Labor Relations Act. There, Congress authorized the National Labor Relations Board to redress an unfair labor practice by ordering the offending party to "cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act." Although Congress used this phrase to describe efforts to enforce fairness in the present, it came a quarter-century later to refer to pro-active government programs seeking to
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remedy past discrimination. President Kennedy’s Executive Order 10925 created the President’s Committee on Equal Employment Opportunity (PCEEO) in 1961, mandating federal contractors to “take affirmative action to ensure that the applicants are employed, and that employees are treated during employment, without regard to race, creed, color, or national origin.”237 Because of Kennedy’s well-known deference to conservative southern Democrats, his affirmative action programs remained voluntary and ambiguous.

Less than a year after Kennedy’s death, President Lyndon B. Johnson signed into law the 1964 Civil Rights Act, which over southern opposition established the Equal Opportunity Commission (EEOC) under Title VII to enforce the Act’s employment provisions. Senator Hubert H. Humphrey, the bill’s floor manager, argued that nothing in Title VII would allow the EEOC or any court to order “a racial ‘quota,’”238 and southern Democrats in Congress further ensured that the Act did not codify racial preferences. Shortly after Johnson’s landslide victory, he issued Executive Order 11246 which terminated the PCEEO and gave the Department of Labor primary responsibility for enforcing affirmative action. The Labor Department created the Office of Federal Contract Compliance (OFCC) to assure that all federal contractors took affirmative, pre-contract steps to hire and promote more minority employees, and use more minority-owned subcontractors.239 Johnson invoked the anti-caste rationale for his order: “you do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘You’re free to compete with others,’ and still justly believe that you have been completely fair.”240 Johnson’s decision to issue his order and administer affirmative action programs through the new OFCC attracted little media or congressional attention and no serious public debate, and the OFCC quickly established a pre-award program requiring construction contractors to prove their readiness to meet affirmative action obligations. In 1967, Johnson added women to the list of favored groups, and in 1968 the OFCC mandated a written affirmative action compliance program including “specific goals and timetables for the prompt achievement of full and equal employment opportunity.” In all of this, however, Johnson emphasized recruitment efforts and development programs designed to help workers in relatively low-wage jobs.241

Affirmative action began to assume its contemporary form with the election

240. President Lyndon B. Johnson, Address at Howard University Commencement (June 4, 1965), quoted in JACOBY, supra note 31, at 76.
241. Elliot & Ewoh, supra note 238, at 215.
of President Richard M. Nixon, who moved the OFCC into the business of mandating preferences.\textsuperscript{242} Nixon had a number of motives. Concerned about growing urban unrest and determined to avoid the riots of the Johnson years, he hoped that reducing the joblessness of young black men would provide an effective antidote. Public opinion about affirmative action had not yet coalesced,\textsuperscript{243} so Nixon believed that he had some political leeway. He also hoped that affirmative action would become "yet another wedge to drive between white workers and blacks in the increasingly fractious Democratic party."\textsuperscript{244}

George Shultz, Nixon's moderate Labor Secretary, revived the Philadelphia Plan, which Johnson had devised but then abandoned as politically untenable. Shultz's version, which sought to compel Philadelphia's segregated construction companies to hire more minority workers, was stringent; it demanded workforce percentages that gave contractors specific target ranges.\textsuperscript{245} In February 1970, Shultz extended this demand to all government contractors with fifty or more employees and at least $50,000 in government business. Labor Department Order No. 4 defined affirmative action as a set of result-oriented procedures, and used the term "under-utilization." Johnson's programs had defined "under-utilization" to mean having fewer members of a minority group actually employed than would reasonably be expected from their availability.\textsuperscript{246} The Order further required "specific goals and timetables," and demanded that all contractors covered by it submit an affirmative action plan to the OFCC within 120 days.

It is highly noteworthy that this program did not cover white ethnic and religious minorities even though affirmative action policymakers knew that these groups too were often victims of job discrimination.\textsuperscript{247} In December 1971, OFCC published new proposed rules, explaining that

members of various religious groups, primarily Jews and Catholics, and members of certain ethnic groups, primarily of Eastern, Middle, and Southern European ancestry, such as Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based on their religion and/or national origin. These guidelines are intended to remedy such unfair treatment.\textsuperscript{248}

John David Skrentny, a leading chronicler of the history of affirmative action, shows that although these rules provided far less protection to these groups

\begin{itemize}
  \item \textsuperscript{242}MCWHIRTER, supra note 152, at 35.
  \item \textsuperscript{243}HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 62-63, 68 (rev. ed. 1997).
  \item \textsuperscript{244}Thomas Sugrue, The Tangled Roots of Affirmative Action, 41 AMER. BEHAV. SCIENTIST 886, 895 (1998).
  \item \textsuperscript{245}Nicolaus Mills, Introduction to DEBATING AFFIRMATIVE ACTION, supra note 128, at 10.
  \item \textsuperscript{246}CAROL LEE BACCHI, THE POLITICS OF AFFIRMATIVE ACTION 32 (1996).
  \item \textsuperscript{247}This paragraph draws heavily on SKRENTNY, MINORITY RIGHTS, supra note 235 (manuscript at chapter 9).
  \item \textsuperscript{248}Quoted in SKRENTNY, MINORITY RIGHTS, supra note 235 (manuscript at 442).
\end{itemize}
than the OFCC afforded to racial minorities, they were further weakened until they imposed no special obligations on employers at all. A number of justifications were offered for excluding non-racial groups from affirmative action but these arguments fail to explain the different treatment. Skrentny summarizes this episode:

[E]thnics had everything that one would assume would be necessary to gain some rights-oriented, equal-opportunity granting, difference-conscious policy. They had a Washington presence. They had advocates in Congress and in the White House. The Nixon White House wanted their votes . . . and some in Congress considered them to be an economically disadvantaged group. But ethnics came late, after the affirmative action regulations had reached their carrying capacity. Their disadvantages were seen as below some perceived threshold of victimization. And unlike blacks, Latinos and—at least until the ERA debate in the 1970s—women, ethnics were seen in a much fuller, more multi-faceted way, without reducing them to one identity.\(^{2}\)

As affirmative action expanded in scope and scale, opponents turned for relief to the federal courts. These critics quickly suffered two decisive setbacks in their battle against racial preferences. First, in March 1970 a federal district judge rejected a challenge to the Philadelphia Plan. A year later, a unanimous U.S. Supreme Court decided *Griggs v. Duke Power Co.*, a class action challenging a promotion requirement for a high school diploma or a passing score on a standardized intelligence test. The Court held that the 1964 Act barred "not only overt discrimination but also processes that are fair in form, but discriminatory in operation. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply their motivation."\(^{250}\) Although the Court did not mention the phrase "affirmative action," its focus on the disparate "consequences" of job requirements seemed to parallel Order No. 4's "result-oriented procedures."\(^{251}\) After *Griggs*, the Labor Department revised Order No. 4 to include women as a part of the "affected class."

In the wake of these developments, Congress passed the Equal Employment Opportunity Act of 1972, extending the EEOC's jurisdiction to employers and unions with more than fifteen members, and to all state, local, and federal employees. It encouraged more class actions aimed at systematic bias rather than individual cases, and it defeated the efforts of a southern Democrat-led minority to include clear anti-affirmative action language. In 1973, Labor and an invigorated EEOC successfully challenged AT&T, the nation's largest private employer; it won a consent decree awarding $15 million in back pay to 13,000 women and 2,000 minority men and setting out new affirmative action goals. Columbia University also acceded to the EEOC's demands to develop a coherent affirmative action framework.

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249. Id. at 473-74.
The election of a Democratic president, Jimmy Carter, moved affirmative action to new areas. In 1977, Congress approved a 10 percent minority set-aside program under the Public Works Employment Act by large majorities, and in 1978 Carter’s Labor Department adopted the Uniform Guidelines on Employee Selection Procedures, which went beyond Revised Order No. 4 to establish an adverse impact framework and a four-fifths rule. The first invalidated employer practices adversely impacting women or minorities unless the employer could demonstrate a business necessity, while the second defined “adverse impact” as a proportional job selection rate falling below four-fifths that of the majority group. A supplement to the Guidelines, moreover, con- doned the use of racial preferences to remedy past discrimination.  

At the same time, the Supreme Court began to define its own view of racial preferences. Three rulings played a particularly important role in shaping the legal and political climate of the affirmative action debate. Bakke, discussed above, created doubts about racial preferences in higher education and perhaps elsewhere as well. But a year later, in United Steelworkers of America v. Weber, the Court upheld an agreement between the employer and a union to implement a training program allocating a certain number of slots to black workers. Justice William Brennan’s majority opinion held that the program was sufficiently voluntary and temporary to pass muster, but according to one analyst and supporter of affirmative action, resorted to “esoteric doctrines of statutory interpretation and strained readings of legislative history” in reaching this conclusion in the face of “the facially colorblind Title VII.” In 1980, the Court in Fullilove v. Klutznick took the bolder step of upholding Congress’s 10% set-aside for minority contractors. Chief Justice Burger justified the statutory quota partly as a remedy for past discrimination, but for the most part the majority and concurring opinions relied on a theory of congressional power to enforce civil rights through mandated preferences.

By the 1980 presidential election, the legal status of racial preferences was murky. Everything seemed to turn on an ambiguous distinction between a goal and a quota, on how voluntary a program was, on the nature of its rationale, on whether the preferences had been mandated by Congress or by federal agencies or other levels of government, on how clear the statute’s factual findings of discrimination were, and so forth. After Ronald Reagan’s victory, his transition team called for a fundamental policy shift, recommending that the new president eliminate not only quotas but all race-conscious affirmative action. Several political factors, however, frustrated this proposal. Polling data indicated widespread opposition to racial preferences, to be sure, but it also indicated strong

252. Id. at 14.
254. Malamud, supra note 9, at 1676.
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support for civil rights and for special recruitment and training programs for minorities. In addition, the Supreme Court had upheld federally-mandated preferences, making opposition to them seem vaguely lawless. Reagan could repeal the executive orders providing for affirmative action, of course, but political calculations dictated otherwise. The business community had come to accept some racial preferences, and government contracting preferences might win him some additional support.\footnote{256}

Reagan nevertheless launched salvos against affirmative action. He appointed the conservative William Bradford Reynolds, an avowed opponent of racial preferences, to head the Civil Rights Division of the Justice Department, and named Clarence Thomas, another anti-affirmative action conservative, to head the EEOC. Between 1981 and 1983, Reagan cut the EEOC and OFCC budgets by 10\% and 24\%, respectively, and their staff by 12\% and 34\%, but his Labor Secretary, Ray Donovan, vigorously opposed efforts to amend or rescind Executive Order 11246. The ideologically polarized viewpoints of his advisers and the messages from business interests favoring goals and timetables appear to have hamstrung Reagan; after his two terms in office, the executive order remained intact.\footnote{257}

Reagan’s challenge to affirmative action ultimately came through his judicial appointments. At the Supreme Court level, he elevated William Rehnquist to Chief Justice and appointed Justices opposed to preferences. From 1986 to 1988, the Court continued to uphold affirmative action programs even without proof of past discriminatory intent,\footnote{258} but 1989 saw several important changes. In \textit{Wards Cove Packing Co. v. Atonio}, the Court required minority workers who alleged disparate-impact hiring violations to show not only a racial imbalance but also that a specific employment practice created the disparate impact.\footnote{259} In \textit{City of Richmond v. J.A. Croson Co.},\footnote{260} an especially important decision, the Court struck down a 30\% set-aside program for minority contractors modeled on the one approved in \textit{Fullilove}, holding that affirmative action set-aside programs are “constitutionally suspect” and cannot be upheld without a

\footnote{256. In another action, oddly detached from the politics swirling around affirmative action in other areas, Reagan supported and signed the “Dole Compromise,” part of the 1982 amendments to the Voting Rights Act in which Congress, while adding language seeming to say the opposite, approved of racial gerrymandering.}

\footnote{257. \textit{Robert K. Detlefsen, Civil Rights Under Reagan}, at 136-38 (1991). Darien McWhirter argues that Reagan ultimately declined to make dramatic changes in the civil rights regime because “big business likes regulations. In a survey of 128 CEOs of major corporations, 122 said they would continue some kind of ‘numerical objective’ program even without government regulations.” \textit{McWhirter, supra} note 152, at 43-44.}


\footnote{259. \textit{Wards Cove Packing Co. v. Atonio}, 490 U.S. 642 (1989).}

finding of intentional discrimination. It also held that future state and local government preferences would be governed by the “strict scrutiny” standard, which demands that the program be narrowly tailored and based on a compelling state interest. In a 1990 detour from its campaign against affirmative action, the Court in *Metro Broadcasting v. FCC* upheld two federal programs creating preferences in order to increase minority ownership of broadcast licenses. But *Metro Broadcasting* proved to be just that, a detour, and would be overruled five years later.

Congress reacted decisively to the Supreme Court’s 1989 decisions by passing a civil rights bill in 1990 by relatively comfortable, largely partisan margins. Among other things, the Act would overturn *Wards Cove* by reducing employees’ burden in proving discrimination and establishing new remedies for intentional workplace discrimination. President George Bush, like Reagan a skeptic about affirmative action, vetoed the legislation because he felt that it encouraged quotas. When Congress sustained the veto, a new round of intense legislative negotiations commenced. It culminated in the Civil Rights Act of 1991, which closely resembled the 1990 bill. Bush threatened to veto the law, particularly after the Labor Department revealed instances of “race norming” in which minority test scores are compared only to those of other minorities, and after polling showed widespread public opposition to racial preferences. When the Clarence Thomas-Anita Hill debacle strengthened Congress’ threat to over-ride a presidential veto, Bush ultimately signed the bill.

President Clinton took office in 1993 on a platform favoring limited affirmative action. He had strongly condemned quotas during the campaign in an effort to woo Reagan Democrats and to mollify a broader public that had always opposed them, convinced that racial preferences contradicted the merit principle. When Clinton nominated Lani Guinier, whom some opponents dubbed the “quota queen,” to head the Justice Department’s Office of Civil Rights, he came under intense criticism and eventually withdrew her nomination. In the 1994 midterm elections, the Republicans won the House of Representatives and controlled Congress for the first time since 1952. With conservatives now shaping legislation and with a federal judiciary dominated by Reagan and Bush appointees, Clinton had little room for pro-preference initiatives despite his control of the executive branch.

In June 1995, the Court hurled a thunderbolt. Overruling *Metro Broadcasting*, it held in *Adarand Constructors v. Pena* that the strict scrutiny standard applied even to federal set-aside programs and that the program under challenge could not meet this standard. A month later, Clinton delivered a major address on affirmative action at the National Archives summarizing his

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262. Elliott & Ewoh, supra note 238, at 220.
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administration’s five-month review of federal affirmative action programs, which had been undertaken in anticipation of *Adarand*. He largely defended existing affirmative action programs, promised to “mend it [not] end it,” and said that it was too soon to eliminate this temporary measure. On the heels of this review, Clinton issued a White House memorandum that set forth new standards for such programs but failed to eliminate any; it was widely viewed as a reaffirmation of the status quo. Republican-sponsored legislation to prohibit federally approved racial preferences never passed. In 1996, Clinton announced new restrictions on government procurement preferences that required specific numbers for minority contractors, while still authorizing “race-conscious” procurement where Justice Department studies could find credible evidence of discrimination in particular industries. By the end of Clinton’s two terms, the *Adarand* restrictions had reduced the number of federal contracts flowing to minority businesses.

The major action is now on two fronts: judicial decisions and state ballot referenda. In 1994, the Fourth Circuit invalidated a University of Maryland scholarship program reserved for black students but the most uncompromising court ruling came in the 1996 *Hopwood* decision where another appeals court held that *Bakke* notwithstanding, race could not be used even as a “plus” factor in university admissions. More recently, two federal district judges reached opposite conclusions on the constitutionality of the University of Michigan’s race-preferential admissions policies, which had principally relied on a diversity rationale. And in August 2001, an appeals court invalidated the University of Georgia’s system of undergraduate admissions preferences which had also invoked that rationale. On the other hand, another appeals

266. Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).
267. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). Issacharoff, who helps to defend Texas’s program in court, argues that opponents of race-based admission preferences could not mount effective court challenges before then, as they lacked standing to sue unless they could prove that they were “next in line” (i.e., that they would actually have been admitted absent the preferences) until *Northeastern Fla. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993). E-mail from Samuel Issacharoff (Apr. 26, 2001) (on file with author). On the other hand, a similar plaintiff’s standing had been upheld in *Bakke*, and some other non-education, pre-Jacksonville rulings had required only that the plaintiff wish to be considered. *E.g.*, Quinn v. Millsap, 491 U.S. 95 (1989); Turner v. Fouche, 396 U.S. 346 (1970).
court has upheld the University of Washington Law School’s system.270

Ballot initiatives are also invalidating racial preferences. Proposition 209 in California, which passed by a 54-46 margin in 1996, banned all racial preferences in public employment and public education programs. Voters in Washington State approved a nearly identical ballot measure two years later. The success of those referenda has galvanized anti-affirmative action groups in other states to promote similar measures; as of April 2001, however, Washington and California remain the only two states to adopt such sweeping repeals.

During the 2000 presidential campaign, George W. Bush attempted to walk a tightrope on affirmative action. He voiced his opposition to preferences but declined to endorse Proposition 209. Ward Connerly, a prominent supporter of Proposition 209, observed that Bush “drag[ged] the red herring of already-illegal ‘quotas’ across his statements on affirmative action” in order to curry favor with the right while not offending the left.271 Prominent in commentary on the current political status of affirmative action today are metaphors of disavowal and disinheritance. Richard Kahlenberg, for example, argues that “affirmative action is a bastard: the true fathers of liberal race policy (King, Kennedy, and Moynihan) deny paternity, and the true father of affirmative action (Nixon) was a scoundrel,” while John Skrentny calls it an “orphan” adopted enthusiastically by the Left after it was abandoned by its original parents.272

How did race-based preferences come to be orphaned? In one sense, the question is easy to answer: the voters oppose them. But in another sense, this simply raises a deeper puzzle. How has a policy this unpopular managed to survive politically for four decades? The next two sections explore both matters.

B. Public Attitudes

Affirmative action has never had much public support,274 “with little evidence of change over time.”275 The vast majority of Americans, including more than a third of blacks and more than 70% of Hispanics, oppose racial preferences in hiring and promotion, with the level of this opposition rising some-

270. Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000).
272. Cited in Malamud, supra note 9, at 1696.
273. SKRENTNY, IRONIES, supra note 9, at 242.
274. SCHUMAN ET AL., supra note 243, at 182. These authors report that, depending on question phrasing, “support has ranged from at most a third of the white public down to just a few percentage points.” See also BENJAMIN PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS’ POLICY PREFERENCES 74 (1992) (public opinion stable over time).
275. SCHUMAN ET AL., supra note 243, at 182; accord Charlotte Steeth & Maria Krysan, Affirmative Action and the Public, 1970-1995, 60 PUB. OPIN. QTRLY. 128, 132 (1996) (decline in support during mid-1990s) (“Attitudes about affirmative action policies for which we have continuous data have not shifted dramatically for whites since 1965, and, even among African Americans, they remain constant for the most part.”).
what over time.\textsuperscript{276} Interestingly, the percentage of black high school dropouts who strongly oppose it was three times higher than among black college graduates.\textsuperscript{277} This may reflect lower-class blacks’ resentment about a policy that seems to favor the middle class. This differential may also support the view that middle-class blacks are more conscious of discrimination and angrier toward whites than lower-class blacks are, in part because the former interact more frequently with whites.\textsuperscript{278} When the issue is college admissions preferences, the opposition is substantial even among blacks and other minorities.\textsuperscript{279}

A leading study of public attitudes toward affirmative action finds, consistent with other studies, that “the most fundamental factor behind opposition to affirmative action is one of principle.”\textsuperscript{280} That is, the opponents view preferences, rightly or wrongly, as inconsistent with the ideals of individualism and merit that almost all strongly endorse. Indeed, even affirmative action supporters feel obliged to honor, affirm, and somehow reconcile these principles with their program—usually by blaming racism and suggesting that the merit and equality of opportunity values can only be achieved through preferences.\textsuperscript{281} Researchers on public attitudes toward affirmative action understand that the phraseology of the question asked, as well as other contextual factors, can affect survey results and that multiple interpretations of the data are possible.\textsuperscript{282} More specifically, widespread agreement exists on the value of diversity in

\textsuperscript{276} Citrin, supra note 135, at 43-44 (reviewing American National Election Studies). Citrin cautions against using data on Hispanic and Asian opinions due to the small number sampled in most surveys. Id. at 43 n.2.


\textsuperscript{278} E.g., Patterson, supra note 3, at 51-52. There is a growing literature about middle-class black rage. E.g., Ellis Cose, The Rage of a Privileged Class (1993); Joe R. Feagin & Melvin P. Sikes, Living with Racism: The Black Middle Class Experience (1994); Lawrence Otis Graham, Member of the Club: Reflections on Life in a Racially Polarized World (1995); Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality (1995); Patricia J. Williams, The Alchemy of Race and Rights: Diary of a Law Professor (1991).


\textsuperscript{280} Sniderman & Carmines, supra note 76, at 145.

\textsuperscript{281} Id. Not all researchers agree with this interpretation. E.g., David O. Sears, Symbolic Racism, in ELIMINATING RACISM: PROFILES IN CONTROVERSY, PERSPECTIVES IN SOCIAL PSYCHOLOGY 53 (P. Katz & D. Taylor eds., 1988) (emphasizing symbolic racism); Lawrence D. Bobo, Race, Interests, and Beliefs About Affirmative Action: Answered Questions and New Directions, in COLOR LINES 91, supra note 235 (emphasizing interest group conflict).

\textsuperscript{282} For thorough reviews of the methodological issues, see Schuman et al., supra note 243, at 58-98, and Donald R. Kinder & Lynn M. Sanders, Divided by Color: Racial Politics and Democratic Ideals 163-195 (1996).
school classrooms, but support for affirmative action declines the more the question characterizes the remedy as "hard" (mandatory; explicit preferences; numbers) rather than "soft" (voluntary; focused on enhancing opportunity enhancement, as with greater outreach or job training; confined to tie-breaking), and the more it describes the rationale as redistribution or representation rather than fairness or equal opportunity. For this reason, it is hard to know the precise division of opinion. No researcher in this field doubts, however, that the public's opinion remains decidedly and intensely negative, pretty much regardless of how the questions are formulated, the state of the economy, or personal financial conditions. Indeed, simply mentioning affirmative action generates much less favorable responses to a range of other questions related to blacks. Finally, politicians, who have a feel for these things, have long assumed that the electorate staunchly opposes race-conscious programs.

Public opinion researchers appreciate that the interpretation of survey results is as much art as science. Seymour Martin Lipset, for example, maintains that most Americans hold both egalitarian and individualist values and that the questions asked in polls draw more on the individualist strain; indeed, even limited affirmative action can arouse intense opposition in societies more egalitarian than the United States. Analysts also recognize that the results might be skewed by "social desirability" and "presentational" pressures caused by respondents' concerns about appearing racist to the interviewer, and that opposition to affirmative action might actually be even greater than the respondent's answers would suggest on their face. Attempts to reduce this possible distortion have focused on devising "unobtrusive" measures designed to uncover respondents' true feelings about affirmative action without requiring them to reveal them to the interviewer, who remains blind to the respondents' racial views. Using unobtrusive measures, researchers find that three out of

283. Bowen and Bok found that less than half of whites who graduated from the elite schools favored placing "a great deal of emphasis on diversity" in admissions. Supra note 80, at 248.
284. Nor is the simple "angry white male" story a credible explanation for this opposition. E.g., Sniderman & Carmines, supra note 76, at 144-45 ("[Y]ounger men are less, not more, likely than older men to oppose it, and women are overwhelmingly opposed to it as well. Opposition to affirmative action is one-sided, intense, and remarkably invariant over time."); Gilens et al., supra note 76. Oddly, Orlando Patterson seems to endorse this hypothesis even while emphasizing, correctly, that only 7% of whites claim to have been personally injured in any way by affirmative action. Supra note 3, at 64. Most uncharacteristically, Patterson here joins other affirmative action proponents in retreating to reductionist explanations of complex phenomena.
287. Steeth & Krysan, supra note 275, at 128.
288. Seymour Martin Lipset, Equal Chances Versus Equal Results, 523 Annals of Amer. Acad. of Pol. & Soc. Sci. 63 (1992). Steeth and Krysan report that when programs and their rationales are defined more specifically, opinion is much more moderate. Supra note 275, at 140.
290. For a detailed description of this method, see Gilens et al., supra note 76, at 163-67.
four whites oppose reserving certain job openings for blacks, that almost two out of five oppose giving qualified blacks preference in college admissions, and that their opposition is intensely felt.\textsuperscript{291}

What is most interesting and surprising about these analyses, however, is who opposes the preferences. When the researchers use the unobtrusive measures to control for presentation pressures, they find that "opposition to, and anger over, affirmative action is pervasive among the white public and is just as strong among whites on the political left as among those on the political right"—the former being the ones that have the most positive views of blacks and the firmest commitment to racial equality.\textsuperscript{292} Here are the conclusions of a recent study by political scientists Paul Sniderman and Edward Carmines, which employs a variety of survey-based experiments in order to tease out public attitudes in a more nuanced way:

\begin{enumerate}
\item The role of racial prejudice in promoting opposition to affirmative action is minor.
\item Rather than opposition to affirmative action signaling a refusal to acknowledge the discrimination and exploitation that black Americans have suffered, a substantial majority of white Americans believe that an extra effort should be made to see that blacks are treated fairly.
\item Opposition to affirmative action is not peculiar to Americans.
\item Opposition to affirmative action does not hinge on the race of the group who benefits but rather on whether the procedures involved are judged to be fair.
\item In addition to dislike of blacks leading to dislike of affirmative action, dislike of affirmative action fosters dislike of blacks.
\item Opposition to and resentment over affirmative action has burst conventional political channels—it is now as prevalent on the left, among liberals and Democrats, as on the right, among conservatives and Republicans.\textsuperscript{293}
\end{enumerate}

The large size of racial preferences in certain domains, coupled with their clear offense to principles in which the public fervently believes, means that Americans in varying degrees—blacks and whites, liberals and conservatives, men and women, rich and poor—regard affirmative action's methods to be not merely misguided but morally wrong. Indeed, if the public knew how large affirmative action preferences in selective college admissions and some other areas actually are, opposition would probably be even more intense than it is. This is bound to taint the diversity, real and spurious, that preferences produce and to discredit the larger liberal project.\textsuperscript{294} The value that Americans ascribe to diversity surely depends, among other things, on how they evaluate the process and criteria that produced it.

\section{Affirmative Action's Political Survival}

If public attitudes dictated policy outcomes in some straightforward fash-

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\item \textsuperscript{291} \textit{Id.} at 167.
\item \textsuperscript{292} \textit{Id.} at 163; \textit{see also id.} at 161.
\item \textsuperscript{293} SNIDERMAN \& CARMINES, supra note 76, at 17-18.
\item \textsuperscript{294} \textit{Id.} at 141-55.
\end{itemize}
\end{footnotesize}
ion, race-based preferences would not have been adopted initially, much less survived for four decades. How, then, can we account for their survival and even, in many communities, their expansion? Twenty-five years after Nathan Glazer first posed this question, there still is no simple answer.

Even in a robust democracy, of course, policy outcomes can diverge from public opinion. The reasons for this divergence can transcend the specifics of affirmative action politics. Interest groups intermediate in complex ways between a diffuse public and specific policy outcomes. Strong political leaders can re-orient opinion or gain some leeway or independence from it. Judicial decisions govern certain issues on the basis of constitutional or other legal norms that may trump political ones. Implementation may transform a policy into something quite different than what the politicians approved. Once in place, policies enjoy political inertia that only sustained political efforts by well-organized, highly-focused groups can overcome.

Even when we move from these general propositions to the specifics of affirmative action, its long survival remains something of a puzzle, albeit one to which the political history recounted earlier provides helpful clues. First, affirmative action’s early development was relatively invisible, resulting less from minority group lobbying than from bureaucratic resourcefulness, especially by the EEOC. Stephen Steinberg, a strong affirmative action supporter, concedes that it “was never formulated as a coherent policy, but evolved through a series of presidential executive orders, administrative policies, and court decisions.” Few public opinion polls on the issue were conducted until the late 1970s when the Bakke decision gave the issue greater notoriety.

Affirmative action’s enforcement strategy, its selection of favored groups, and its emphasis on a kind of proportional representation in the workforce were driven largely by an obscure form (Form 40, later EEO-1) originally designed merely to gauge the racial composition of employers’ workforces. By the time public opinion had hardened against it, the policy was sufficiently entrenched that the political cost of eliminating it daunted even strong opponents like Reagan. In this account, its survival is a story of obscurity followed by inertia.

299. Skrentny, Ironies, supra note 9, at 127-28.
300. For variations on this theme, see, for example, Cass R. Sunstein, Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting: Public Delibera-
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Discussions of affirmative action during the 1960s and early 1970s, moreover, commonly viewed it as a more or less logical or natural extension of morally and politically compelling non-discrimination laws protecting blacks. Simple morality entitled blacks to special solicitude and assistance, and goals and timetables seemed like a limited, appropriate remedy. Only later did these soft measures ossify into programs resembling hard quotas. Initially, black groups had urged the EEOC to enforce non-discrimination rules more effectively rather than pressing the agency to count a workforce's minority group members. Although no group made race-conscious hiring a priority, the EEOC devised such a remedy based on numbers it had collected on its EEO-1 form.

Nor was it clear in affirmative action's early years that it would expand to cover groups other than American blacks. The EEOC began by focusing on them almost entirely, devoting relatively few resources to other minorities and almost none to women. Indeed, according to Skrentny, the agency viewed women's rights "as a distraction at best," did not include them in the government's programs until the 1980s, and periodically dropped Asian-Americans from the list of favored groups. It was mainly elected officials, pursuing the political logic of coalition-building and group mobilization in quest of new voter blocs, who pushed to add more groups, as when President Nixon added Latinos to his employment and minority capitalism programs. The supply of preferences created a demand to expand the programs. The regulations, moreover, defined these new groups casually and very broadly, thus concealing large intra-group variations. The black group includes individuals from families who migrated to the United States more than a century after slavery ended. The Asian group, which is more highly educated on average than almost any white ethnicity, includes individuals whose families come from 25 different countries spread over 6000 miles and who have little in common with those from other Asian nations. The only commonality of the large Hispanic group, most of whom consider themselves white, is an ancestral language. The Native American category is muddied by very high rates of intermarriage; it also combines hundreds of tribal groups with highly disparate cultures and languages. Indeed, the incoherence of affirmative action's categories so attenuates the moral basis of many claims for special treatment that it may doom the policy legally if not politically.

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302. E-mail from John Skrentny (Nov. 4, 2001) (on file with author).
304. SKRENTNY, IRONIES, supra note 235, at 231-45.
305. Citrin, supra note 135, at 47 (citing Martin Weiner).
Accounts of affirmative action’s survival based on its initial lack of transparency and its largely incremental and bureaucratic growth are certainly plausible, but they can take us only so far. At some point, particularly after the 1978 *Bakke* decision, the earlier veil lifted. This alerted the public to how the policy had evolved and expanded, and informed politicians of voters’ opposition to it. Why did the politicians not turn decisively against it at that point? More explanation is needed. Interest group politics, analyzed in the light of public choice theory, provides additional insights. Affirmative action may be a classic case of what James Q. Wilson called clientist politics, in which a policy’s benefits are concentrated on a relatively small but intense group while its costs are spread among a much larger but more diffuse, hard-to-organize group for which the issue is less salient.  

We saw that the number of white workers, college applicants, and others potentially disadvantaged by affirmative action is large, but that relatively few report actual disadvantage, perhaps because the statistical probability of such disadvantage to an individual white is quite small. (As we shall also see, this statistical result is less true of Asians, which may make them a more potent source of future opposition.)

Powerful political interests have indeed supported affirmative action. According to Lemann, “[t]he new meritocratic elite didn’t resist affirmative action at all—in fact it voluntarily established affirmative action in every institution under its control.” In time, liberal advocates for minority groups placed it high on their policy agendas. As Orlando Patterson explains, black perceptions of white racism are probably heightened (and distorted) by the proportion of the two groups in the population, which increases the policy’s salience to blacks. The status quo has been sustained by strong support by ethnic organizations, national media, leading educational institutions, large corporations, government bureaucracies, mainstream foundations, and other opinion leaders. It has been further fortified by the growing acquiescence (and in the districting area, connivance) of national Republican politicians and the inertial advantages of

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308. *Infra* paragraph accompanying note 350.  
312. There, the Republicans argue and litigate in favor of mandating majority-minority districts.
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any long-established policy.

Large corporations’ strong support for affirmative action might seem counter-intuitive. After all, employers must bear most of the direct compliance costs, and affirmative action often places them between contending employees in an awkward damned-if-you-do, damned-if-you-don’t position. Nevertheless, some large companies support affirmative action even in non-business settings. Their leaders emphasize the benefits of ethno-racial diversity in a global market, and the programs are promoted by powerful internal and external constituencies, including some customers. The programs also tend to advantage large companies by imposing onerous reporting, staffing, and other compliance costs on smaller competitors who cannot bear them as easily. Firms also see affirmative action as a safe harbor sheltering them from Title VII claims, helping them to “keep the peace” and avoid adverse publicity. Absent allowable preferences, these claims would come not only from black workers, but also from the vastly larger number of white workers who might allege reverse discrimination. In a notoriously uncertain system, firms favor almost anything, even regulations, that can clarify their legal duties.

All of these corporate interests, taken together, surely help to explain the failure of President Reagan and the first President Bush to move vigorously against affirmative action—except through judicial appointments—despite numerous opportunities to do so. (Johnson, Nixon, Carter, and Clinton, we have seen, supported it in varying degrees.) Today, most Republican politicians, with their eyes on Hispanic and Asian voters (and money), are unwilling to rock the affirmative action boat and risk being pilloried as racist or insensitive to minority interests. It is hardly surprising, then, that the battles against

E.g., Hanley, supra note 41.

313. A number of Fortune 500 firms have filed amicus briefs defending the programs in the pending University of Michigan cases. Jim Sleeper notes that Boeing, Microsoft, and other corporate giants were the major defenders of preferences in Washington State’s 1998 referendum, “a fact that made some on the left wonder whether the color-coding of American identity is really so ‘progressive’ after all, and some on the right to wonder whether private-sector bureaucrats can be just as stultifying as public ones.” Jim Sleeper, Yankee Doodle Dandy, L.A. TIMES, July 2, 2000 (reviewing NORMAN PODHORETZ, MY LOVE AFFAIR WITH AMERICA (2000)).

314. E.g., BOWEN & BOK, supra note 80, at 11-13.


316. Similar reasons may have motivated Philip Morris to advocate federal regulation of tobacco. Gordon Fairclough, Philip Morris Pushes for FDA Tobacco Regulation, WALL ST. J., Apr. 11, 2001, at A2. In addition, the settlement of state suits over tobacco has created significant barriers to new competition over both price and safer cigarettes.


318. McWhirter, supra note 152, at 14.

319. John D. Skrentny, Republican Efforts to End Affirmative Action: Walking a Fine Line, in THE NEW POLITICS OF PUBLIC POLICY (Marc Landy et al. eds., 2001); see also DETLEFSEN, supra note 257; LEMANN, supra note 113, at 278-79; McWhirter, supra note 152, at 43-44.

320. Neal Devins, Congressional Factfinding and the Scope of Judicial Review: A Preliminary
affirmative action (and bilingual education) in California and elsewhere have been spearheaded primarily by private political entrepreneurs in ballot referenda, not by elected politicians.

A final explanation of affirmative action's political survival transcends the interests of particular groups and politicians and is undoubtedly important. Many who might otherwise oppose preferences simply do not see any viable alternative. Advocates of preferences have skillfully exploited a deep reservoir of elite guilt about past discrimination. Many who might otherwise oppose them do not see any viable alternative, and others see them as "easier than the slow acculturation that would naturally prepare blacks to compete at school and on the job."321 Charles Fried notes this dilemma: "[w]ithout preferences, the elite institutions of this country might rapidly be stripped of much of their African-American presence . . . [and] a society that is segmented by race, with all the best jobs, places, honors, and titles going to whites (and Asian Americans) is simply not an integrated society, whatever the reason for the segregation. It is two societies, separated by race."322 As we saw, this concern is especially acute at the elite schools where the credentials gap makes the re-segregation scenario seem quite plausible.323 This issue is discussed further in Part VIII.

VII. THE CONSEQUENCES OF AFFIRMATIVE ACTION

I have considered some of affirmative action’s consequences, such as the increase in black representation at selective undergraduate, graduate, and professional institutions; the entry of their graduates into the black middle class; and the public’s views on race issues. But these hardly exhaust the consequences; three others remain to be discussed: the rate of black progress, the distribution of affirmative action’s benefits, and the incidence and distribution of its costs.

A. Rate of Black Progress

The improvement in American blacks’ social and economic conditions has been, in Orlando Patterson’s words, “nothing short of astonishing” in almost every respect.324 The relevant question for present purposes is: how much of this progress is due to affirmative action? Since affirmative action in some domains has been in place as a national policy for more than three decades, this is

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321. JACOBY, supra note 31, at 541.
322. Fried, supra note 301, at 55.
323. See discussion supra at text accompanying notes 80-97.
324. PATRERSON, supra note 3, at 15. The major exception is the illegitimate birth rate, especially to teenagers. Id. at 35-38. The teenage birth rate has declined slightly in recent years. Id. at 36.
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a difficult question to answer. Two ways to approach it is to compare the trajectory of black progress before and after the policy was established, and to analyze the backgrounds of those who benefited from it in order to draw inferences about whether and to what extent they would have improved their positions without preferences. Both methods produce interesting but uncertain results.

Affirmative action, we saw, has unquestionably had a large effect on the number of blacks admitted to selective institutions. The evidence is murkier in the employment area. Economists John Donohue and James Heckman sought to discover how much of blacks' economic gains since 1940 were due to federal civil rights policy and enforcement under the Civil Rights Act of 1964, particularly Title VII barring employment discrimination. They concluded that this federal activity was "the major contributor to the sustained improvement in black economic status that began in 1965," while noting the difficulty of controlling for important contemporaneous developments such as black migration to the north, selective attrition of older, less skilled blacks from the work force, improvements in black education, the rise in wages resulting from Vietnam War-related shortages, and underlying attitudinal changes among whites. A recent study, using outcome variation among states passing anti-discrimination laws instead of the time series methodology employed by Donohue and Heckman, finds smaller positive effects on blacks than they did; moreover, almost all of the gain was by black females. Some studies, comparing outcomes before and after Title VII, have found negative effects on blacks.

An even greater challenge is to distinguish between gains attributable merely to non-discrimination and those attributable instead to affirmative action preferences. In the South, where Donohue and Heckman found the major gains, non-discrimination presumably was the major enforcement thrust; remedies taking the form of numerical preferences were often upheld, but only to rectify specific instances of past discrimination. Another economic analyst finds that affirmative action has not improved the employment prospects for the most disadvantaged blacks but has instead redistributed black workers from small and medium-sized firms to large employers and federal contractors most aware of legal requirements, without increasing black employment rates over-

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326. Neumark & Stock, supra note 19.
329. E.g., Schnapper, supra note 19 (classifying remedies cases).
The econometric studies of affirmative action find modest gains for favored groups in employment, government contracting, education, and entrepreneurship, with inconclusive evidence on efficiency effects. Again, however, it may be impossible to disentangle the effects of non-discrimination and affirmative action policies.

B. Distribution of Benefits In and Outside the Favored Group

If we wish to know whom affirmative action directly benefits, we must first disaggregate the broad favored group (e.g., blacks, Hispanics) in order to determine which of its members are helped by the program. Disaggregation is especially necessary with respect to affirmative action. First, even its proponents concede that only a very small fraction of the group can hope to take advantage of it. This is most obvious with selective college admissions and FCC broadcast licenses, discussed immediately below, but it is bound to be true as well for employment that requires special job skills or a certain level of education. Second, affirmative action effects a redistribution of opportunity and status within the favored group; as discussed below, the program’s mere existence makes some members worse off—particularly those who, rightly or wrongly, are stigmatized as needing special help when in fact they do not need it and can qualify under conventional race-neutral standards. Again, the Bowen-Bok study shows that affirmative action in admission to selective colleges and universities largely benefits students from middle- and upper-class families. This is hardly surprising, as these students are best equipped to apply to such competitive and costly schools. This pre-college advantage is then multiplied when these students, now graduates of the selective schools, go on to apply to selective professional and graduate programs and then proceed with their careers. As we saw, most of them graduate from these programs and do well, but a disproportionate number (at least in law) do not gain entry to the profession.

The skewed distribution of benefits from FCC licensing is even more dramatic, as they are enjoyed by a handful of black entrepreneurs who are already sufficiently successful to be able to meet the complex bidding and licensing standards. Indeed, the black bidders or licensees are sometimes little more than fronts for white business interests seeking to exploit the economic value of affirmative action preferences. Similar abuses have been documented in pre-

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330. Farrell Bloch, Antidiscrimination Law and Minority Employment (1994). Like Donohue and Heckman, supra note 325, Bloch emphasizes that because existing employees are much more likely to file civil rights complaints than people applying for jobs in the first instance, employers have an incentive to avoid hiring potentially litigious minorities. BLOCH, supra, at 88-116.


332. See discussion supra at text accompanying note 150.

333. See discussion supra at text accompanying note 93.

334. E.g., U.S. GEN. ACCT. OFFICE, SMALL BUSINESS ADMINISTRATION: 8(A) IS VULNERABLE TO
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ferences applying to tens of billions of dollars in federal, state, and local government contracts, and to additional billions intended for minority-owned small businesses under the scandal-ridden Section 8(a) and other set-aside programs. Such programs are designed to help a relatively small number of people who can only take advantage of them if they are already fairly sophisticated and well-connected.

A preference program, moreover, is a zero-sum game in two senses. It not only pits favored groups against nonfavored groups as they compete for a fixed set of resources or advantages—a competition that foments complaints of reverse discrimination—but it also pits each favored group against the other favored groups. Blacks’ success in gaining a preference is at the expense, not only of whites, but also of Hispanics, Asians, and other preference-eligible groups—and vice-versa. This intergroup competition is most notorious in higher education and contract preference programs. Such rivalries exacerbate the already-tense conflict over politically-distributed, racially-defined spoils.

Racial preferences’ skewed benefits can also be seen in officially-sanctioned or officially-required racial gerrymandering of legislative districts that seeks to benefit blacks. Political analysts have long disagreed over whether this form of affirmative action helps black voters by packing them into a small number of majority-minority districts where they can easily elect black representatives, or whether their interests would be better served as a substantive matter by line-drawing that leaves them as a significant minority in a larger number of white-majority districts. Those who favor this latter approach find growing empirical support in studies showing that the majority-minority districts benefit the few black politicians who occupy or aspire to the safe seats

Program & Contractor Abuse (1995); Edmund L. Andrews & Geraldine Fabrikant, The Black Entrepreneur at a Firestorm’s Center, N.Y. Times, Feb. 10, 1995, at D1 (tax benefits for sales of cable properties to minority-owned company received by a company with significant nonminority investment); Paul M. Barrett, Foes of Affirmative Action Target SBA’s 8(a) Program, Wall St. J., Mar. 18, 1996, at B2; see also Ian Ayres, Symposium on Affirmative Action: Narrow Tailoring, 43 UCLA L. Rev. 1781, 1823 n.113 (1996) (minority-owned broadcasters hired higher proportions of minority workers than non-minority ones; however, he found little information on this trend in other fields).

335. E.g., Cho, supra note 31 (preferences for female-owned construction and engineering firms).


337. But see Maria E. Enchaughtegui Et Al., Urban Institute, Do Minority-Owned Businesses Get a Fair Share of Government Contracts? (December 1997), available at http://www.urban.org/civil/civil1.htm (reviewing post-Croson “disparity studies” and finding large disparity, especially absent affirmative action programs, between share of minority-owned firms and share of contracts received—but not testing for discrimination).

338. E.g., Cho, supra note 31 (contracts to female-headed firms send “alarm bells ringing in many minority business communities”).

339. Mary Anne Case’s analogy of ethno-racial preferences to the free exercise of religion, criticized above, also founders on her failure to recognize that the former are zero-sum and the latter is not. Case, supra note 222, at 329.
they yield, but not their black constituents who would be better represented substantively by representatives, white or black, in districts where black voters constitute a significant minority. Indeed, many analysts hold the majority-minority strategy partly responsible for the unseating of a large number of liberal Democratic members of the House by conservative Republicans in 1994. Another example of the conflict of interest between the few black politicians (and others) who benefit from policies concentrating blacks geographically occurs in affirmative action remedies that have the effect of keeping blacks in their isolated neighborhoods rather than moving them to better, hopefully more integrated ones.

This problem—the narrowness and relative affluence of those within the broader preferred group who actually benefit from the preferences—is probably endemic to all affirmative action programs rather than being confined to American ones. Will Kymlicka, a Canadian proponent of preferences there (and in the United States), reports that the same is true of Canada’s programs. Studies of preferences in other countries, including less-developed ones like India that target the most disadvantaged groups, find much the same thing. Again, this is predictable; the supply of preference slots and the qualities needed to gain access to and use them are in very limited supply relative to demand.

C. Incidence and Distribution of Costs

I have been discussing affirmative action’s beneficiaries. I now ask what are its costs, and who bears them? This is a much more difficult question to answer than on the benefits side. There is, first, a conceptual and normative difficulty. Consider those applicants—the “losers”—who would have been hired or


342. Schuck, supra note 6.


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admitted on the merits (however defined), but who are not hired or admitted because of preferences given to others. Should (and do) the losers think of themselves as members of a demographic group and assess their loss in terms of that group’s changed probability of admission, or should (and do) they view themselves as individuals and assess their loss accordingly?

In thinking about these questions, two empirical factors might seem to support the argument for affirmative action. First, only 7% of whites surveyed in 1990 claimed to have experienced any form of reverse discrimination themselves, 16% knew of someone close who had, and fewer than 25% said it was something they had witnessed or heard about in their workplaces. Some analysts, however, attribute the low complaint rate of whites to the policy’s informality, their reluctance (common to other discrimination victims) to get embroiled with the law, and a dose of “you can’t fight City Hall” fatalism.

Second, affirmative action only slightly reduces the ex ante statistical group probability of elite school admission of whites: eliminating it would increase their probability only from 25% to 26.5%. This increase is so small, of course, because the white applicants and admittees vastly outnumber the black ones. Affirmative action advocates correctly argue that when the program is viewed in this ex ante, probabilistic, group-centered way, whites suffer a trivial reduction in its chance of admission so that blacks can more than triple both their ex ante group chance of admission and their representation on campus. Whites might still argue, of course, that this reduction is unfair to them because at the margin and thus for some, it means the difference between admission and rejection. But from the ex ante group perspective, no white can properly claim an individual expectation of admission, much less a right to it, since the individuals who lose slots as a result of the preferences will never know whether they would otherwise have been admitted. Given the loser’s anonymity, the most that any one of them can claim is that absent affirmative action, more whites would have been admitted and she might (or might not) have been one of them, depending on how her application compared to those of other disappointed white applicants.

We must complicate this picture of group consciousness and competition in several respects. First, the 1.5% decline in probability of admission seems trivial, but when applied to the entire group of white applicants it means that a significant number of people are affected—and many more will think they were

345. PATTERSON, supra note 3, at 148-49.
348. BOWEN & BOK, supra note 80, at 36.
349. Id. at 33-34 (without affirmative action, blacks’ chance of admission would decline from 42% to 13%; their percentage of the student body would decline from 7.1% to 2.1%).
350. Extrapolating from Bowen and Bok’s figures, almost 2000 more white students in the 1976
affected (the flip side of the "anonymous loser" factor). Second, substituting Asians for whites makes the picture look very different and more troubling. Indeed, relatively high-achieving Asians are probably the group most unfairly treated by preferences for blacks. During most of the nineteenth century, many Asian laborers endured a kind of servitude and subordination that was only a cut above slavery. The *Chinese Exclusion Case*, sometimes called the *Dred Scott* decision for Asians, rivals the Japanese internment cases for harshness and injustice. Until 1952 (for the Chinese, 1943), Asians could not naturalize as American citizens. Increasingly, affirmative action in effect punishes the stunning academic and economic achievements of many Asians by excluding them, like whites, from eligibility for preferences. This disadvantage, moreover, falls more heavily on Asians than on whites. Because the number of Asian applicants is so much smaller, preferences for blacks reduce the ex ante admission probability of Asians as a group and as individuals much more than they do for individual whites.

A third and related complication arises from the growing possibility that, contrary to my assumption in this scenario, the whites disadvantaged by preferences may in fact think of themselves not as whites but as members of some other group—say, New York City public school students, Muslims, whites with SAT scores of X, outwardly gay women, or any group that they believe is salient to their applicant-identity. Because these non-preference groups are so much smaller than the white group, the preference for blacks may create a much greater disadvantage for them than the 1.5% for whites.

Now suppose that we instead imagine that the white losers think of themselves as individual applicants, not as members of the demographic group "whites." I would expect them to feel a more profound sense of unfairness and personal loss, if not bitterness. Regardless of how large or small their racial group disadvantage was, they will think that it may have been the difference, depriving them of admission on what most will presumably regard as a non-meritorious, hence illegitimate, basis. In psychological reality, and not just by cohort would have been admitted to the schools that were studied.


353. For experimental evidence on these feelings, see, for example, Frederick R. Lynch, Casualties and More Casualties: Surviving Affirmative Action (More or Less), in AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION? 90 (Francis J. Beckwith & Todd E. Jones eds., 1997).
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hypothesis, they will not have thought of themselves as "whites" in this connection, at least until they learn that affirmative action disadvantages whites as a group. Perceiving their group membership as a reason, if not the reason, for their rejection is bound to demoralize and anger them in a way that would not occur to those who conceive of themselves not as unique individuals, but rather as members of a specific demographic group that has a statistical chance of admission.354

In a culture that ardently affirms the principles of individual freedom, merit, and equality of opportunity, this demoralization and anger must be counted as a very large social cost. It is no less a cost because it is borne by whites, and often less privileged whites at that. If these principles make it unfair to impose this cost, the fact that the unfairness is spread across a large group of people may not make it any more palatable. In fact, diffusing the unfairness in this way will simply increase the number of people who feel themselves aggrieved. The most powerful groups among them may seek protection by seeking new preferences for themselves. These incentives do not fully explain the politics of affirmative action, but they surely are part of the story.

Other costs of affirmative action are also diffuse, invisible, hard to measure, or ineffable. Here as elsewhere, we do well to remember the laws of unintended consequences, of inertia, of program politicization, and of reinforcement of existing advantage—laws that are as implacable and distort affirmative action as much as other well-intended policies.355 Black students' much higher drop-out rates from the selective schools represent a large financial and psychological cost to the students and to the schools.356 Shelby Steele, who firmly opposes

354. Bowen and Bok found that graduates rejected by their first-choice schools were as supportive of diversity efforts as those who were admitted. Supra note 80, at 251-52. On the other hand, almost all applicants to selective schools apply to a large number of them and presumably do not expect to get into their first choices (commonly called a "reach") anyway.

355. See generally SCHUCK, supra note 307, at 419-79. Despite methodological and interpretive difficulties, some researchers have studied the effects, if any, of affirmative action on behaviors in "micro" policy contexts. Results are mixed. E.g., Brandice J. Canes & Harvey S. Rosen, Following in Her Footsteps: Women's Choices of College Majors and Faculty Gender Composition, 48 INDUS. & LAB. REL. REV., 486 (1995) (adding more female role models to three faculties had no effect on gender composition of undergraduate majors); Lott, supra note 147 (increasing black and minority police officers increased crime rates, especially in heavily black neighborhoods, by lower hiring standards for both minority and non-minority officers; no effect found with female recruits); C.J. Chivers, From Court Order to Reality: A Diverse Boston Police Force, N.Y. TIMES, Apr. 4, 2001, at A1 (positive effects on policing); Barbara Whitaker, When California Lights Dim; Utilities' Turmoil also Hits Program that Aids Concerns Owned by Women and Minorities, N.Y. TIMES, Feb. 28, 2001, at C1 (describing "Women, Minority and Disabled Veterans Business Enterprises Program for Public Utilities" as a "national model for minority contracting efforts" but also an example of the perils of dependence on particular revenue sources).

356. See generally BOWEN & BOK, supra note 80, at 258-59; THERNSTROM & THERNSTROM, BLACK AND WHITE, supra note 138, at 405-12; Sandalow, supra note 85, at 1884-1891. Although the former Chancellor of the University of California at Berkeley claims that it is a "myth" that students admitted under affirmative action do not succeed academically, his own figures from his own campus belie this claim: the five-year graduation rate for blacks was 46%, for Chicanos 56%, for Latinos 59%, for Filipinos 63%, for whites 76%, and for non-Filipino Asians 78%. Tien, supra note 128, at 245.
affirmative action, sees it as an “iconographic” policy aimed at enhancing whites’ virtuous self-image and blacks’ sense of power—“the precise qualities that America’s long history of racism had denied to each side.” The fact that affirmative action is a feel-good policy for white elites, of course, tells us nothing about whether or not it is moral, rational, or effective. Many socially desirable behaviors are actuated by guilt or by the desire to be esteemed by others and by oneself as righteous and generous. Indeed, no community can flourish without such motivations.

Some of affirmative action’s iconographic elements, however, are less uplifting. What signals does society send when it exempts one from the normal rules of the game, treats one as a kind of ward of the state or of some other institution, presumes that one needs special help because one cannot make it on one’s own, subjects one to others’ lowered expectations for oneself, and segregates one—paradoxically, in the service of the integration ideal? No one really knows how program beneficiaries decode the subtle semiotics of preferences; they surely read them in many different ways. Indeed, because these signals are multiple, intricate, and perhaps internally contradictory, the beneficiaries may be as confused as the rest of us about what preferences actually connote.

In any event, one must wonder about the iconographic authenticity of a policy in which most of the feel-good benefits go to those who bear few if any of its costs. Most of affirmative action’s costs are borne by young people struggling to reach the first rungs of the long ladder to success, while many of its most influential supporters are elite universities and corporations. In these institutions, domestic tranquility, good governmental relations, and a public image of rectitude are paramount considerations. The best-off members of these institutions, moreover, are the ones least likely to be displaced by it.


358. *E.g.*, SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* (1990); see also Missouri v. Jenkins, 515 U.S. 70, 122 (1995) (Thomas, J., concurring) (“‘Racial isolation’ itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.”); Alex M. Johnson, *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993); supra text accompanying notes 122-125.

359. Even so, many of their front-line shock troops may be having second thoughts. One survey of professors suggests that they reject group preferences by overwhelming margins. Balch, supra note 32, at 2. Competitive trends at the elite schools may also reduce the schools’ enthusiasm for preferences. As one economist said in 1997, “if affirmative action raised hackles in the 1980’s and 1990’s, watch what happens when a third more students are competing for the same number of places in class.” Peter Paskell, *Economic Scene*, N.Y. TIMES, Mar. 1, 1997, at D2.

360. On the importance of corporate support for affirmative action, see discussion supra at text accompanying notes 313-318. See also Judith H. Dobrzynski, *Some Action, Little Talk*, N.Y. TIMES, Apr. 20, 1995, at D1 (noting that executives prefer a low-key, behind-the-scenes approach).
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Again, this fact does not mean that they are wrong to defend affirmative action; it only means that they free-ride on its iconographic journey.

Another subtle aspect of affirmative action is how it reshapes the ways in which merit is defined, measured, and discussed. An example is the trend for select institutions of higher education to move away from national testing toward a consideration of “the whole person,” something that elite institutions, of course, always sought and can best afford to do. Which criteria of merit will take its place, however, remains conspicuously unexplained. This question is especially important for large institutions. The University of California cannot realistically consider 68,000 applicants for about 28,000 freshman places on any meaningful “whole person” basis. Alternative criteria like personal interviews, recommendation letters, high school rank, and extracurricular activities are likely to have other, perhaps greater, disadvantages for applicant pools drawn from very diverse, hard-to-compare high schools. These questions, of course, intersect with the robust, politically salient national debate over educational standards and testing, which became a centerpiece of the 2000 presidential election. In less rarefied contexts like police departments, the practice of racial or gender norming of qualifications is now common, breeding cynicism, resentment, and uncertain effects on the quality of public services.

Yet another hard-to-measure effect of affirmative action, especially at select institutions of higher education, is the pervasive dissimulation and deformation of thought on all sides due to the felt need to deny or ignore the fact that racial preferences play a large, often decisive role in many admissions decisions. Even more pernicious—and tragic for the individuals involved—is the denial that the preferentially admitted students, as we have seen, tend to have much lower academic performances and higher drop-out rates. The current attack on SAT scores, it seems, is “not because they are uninformative but because they are all too informative: they consistently gives whites and Asians higher scores than blacks and Latinos.” These evasions in turn create a perverse rhetorical incentive that encourages double-talk. Below, I discuss a current example of this—California’s constant revision of its admissions criteria in order to get the

361. Supra note 25.
363. These are tests, after all, that were devised to enable colleges to compare applicants from high schools with extraordinarily diverse programs, standards, and student bodies. Under pressure by the many groups that hope for more minority admissions, the tests have often been revised in order to minimize their supposed cultural and other biases. See generally Lemann, supra note 113.
364. For examples, see Zelnick, supra note 235, at 107-18 (police and fire departments).
365. For one participant-observer account of how this dissimulation multiplies, see G. Kindrow, The Candidate: Inside One Affirmative Action Search, in Debating Affirmative Action, supra note 128, at 140. For others, see Lynch, supra note 347, at 51-82; see also Issacharoff, supra note 11, at 675 n.14 (describing how Attorney General of Texas falsely denied racial preferences’ role in the law school’s program even though the law school had admitted it).
366. Lexington, supra note 362.
A cost of preferences that is impossible to measure is the insidious innuendo about the deserts of almost all but the most unquestionably superior members of the preferred group—and perhaps even of them.\textsuperscript{368} Ironically, this innuendo tends to perpetuate the very stereotypes that affirmative action was supposed to dispel. That these costs are often invisible and unacknowledged does not make them any less real and cruel—or hypocritical, given athletic and other types of preference with even less justification.\textsuperscript{369} Fish dismisses this stigma by saying that a particular beneficiary may prefer to bear that cost in order to gain the preference, and that it would not exist if people just stopped thinking that way.\textsuperscript{370} The problem, however, is that even unbigoted people do think that way—they still believe in merit despite efforts to discredit the ideal, and they are right to think that preferences often violate it. Moreover, the stigma attaches to every member of the preferred group whether she is willing to accept this bargain or not.

More generally, affirmative action has contributed to the relentless racialization of discourse on a vast range of public and private subjects, some of which actually have little or nothing to do with race. At least two factors are at work here. First, the felt need to defend it against strong public opposition has encouraged many advocates to play the race card at every turn and with a desperation that grows with the effectiveness of the critique. When opportunities are made to turn on race, one is more likely to emphasize one’s racial identity rather than the many other identities that one naturally acquires in a society as fluid, complex, and individualistic as ours. Orlando Patterson, a proponent of temporary affirmative action, captures this discursive tic so astutely and succinctly that I can do no better than to quote him at length:

Any reference to Afro-Americans by Euro-Americans that does not acknowledge the totality of racism or flatter all things Afro-American risks sneers of contempt or the charge of racism. Any but the most professionally qualified expression of sympathy is likely to be dismissed as liberal patronage. Any suggestion that an Afro-American person might be responsible, even in some minor way, for his or her condition invites the knee-jerk response that one is blaming the victim. The result is that no Euro-American person, except one insensitive to the charge of racism, dares say what he or she really means. . . . [s]o much “race” speech has become ritualized and rhetorical. . . . The overwrought nature of ethno-“racial” talk results in curious forms of self-censorship and privileged speech among ethnic groups in their interactions with each other. . . . [A]n Afro-American person is privileged to say, “I love my blackness,” or “I take pride in the great cultural achievements of my race,” or any such chauvinistic clap-trap. No Euro-American person dares say the very same.

\textsuperscript{367} Infra text accompanying notes 373-374.
\textsuperscript{368} Glazer, supra note 85, at 59 (quoting Bowen and Bok’s statement that stigmatization helps explain institutions’ reluctance to discuss the degree of preference given black students).
\textsuperscript{369} For a careful review of the psychological evidence, see Krieger, supra note 13. For more anecdotal evidence, see, for example, Lynch, supra notes 347, 353.
\textsuperscript{370} Supra text accompanying note 125.
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thing, not if she cares about her reputation, even though it is true that nearly all Euro-Americans cherish their appearance and cultural heritage. . . . Every Afro-American is presumed to be an expert on all aspects of the subject of "race." . . . When they are not proving that "race" as a concept has no scientific meaning, most social scientists and even medical researchers are busily controlling away all other variables in a relentless effort to prove that one, and only one, variable explains the condition of Afro-Americans: "race." Having abolished the ontological basis of "race" in biology, American social scientists vie with each other to reestablish its ontological essence as a social fact. . . . American social science is either uninterested in, or befuddled by, the fact that the vast majority of Afro-Americans, including the majority of those born and brought up poor, overcome their circumstances and led healthy, happy, productive lives. . . .

Patterson's insistence on the reality of black progress brings us to what may be the most important question of all about affirmative action: What would happen if it were eliminated? What would workplaces, high schools, legislatures, college campuses, and other purlieus of American life look like without affirmative action—or at least without the kinds of preferences that are now in place?

VIII. THE RE-SEGREGATION NIGHTMARE

The prospect of all-white (and Asian) institutions is deeply repellent to everyone I know. Most Americans who oppose affirmative action in principle, the evidence suggests, are likewise appalled at the thought of returning to a world in which whites seldom interact with minorities, and almost never as social equals. As we have seen, this nightmarish prospect accounts for much of the support for affirmative action. Do we actually face it?

Knowing precisely what America would look like without government-mandated ethno-racial affirmative action is probably impossible. The difficulty is increased by the rhetorical strategy of preference defenders like the University of Michigan, who shift uneasily between arguing that (1) preferences confer only a marginal advantage on minority applicants; and (2) re-segregation would occur absent those preferences. In making predictions, however, we must not lose sight of how much American institutions have changed since the 1950s and how strong the non-legal incentives for maintaining and increasing diversity are today. If diversity depended on racial preferences as much as some advocates imply, even the levels that now prevail in colleges, workplaces, politics, and communities would simply be inexplicable. A key question is how the more selective institutions would react to such a ban. Since private ones often engage in affirmative action now when they are under no legal mandate to do so, it is safe to predict that they would continue the practice, and perhaps even increase it in light of the legal constraints on the public ones. Many private institutions evidently find the organizational, political, and moral considerations

compelling, and there is no reason to believe that their reasons would change.

An across-the-board ban on ethno-racial preferences by public institutions would surely make a difference, although it is impossible to know how much. The public universities, most notably in California and Texas, have already demonstrated their determination to maintain their black and Hispanic enrollments even in the face of legal prohibitions against preferences. They have substituted other criteria that are not explicitly ethno-racial but effectively maintain or raise the previous levels of minority admissions. Texas changed its system to admit the top 10% of graduating high school seniors to the public campus of the students’ choice. A recent study of admission data through 1999 finds that the program has had “mixed results” at the flagship campuses there and has helped Asians as much or more than blacks and Hispanics.372

California’s approach was more restrictive; it was limited to the top 4%, excluded students who have not taken certain preparatory courses, and did not guarantee enrollment at the campus of their choice.373 Even so, using greater outreach, more individualized review, and “holistic” criteria, 18.6% “underrepresented minorities” were admitted to the California system in 2001, essentially the same as the 18.8% in the last year of affirmative action (1997), although their distribution among the various campuses in the system was different.374 Under less political and legal pressure to abandon preferences, Florida adopted a plan that admits the top 20% from each high school to the state system, yielding more than 40% minority incoming students and raising black enrollment at its flagship campuses.375

But even if the new “percent plans” (as they are called) succeed in maintaining or increasing black and Hispanic enrollments, they will not necessarily be a cause for unequivocal rejoicing. First, they may simply preserve the same objectionable use of ethno-racial preferences by disguising them and effectuating them indirectly. In addition, these programs enable many students who graduate from uncompetitive high schools to gain admission to institutions for which they are ostensibly unqualified, with all the difficulties this entails for them and the institutions. Those admitted under the programs, moreover, will still constitute but a very small fraction of their groups’ cohorts. After all, only

372. Marta Tienda, College Admission Policies and the Educational Pipeline: Implications for Medical and Health Professions, in The Right Thing to Do, the Smart Thing to Do: Enhancing Diversity in Health Professions 117, 128-29 (Brian D. Smedley et al. eds., 2001).
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6% and 7% of black and Hispanic students, respectively, who graduated from high school in 1998 scored at least 900 on the SAT and ranked in the top 20% of their classes, and neither of these groups would qualify for automatic admission under the plans. \(^{376}\)

Another dismaying and perverse feature of these plans is that their effectiveness depends on segregated neighborhoods and high schools and on school districting practices that can be manipulated to qualify students under the plans. \(^{377}\) Furthermore, the percent plans disadvantage minority students (especially those attending good integrated high schools) who fall just below the new cutoff but could succeed academically at the more selective schools. Also disadvantaged are those white students who are more qualified than the whites who, because of their higher class ranking at inferior schools, will be admitted in their place. Indeed, one can predict that the state university systems, under great pressure from minority caucuses in the legislature, will lower academic standards further by raising the percentages specified in the plans and by again reducing the percentage of students who must be admitted on the basis of academic criteria. For all these reasons, the new rules seem likely to lower the credentials of whites as well as minorities in the state system. \(^{378}\)

Manipulation of the new emphasis on class rank and holism rather than higher standards is already evident \(^{379}\) and the California system had countenanced if not conspired with these stratagems even when they violate the principle of equal opportunity. \(^{380}\) Consider, for example, one ruse that benefits Hispanic applicants to the disadvantage of blacks and most whites. \(^{381}\) High school students who speak Spanish at home are now encouraged to take Spanish as one of their three SAT II tests, which are designed to measure achievement in a specific subject matter area. Not surprisingly, they score very well on the Spanish SAT II as well as on the Spanish advanced placement test (which also strengthens their applications) without ever having taken a course in the subject! Students in one low-performing Los Angeles school who took the Spanish SAT II averaged 715 out of a possible 800 on it compared to an average of 396 on the SAT, far below the national norm. Since the California system now weighs the SAT II scores more heavily than the SAT scores, many Hispanic

\(^{376}\) Tienda, supra note 372, at 128.

\(^{377}\) Id. at 139.

\(^{378}\) Nate Tabak, Acceptance Policies May See Major Changes, DAILY CALIFORNIAN, July 3, 2001, at 1.

\(^{379}\) E.g., Daniel Golden, College Entry in U.S. Inspires New Calculation, WALL ST. J. (Euro ed.), May 16, 2000, at 34 (describing schools' manipulations); see Issacharoff, supra note 11, at 687 (without affirmative action, public universities in Texas will lower standards "as far as necessary to avoid resegregation").

\(^{380}\) Citrin, supra note 154 (among students with same credentials and family income and background, black and Latino students are more likely to receive higher holistic ratings; faculty opponents of affirmative action excluded from admissions committees).

students win a guaranteed slot in the system despite extremely low SAT scores. Other language-minority students, such as Chinese, Koreans, and Japanese, are doing the same thing where the SAT II offers a test in their language, sometimes after heavy ethnic group lobbying and subsidization of test development.

In California, the end of legally-mandated ethno-racial preferences did not significantly reduce minority admission to the public university system overall. This outcome, however, rests on two conditions. First, minority students’ distribution among the system’s campuses changed. At Berkeley, for example, the demise of preferences substantially reduced black enrollment there, especially at its law school, but most of the students who no longer could get into Berkeley attended other schools in the system instead. One would expect this to happen, and it is not necessarily regrettable. Dropping down a rung on the academic ladder in the public systems does not necessarily damage a student’s educational and life opportunities. The data presented in Part IV on academic performance, drop-out and bar passage rates, and the educational and career paths of black leaders, suggest that the opposite may be true, at least for those who would have done poorly at the flagship campuses. Less qualified students are more likely to succeed or excel academically at less demanding schools, and failing at a more prestigious school is probably worse than succeeding at a lesser one.

In the year before preferences ended at the University of California, only one black freshman at the San Diego campus had a GPA of 3.5 or better, as compared with 20% of whites. In 1999, after Proposition 209, 20% of

382. For the situation in 1997, the first post-affirmative action year there, see John E. Morris, Boalt Hall’s Affirmative Action Dilemma, AM. LAWYER, November 1997, at 73. For the situation in 2000, see University of California at Berkeley School of Law (Boalt Hall), 2000 Annual Admissions Report. The entering class in 2000 contained only seven blacks (twenty-eight received offers) and ten Chicanos (thirty-two received offers), constituting 3% and 4% of the class, respectively. Id. at frontspiece (un-numbered first page). The number of blacks who applied to Boalt declined almost 50% between 1996 and 2000; the Chicano application decline was about 30%. Id. at 5. The share of those who accepted Boalt’s offer dropped only slightly for blacks (26% to 25%) but substantially for Chicanos (42% to 31%). Id. at 9. Those who declined the offer almost certainly went to comparable or higher-ranked law schools. Morris, supra, at 78 (eleven of the fifteen who received offers in 1997 went “to schools with more cachet than Boalt”). Boalt’s problem was that the pool of blacks and Chicanos who met their minimum standards was exceedingly small to begin with—only sixteen blacks and forty-five Hispanics nationwide even came close to the median for whites entering Boalt (id. at 74)—and most of those in that pool chose to attend other schools.


384. The evidence on how attending institutions of varying selectivity affects future earnings is mixed and hard to interpret. Compare Bowen & Bok, supra note 80, at 128 (without controlling for pre-college aptitude, finds wage premium for attending selective institution), with Stacy Berg Dale & Alan B. Krueger, Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables, Working Paper #409, Industrial Relations Section, Princeton University (July 1999) (controlling for pre-college aptitude, finds no wage premium for attending selective institution for either whites or blacks, though sample of blacks was small). Recent studies indicate that the returns to additional years of schooling are now about equal for blacks and whites. Alan Krueger, Michael Boozer, & Shari Wolkon, Race and School Quality Since Brown vs. Board of Education, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 269-326 (Martin N. Baily and Clifford Winston eds., 1992).
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black freshmen at San Diego had GPAs of 3.5 or better, and an internal administration study found no substantial GPA differences based on race or ethnicity.\textsuperscript{385}

This outcome, I contend, benefits the minority and white students and the larger society. Even so, of course, this will no more assuage such students’ disappointment in not being admitted to their first choice school than white students will be mollified by being told that affirmative action reduces their ex ante chances by only 1.5%. At the lowest rungs of the ladder, to be sure, the most marginal minority students, like their white counterparts, may not gain admission to any of the system’s campuses, and some of them may be unable to afford the tuition at any of the vast number of non-selective private colleges that admit all applicants. We do not know how many are in this predicament and what they will do about.

The second reason why California has been able to maintain overall minority enrollments in its public system without formal preferences is that it has kept jiggering its admissions criteria in a determined search for a formula that will produce the numbers it wants.\textsuperscript{386} I have already explained why I think this well-intentioned tactic will lower academic standards, disserve and stigmatize those minority students who are unprepared for the schools they attend, engender deep resentment on all sides, encourage subterfuge and dissimulation, have perverse effects at the high school level, and eventually bring a once-great university system into disrepute. My belief that this game is not worth the candle is fortified by the system’s ability to maintain or even expand minority enrollments by appropriately redistributing them among its different campuses while also trying to improve their pre-college preparation (discussed below). Obviously, many others disagree.

If past is prologue, the remarkable and hard-won achievements of minorities should lead in the future to greater diversity in higher education, workplaces, and other social institutions—with or without racial preferences. This diversity will occur despite the imperfections of anti-discrimination remedies.\textsuperscript{387} Those remedies should be strengthened wherever possible. In addition

\begin{itemize}
  \item \textsuperscript{386} \textit{U. of California Alters Admission Policy}, N.Y. TIMES, July 20, 2001, at A12 (starting in fall 2003, top 12.5% of high school class assured eventual place at a university campus; most of those between 4% and 12.5% must first complete two years at community college); Barbara Whitaker, \textit{University of California Moves to Widen Admissions Criteria}, N.Y. TIMES, Nov. 15, 2001, at A26 (replacing two-tier system with “comprehensive review” system that considers applicant’s success in overcoming disadvantages).
  \item \textsuperscript{387} For a decidedly less optimistic prediction based on cognitive psychology research, see Krieger, \textit{supra} note 13, which leads her to advocate continued affirmative action. Krieger shows that subtle cognitive biases make discrimination hard to detect and remedy, in part because of the salience and persistence of intergroup distinctions. The psychological literature she cites is complex; it indicates that racial preferences may magnify these distinctions in some ways while reducing them in others.
\end{itemize}
to the usual law enforcement strategies, for example, the government could deploy many more trained testers disguised as job applicants, homebuyers, borrowers, and so forth to gauge discrimination in various markets, while increasing the penalties for violations. Violators could be required to publicize their violations to suppliers, customers, and communities. Other remedial reform proposals have been advanced and should be seriously considered.

IX. ALTERNATIVES

The real choice for America, then, is not between the status quo and a return to the 1950s—or even the 1980s. The powerful processes of immigration and social change, augmented by more vigorous enforcement of the anti-discrimination laws and voluntary private affirmative action, promise to expand diversity in all areas of American life. By the same token, we need not choose between existing forms of affirmative action and none at all. Indeed, many proposals to reform affirmative action have been offered by its defenders and critics alike. I discuss these proposals under six broad rubrics: (1) better targeting within currently-favored groups; (2) disadvantage-based preferences; (3) lottery; (4) addressing root causes; (5) time-limited programs; and (6) voluntary programs.

A. Better Targeting Within Favored Groups

Many of the proposals take cognizance of the over-breadth of the coverage and definition of favored groups—for example, as noted earlier more than 75% of the post-1965 immigrants to the United States qualified as soon as they arrived—and seek to focus more narrowly on particularly compelling claims for preference. The most important of these proposals would limit the preferences to blacks (and, for obvious historical reasons, Native Americans) by virtue of the disadvantages they have suffered from the legacy of black enslavement and pervasive race discrimination. On this reasoning, one might further limit preferences to non-immigrant blacks (i.e., those descended from Afro-American slaves), but programs seldom if ever make this distinction. Any

Krieger believes that effective legal remedies can deal with such unconscious biases, but I am not fully persuaded. E-mail from Linda Hamilton Krieger (Mar. 9, 2001) (on file with author).

388. E.g., A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING (Michael Fix & Margery Austin Turner eds., 1998); AYRES, supra note 47, at 396-427.


390. Nathan Glazer is most prominently associated with this position. NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW (1997).

391. According to a leading expert on affirmative action, employment preferences do not make such a distinction. Hugh Davis Graham, Affirmative Action for Immigrants, in COLOR LINES, supra note 235, at 54 (noting that nineteen percent of the black faculty recruited under the university's af-
who oppose affirmative action in principle but who also recognize blacks' special moral and historical claims might well support this approach as a better compromise. But the growing political influence of Hispanics, whose leaders often couch the group's claims for preference in similar terms, makes such a change less likely. Distinguishing among blacks in this way might also be administratively unworkable.

Other proposals illustrate just how fine-grained and also how crude these targeting efforts might need to be. Orlando Patterson, for example, would exclude "first-generation persons of African ancestry from Africa, the Caribbean and elsewhere . . . [but] [l]ike Mexican-Americans, their children and later generations should be eligible in light of the persistence of racist discrimination in America." He would also exclude all Hispanics except for Puerto Ricans of any generation, and Mexican-Americans of second or later generations, and would exclude "all Asians except Chinese-Americans descended from pre-1923 immigrants. . . ." With due respect for Patterson's pathbreaking work on race, his specification more resembles a tax code provision governing depreciation expenses than a coherent, workable formula for promoting social justice.

Another recent proposal for an alternative form of affirmative action in legal education would grant admissions preferences on the basis of three criteria: whether the applicant has experienced the effects of racial discrimination; is likely to contribute a perspective or viewpoint on racial justice that is currently not well-represented in the classroom; and is likely to provide legally underserved communities with services and resources. The advantage of these criteria, according to the author, is that they target qualities for which law schools have traditionally used race as a proxy, without themselves being racial classifications and thus constitutionally suspect. This scheme might indeed pass constitutional muster, although this would depend on how it was administered and whether it can be shown to be anything more than a transparent disguise for the kinds of racial preferences that courts have rejected. One wonders, however, how schools—as a practical matter and without relying on impermissible racial stereotypes—would determine the answers to the three questions. The proposal, one suspects, would simply invite institutions, parents, and students to dissemble, with a resulting increase in demoralization of the participants and system.

Rather than amending the categories of favored groups, some targeting proposals would demand more rigorous proof of actual discrimination-based
disadvantage before affirmative action could be upheld, a requirement that the Supreme Court has imposed in any event, especially with regard to race-based preferences. President Clinton’s proposal to "mend, not end" affirmative action, discussed earlier, took this approach.

B. Disadvantage-Based Preferences

Perhaps the most alluring proposal for targeting would shift the focus from preferences based on race or ethnicity to race-neutral preferences based on economic or other disadvantages (e.g., disability). Not only would this limit preferences to those in the currently-favored groups who most need help; it would also extend them to low-income whites, the disabled, and others who are not now favored by affirmative action. Because blacks are disproportionately poor, the thinking goes, they would disproportionately benefit without incurring the hostility that attaches to race preferences. Most Americans, after all, are morally more inclined to assist people on the basis of their economic need than on the basis of their skin color, language, region of origin, or gender.

Despite these supposed advantages of class-based preferences, however, they would be neither administrable nor advantageous to many blacks. First, as others have noted, most poor people are white, not black, so a class-based program would disproportionately favor whites. In response to this problem, some supporters emphasize that poor blacks, unlike poor whites, are separately disadvantaged by race and by class, so their predicament should be assessed on a different scale. In itself, of course, this aspect of class-based programs is not a good argument against them—poor people are poor whatever their color—but it does reduce the enthusiasm for such programs on the part of many affirmative action proponents who primarily want to benefit blacks. For example, Berkeley’s law school, Boalt Hall, like the rest of the California university system, experimented with a socio-economic disadvantage criterion (among others) instead of race, but abandoned it after one year when it produced no additional black admissions—thereby signaling both the inefficacy of this par-

395. E.g., Days, supra note 300.
399. Malamud, supra note 9, at 1707 (agreeing with others on this point).
401. Sarah Kershaw, California’s Universities Confront New Diversity Rules, N.Y. TIMES, Jan. 22, 1996, at A10 (up to half of applicants meeting minimum academic standards to be evaluated on basis of "special circumstances," including social disadvantage).
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ticular targeting strategy and the institution's determination to find some way to get the numbers that it wanted.

Second, determining economic need would be a very tricky business, as it has proved to be in the administration of need-based social welfare programs more generally. 402 For all the arbitrariness and over-breadth of existing affirmative action categories, they are far more objective and administrable than a need-based program would be. After all, it is much easier and less contestable for a bureaucrat accurately to detect one's skin color, language, ethnicity, and gender than to make the kinds of empirical and normative judgments necessary to determine the extent, and even more controversially, the causes of one's economic need. 403 Morally, it matters to most people whether another's poverty is due, for example, to discrimination or to drug abuse. Journalist Michael Kinsley, who favors some forms of affirmative action, imagines what would happen:

Is it worse to be a cleaning lady's son or a coal miner's daughter? Two points if your father didn't go to college, minus one if he finished high school, plus three if you have no father? (Or will that reward illegitimacy, which we're all trying hard these days not to do?) Communist societies tried this kind of institutionalized reverse discrimination—penalizing children of the middle class—without any enviable success. Officially sanctioned affirmative action by "disadvantage" would turn today's festival of competitive victimization into an orgy.

Some targeting proposals would focus on "place, not race," allocating government contracts to companies located in economically distressed areas rather than their owners' race. 405 Some propose distinguishing between jobs that merely require an employee to be competent, for which preferences could be used, and those for which a high level of performance is necessary and merit is an overriding value. The locational proposal, however, seems suspiciously similar to an economic development program for distressed areas, which has little or nothing to do with the rationales for affirmative action and which have often been shown to be problematic in their own right. The competence-achievement job distinction, like the class-based program, would be very difficult to administer. It would also place even more of affirmative action's burdens on low-income workers who happen to be white while leaving well-off workers unaffected, an outcome that seems distributionally perverse.

402. Some proponents apparently ignore this problem. Patterson, for example, would include those of "lower class background," without noting that the meanings of both "lower class" and "background" are highly debatable in this context. Patterson, supra note 3, at 193.
403. Richard Kahlenberg has responded to these and other criticisms, unpersuasively in my view. Supra note 397.
C. Lottery

Lani Guinier, noting that affirmative action is a winner-take-all, us-against-them system, has proposed substituting a lottery to allocate slots in desirable schools. The school would allow all students scoring above the minimum total that now secures admission to compete by random selection, with the school allocating additional lottery tickets to students it thinks possess special talents. Under this system, Guinier says,

no one would feel “entitled” to admission; nor would anyone feel unjustly excluded. Such an approach recognizes that claims of “merit” and “diversity” are equally legitimate. It does not set “us” against “them.” It does not assume that only one group wins. It avoids a zero-sum solution in favor of a positive-sum solution that more broadly accommodates the goals of diversity and genuine merit.  

Although Guinier’s proposal does possess the virtue, lacking in some reform proposals, of assuring that all admittees would possess at least a minimal level of merit (as defined by the school), it is objectionable on both practical and principled grounds. By flooding the applicant pool with whites who are only minimally qualified and who would not otherwise have applied, it would reduce the overall quality of admitted students without necessarily increasing black admissions at all—and perhaps decreasing them. Americans, moreover, emphatically do not believe that the claims of merit and demographic diversity are equally legitimate; they value diversity only when it is achieved in ways that are consistent with deeply-held moral values like merit (however defined). Guinier offers no moral justification for denying people who excel by dint of hard work and sacrifice the fruits of their efforts, nor does she consider that her plan sends the wrong messages and creates the wrong incentives for people to strive for excellence, not just minimally satisfactory performance.

D. Root Causes

Other alternatives to affirmative action are more attractive on their merits and may be more politically feasible. One might be called a “root cause” strategy; it begins from the premise that the main reason why affirmative action seems necessary is the inadequacy of the education and training received by youngsters in the favored groups, which renders them unable to compete on equal terms with their counterparts. In this view, affirmative action is simply a poultice that not only fails to treat the underlying wound, but also conceals its true dimensions. A root cause strategy would emphasize the desperate need to improve the schools that low-income children attend, provide remedial assistance to those who cannot progress without it, expand job training for low-skill

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Affirmative Action workers who cannot otherwise compete in the labor market, and help minority entrepreneurs build stable, competitive businesses.\footnote{E.g., Paul M. Barrett, \textit{Birmingham's Plan to Help Black-Owned Firms May Be Alternative to Racial Set-Aside Programs}, WALL ST. J., Feb. 27, 1995, at A14; see also \textit{LEMANN}, supra note 113, at 348-49 (favoring restraints on local schools); Rubenfeld, \textit{supra} note 126, at 471 (favoring “a massive capital infusion into inner-city day care and educational facilities”).}

No one really doubts that these are essential elements of any effective solution to the inequality problem that affirmative action seeks to remedy, or that the root causes of this inequality begin to operate very early in a child’s life. Adopting a root cause approach to reforming affirmative action yields the same difficulties that this approach faces in other social policy areas. Root causes usually remain root causes for one of three reasons: we do not know how to eliminate them, or we (think we) know how but consider it too costly to do so in terms of resources or competing values, or we believe it is worth doing but simply cannot muster the necessary political will. When these impediments to attacking root causes exist—with violent crime, for example\footnote{This problem is discussed in \textit{JAMES Q. WILSON}, \textit{THINKING ABOUT CRIME} 51, 73 (1975).}—our best course may be to focus on managing symptoms until we can figure out how to remove the more fundamental causes. In such cases, insisting on a root cause strategy may in effect be a prescription for inaction, futility, rhetorical excess, and (because root causes are hard to understand) sloppy analysis.

To the extent that the academic performance of low-income children can be improved by remediation and educational reform, this is clearly the road that we should travel—and hopefully \textit{are} traveling\footnote{States have substantially increased spending on public elementary and secondary education in recent years; their per pupil expenditures increased almost 50% in constant dollars between 1980 and the late 1990s. U.S. \textit{CENSUS BUREAU}, \textit{STATISTICAL ABSTRACT OF THE UNITED STATES}: 2000, at 164 tbl.262, \textit{available at} http://www.census.gov/statab/www/ (last accessed Dec. 3, 2001). Their general fund spending in fiscal 2002 will increase 3.7% above 2001 levels. Jessica L. Sandham, \textit{States Slowing Spending for Public Schools}, \textit{EDUC. WEEK}, Sept. 5, 2001, \textit{available at} http://www.edweek.org/ew/newstory.cfm?slug=down.html (last accessed Oct. 15, 2001). At the same time, federal elementary and secondary education spending will enjoy its largest rise ever, with a 20% increase in Title I spending, outstripping Bill Clinton’s previous record increase of $3.6 billion for fiscal year 2001. The new legislation also increases teacher and school accountability. Adam Clymer, \textit{Congress Reaches Compromise on Education Bill}, \textit{N.Y. TIMES}, Dec. 12, 2001, at A1.}—even as we search for other ways to improve their life prospects. But to the extent that we do not understand the causes of their inferior performance, or those causes seem to lie in more recalcitrant social structures of low-income neighborhoods, or the politics of educational and social reform impede desired solutions, such measures may be ineffective—or worse.

E. \textit{Time Limits}

Another alternative approach to affirmative action is to concede its offense to liberal values but insist that it is desirable if it is temporary. This, of course, is hardly a novel proposal. I know of no proponent of affirmative action who
does not endorse this objective; the program is always defended as a short-term remedy, as a temporary expedient to be continued only until the favored groups can achieve . . . what? Very few proponents have specified, even in principle, which conditions would trigger its termination. They seem disinclined to speculate, perhaps because they believe that existing inequalities are so large and intractable that they will not be erased in the foreseeable future. Indeed, Justice Thurgood Marshall spoke in this spirit when he remarked that it would take at least 100 years.\footnote{According to John Jeffries, Lewis Powell's biographer, Justice Stevens speculated during the Supreme Court's deliberations in \textit{Bakke} that blacks might not need preferences much longer. Justice Marshall "broke in to say that it would be another hundred years." \textsc{John C. Jeffries Jr.}, \textit{Justice Lewis F. Powell, Jr.} 487 (2001).}

Still, many Americans worry about the indefinite continuation of a policy that raises the most difficult moral and political questions and that has always been rationalized as a temporary remedy. They have good reason to ask, and are entitled to know: what measure of equality would be enough to end affirmative action? My point is not that this question is unanswerable—indeed, one can easily imagine any number of plausible answers—but that almost no proponent of preferences seriously addresses it.\footnote{The U.S. Supreme Court has confronted this question, but only in the special context of the dismantling of previously segregated school systems that have been under court order. \textit{United States v. Fordice}, 505 U.S. 717 (1992).}

I say "almost" because at least one individual, Orlando Patterson, has done so—although his fifteen-year termination date is actually a conversion date on which race-based affirmative action would become a wholly class-based program that would continue indefinitely. In light of his conviction that affirmative action "is a major factor in the rise of the Afro-American middle class, the single greatest success story of the past forty years," and that its benefits "far outweigh its costs," one is struck by Patterson's failure to explain why he would phase it out at all, much less in fifteen years.\footnote{\textsc{Patterson, supra} note 3, at 192-93.} Is the desired equality now in view? Or is it simply that he and affirmative action's other defenders can no longer hold off the incessant attacks by its misguided and gullible assailants? In short, is his phase-out a principled proposal consistent with his praise of the policy, or is it instead merely a pragmatic concession to political reality? One cannot tell.

Whatever the content of Patterson's proposal, the political reality is that once affirmative action preferences are established, they are almost impossible to dismantle. So far as one can tell, this has been the universal experience of the other countries that have established them.\footnote{\textsc{Sowell, supra} note 344; \textsc{Erik Bleich}, \textit{The French Model: Color-Blind Integration}, in \textit{COLOR LINES}, supra note 235, at 270; \textsc{Parikh, supra} note 344; \textsc{Steven M. Teles}, \textit{Positive Action or Affirmative Action? The Persistence of Britain's Antidiscrimination Regime}, in \textit{COLOR LINES}, supra note 235, at 241.} The United States is no different.
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As we saw earlier, when conservative Republican presidents and congresses have been in power, they have not seriously challenged existing preferences despite their avowed opposition to them. The logic of coalition-building among groups and don't-rock-the-boat politics dictates that these preferences will remain with us for the foreseeable future.

F. Voluntary Programs

Voluntary affirmative action is a final example of another approach that might meet or minimize some of the objections to current programs, particularly the criticisms that they are coercive, legalistic, inflexible, and insufficiently sensitive to specific contexts. Strong reasons exist to believe that many, though certainly not all, educational institutions and businesses that now practice mandatory affirmative action would continue to do so without legal compulsion if the law permitted it. The fact that much affirmative action would exist without legal compulsion, of course, is not a conclusive argument against mandating it. For one thing, a program might be quite different depending on whether it is voluntary or mandatory. For another, as I have been at pains to show, even voluntary preferences are problematic, especially when they are used as the basis for allocating valuable social resources whose principle of distributive justice is and should be merit, properly defined. In addition, mandating preferences would address the market failure argument discussed earlier in Part V, Section E.

Be that as it may, entities often have their own political, ideological, and self-interested reasons, quite apart from legal considerations, for seeking to diversify (as they define the term) their student bodies, faculties, work forces, and markets. Corporate leaders, for example, have been expanding their management desiderata to include diversity of thought, lifestyle, culture, dress, and other attributes not covered by affirmative action law even as they explicitly disassociate themselves from affirmative action mandates. More generally, elite institutions, as we have seen, are among the most influential groups that favor affirmative action, along with the Democratic Party even (or especially)

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414. It seems unlikely, for example, that banks would voluntarily invest in distressed neighborhoods where it seems unprofitable, nor would many companies regulated by the FCC and other agencies co-venture with, or give stock to, members of favored groups if that did not help them to obtain government licenses.

415. On corporations, see, for example, THERNSTROM & THERNSTROM, BLACK AND WHITE, supra note 138, at 452-53; Lauren B. Edelman et al., Diversity Rhetoric and the Managerialization of Law, 106 AM. J. SOC. 1589 (2001); Levinson, supra note 159, at 585-89 (example of Coca-Cola); Dobrzynski, supra note 360; Alan Wolfe, Affirmative Action, Inc., NEW YORKER, Nov. 25, 1996, at 106, 107 (“[T]he support of business for affirmative action is one of the better-kept secrets of the debate.”) On selective educational institutions, see supra discussion in Part V, Section G.

416. Edelman et al., supra note 415 at 1581 (managers and their consultants believe that “diversity is directly valuable to organizational efficiency and important in its own right rather than because it might promote legal ideals”).
in its Clintonian, "New Democrat" make-over.\footnote{E.g., \textsc{Christopher Edley, Jr.}, \textit{Not All Black and White: Affirmative Action, Race, and American Values} (1996) (written as a defense of the administration's essentially stand-pat position on affirmative action).} Sociologist Alan Wolfe, who calls this voluntary approach "prudential affirmative action," notes that it has the additional advantage of not requiring American society to take a clear-cut principled position on a policy for which in truth no favorable political consensus exists or is ever likely to form.\footnote{Wolfe, \textit{supra} note 415, at 114-15.}

Certain arguments for making affirmative action voluntary are a bit too facile. I believe that private entities (Stanford University, the Boy Scouts, or the Catholic Church, for example) should be able, as a legal and a policy matter, to make many choices that the government may not properly make. Nevertheless, this cannot explain why as a matter of principle private decisions to allocate resources and opportunities on the basis of skin color are any less objectionable than governmental ones. After all, a large body of public law, now more than three decades old, prohibits not only governmental discrimination but also much private, voluntary discrimination in areas like employment, public accommodations, some contracting, and government-assisted activities covered by the Civil Rights Act of 1964. The coverage of state anti-discrimination laws is sometimes even greater. Even if we put the law to one side, why are preferences that are arbitrary and morally wrong when government employs them not at least prima facie arbitrary and morally wrong when private entities do so? To many people private voluntary affirmative action is no less problematic than a governmental mandate, and there is no satisfying normative basis for distinguishing between them.\footnote{E.g., \textsc{Kinsley, supra} note 49, at 67.} Finally, mandating preferences would address the market failure argument discussed earlier in Part V, Section E.

I disagree. A racial preference mandated by public law is much more objectionable than one that a private entity decides to establish to reflect its own values and for its own purposes. Let me be clear about why this is so. Governmental preferences are more objectionable, in my view, not because they deploy public funding or authority while private ones do not, and not because public institutions are invariably more powerful than private ones. In fact, public law pervasively shapes private entities, and private influence in society may match or exceed that of government agencies. Critics often use these facts to discredit both the public-private distinction and its constitutional analogue, the "state action" doctrine, under which the Constitution's due process and equal protection guarantees do not limit private conduct.\footnote{Symposium on The Public/Private Distinction, 130 U. Pa. L. REV. 1289 (1982).} Although the state action doctrine has a dubious constitutional pedigree, the Court has reaffirmed it so often and recently that its continuing authority cannot really be doubted.\footnote{E.g., \textsc{Brentwood Academy v. Tennessee Secondary School Athletic Ass'n.}, 121 S. Ct. 924, 86.
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But even if no state action doctrine existed, a liberal polity with a genuine commitment to diversity would have to invent something very much like it to permit private associational choices to exclude groups not entitled to heightened constitutional protection. Such permission safeguards the autonomy and freedom that are diversity's lifeblood. Mandatory racial preferences threaten these values more than otherwise similar private ones do. In part this difference reflects the nature of all legal regulation. Mandates are more coercive than voluntary actions not only by definition but as a quantitative matter; they regulate more people and more activity than voluntary ones that govern only those who elect it and apply only to activities they choose. Prima facie, they offend liberal values more.

Other differences are qualitative. For reasons I have explained elsewhere, legal rules issued from the center tend to be more simplistic, slower to develop and to correct, and less contextualized than voluntary practices that can be tailored to specific needs and situations. A legal rule reflects interest group politics or the vagaries of judicial decision, whereas a voluntary practice is the product of the chooser's own (albeit socially conditioned and economically constrained) assessment of benefits and costs. When change is desirable, a voluntary practice is easier to reform or abandon than a legal rule. One who opposes a voluntary practice can avoid its burdens more easily than one who opposes a mandatory rule. Voluntary practices can assume more diverse forms than mandated ones; this facilitates social learning and problem solving.

Most important, public law speaks authoritatively for the entire society, binding all who are subject to it. Indeed, many legal theorists maintain that law's expressive and symbolic functions, by signaling community values and commitments, shape social behavior. It does so quite apart from—and perhaps even more powerfully than—the sanctions it may impose. While a public law preference does express a certain kind of compassion for and commitment to the preferred groups, other signals dominate its message—among them, that American society thinks it just to group people by race and ethnicity, to treat those groups monolithically, and to allocate precious resources and opportunities accordingly; that it holds equal treatment and individual merit as secondary, dispensable ideals; that the preferred groups cannot succeed without special public favors; that such favors do not stigmatize them in the minds of fair-minded others; that those who oppose preferences thereby oppose the aspirations of the preferred groups; and that society can assuage old injustices by cre-


422. SCHUCK, supra note 307, at 419-79.

423. The classic exploration of this distinction is ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINES IN FIRMS, ORGANIZATIONS, AND STATES (1970).

424. See generally SCHUCK, supra note 307, at 434-54.

ating new ones. When public law says such things, it speaks falsely, holds out vain promises, and brings itself into disrepute.

A private, voluntary preference is very different. Rather than sending a strong, authoritative signal about what society does and does not value and how social goals should be pursued, it expresses only the values of those who choose to engage in it. Because most of my substantive objections to preferences apply whether to private ones as well, I would probably not choose them for my own academic institution. But many others who also cherish the non-discrimination and merit principles and conscientiously weigh the competing values reach different conclusions.

One who affirms, as I do, the broad freedom of an individual, group, or entity to choose how to order its own affairs cannot simply dismiss such conclusions out of hand. Suppose that a private university chooses to sacrifice some level of academic performance in order to gain greater racial diversity and whatever educational or other values it thinks this diversity will bring.426 (If the university perceives no sacrifice, then it follows that there is no problem and no need for a preference, except perhaps in the rare case of a tie-breaker.) I may view its choice as profoundly misguided and think it will disserve many of those it prefers because of their skin color, unjustly harm those rejected for that reason, diminish its own institutional values, and erode overriding social commitments. But I cannot say categorically that its choice is morally indefensible. More to the point, the law should not categorically say this either.

This distinction between public and private morality, between the values law should mandate and those it should leave to the disparate choices of a diverse civil society, lies at the core of a liberal society. Tamar Jacoby, who studied affirmative action and race relations in three cities, put it well:

No one who understands what makes America great can quarrel with ethnic pride. At home, on the weekend, in the family and the neighborhood, Jews will be Jews, Italians Italian—and there is no reason blacks should be any different. Religion and ethnicity are essential parts of our lives, and government should not curtail how we express them in the private sphere. But when it comes to public life, even the benevolent color coding of recent decades has proved a recipe for alienation and resentment. ... Society need not be color-blind or color-less, but the law cannot work unless it is color-neutral, and the government should not be in the business of abetting or paying for the cultivation of group identity.427

Americans, Jacoby suggests, must each find their own ways to reconcile their ethnicity and their common citizenship. Preferences, many believe, promise to accelerate this process, but in fact there are no shortcuts.428

A post-affirmative action law, I believe, should harmonize the non-discrimination principle with the important liberal principle of private ordering

426. For a discussion of what these values might be, see Levinson, supra note 159, at 592-608.
427. JACOBY, supra note 31, at 541.
428. Id.
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(or autonomy) by preserving a limited space for private, voluntary preferences that meets minimal conditions of norm compliance and public accountability. The private ordering principle holds that society must respect a private entity’s decision about how to conduct its own affairs, absent some overriding public justification for regulating that decision (laws barring racial discrimination, for example, or First Amendment neutrality requirements in intra-church property disputes).429

How much private ordering through preferences can the non-discrimination principle accommodate? So far, the law has answered “very little,” allowing a private entity to use preferences only if they are narrowly tailored to remedying its own past discrimination. Private ethno-racial preferences have largely escaped judicial scrutiny, but it is only a matter of time before they too are challenged in the courts. Such preferences may be upheld on the basis of the kind of “expressive association” defense that the Supreme Court recently extended in Boy Scouts of America v. Dale,430 but the availability of that defense to large private universities and other diverse organizations is by no means clear.431 For example—and perhaps ironically—the diversity of a large private institution might militate against recognizing an expressive association defense for a preference rationalized on diversity grounds; the argument would be that the institution’s very diversity precludes the kind of coherent, self-defining point of view that the expressive association defense is meant to protect.

I want to suggest another exception to the non-discrimination principle for private preferences, one that depends on their transparency. Private entities that now use preferences seldom admit this fact to the public, preferring obfuscation and outright deception to candor. One may argue that silence is golden here, that opacity about racial preferences minimizes social disputes over abstract, irreconcilable principles and sustains desirable social myths.432 Although this argument for opacity has force in some contexts, it is notably weak as applied to affirmative action. There, divisions and suspicions already abound and disimulation serves only to magnify and multiply them, as people who assume that preferences are even more widespread than they actually are stigmatize even those who did not receive them. Concealment of the truth about preferences inflames these social conflicts and injustices.

The relative benignity of private voluntary preferences justifies allowing

432. For an exploration of considerations sometimes favoring opacity, see GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978).
them as an exception to the non-discrimination principle, but only on two conditions. First, the entity must publicly disclose the preference in advance; it must describe its criteria and weighting system and state why it thinks the preference serve its goals. Second, the preference must not disadvantage a group that enjoys the highest level of constitutional protection against discrimination.

The first condition, transparency, is designed to discipline the granting of preferences by forcing institutions to be more candid about their value choices and by triggering reputational, market, and other informal mechanisms that make the entity bear more of the costs of adopting preferences instead of shifting them to innocent third parties. Customers, students, alumni, investors, journalists, and other interests to which the entity must be attentive can then hold it accountable, rewarding, punishing, or ignoring the preferences, as they see fit. I can only agree with my colleague Jed Rubenfeld, a grudging advocate of preferences, when he writes that “[i]nstitutions with affirmative action plans should be open about them or scrap them.”

The same is true, I believe, of legacies and other kinds of non-racial preferences, though it is doubtful that federal law can or should compel disclosure in those situations.

Disclosure, of course, is no panacea for the moral and other problems that preferences create, and it would entail some problems of its own. Institutions presumably dissemble for reasons they think are important, perhaps even humane. Harvard, for example, believes that it would be poor educational policy to reveal to the public high school students from Boston and Cambridge to whom it gives admission preferences that they are less academically qualified than others. And someone—a legislature, agency, court, or contracting parties—will have to decide what full and accurate disclosure means. Even so, challenges would go to the nature of the preference and whether it was fully disclosed, issues that are simpler and less costly to resolve than the legality issues under the current affirmative action regime. The law might promote transparency in other, possibly less intrusive and litigious ways. Adequate disclosure, for example, might be a defense in a subsequent civil rights challenge or at least limit damages, much as some retraction statutes do in libel cases.

The second condition, non-discrimination against groups entitled the highest level of constitutional protection, underscores the important distinction between non-discrimination and affirmative action preferences discussed early in this Article. This will not persuade those who deny this difference and believe that preferences are as normatively compelling as non-discrimination. But others like me who view the distinction as fundamental (while conceding that it can blur at the edges) should favor a strong presumption that the value of non-discrimination against groups that society believes need special constitutional

433. Rubenfeld, supra 126, at 471.
435. Supra Part II, Section A.
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protection must trump the value of private ordering. With this constraint satisfied, the law should accommodate fully disclosed voluntary affirmative action preferences that do not discriminate against those groups entitled to the highest level of constitutional protection.

Whether voluntary affirmative action can survive under these conditions is an empirical question. Under this regime, a private educational institution wishing to prefer ethno-racial minority students or those suffering from disabilities for diversity, anti-caste, or other reasons could presumably satisfy both conditions, as could a private employer wishing to favor such minorities or the disabled. But an institution or employer that wanted to favor whites would violate the second condition. Although whites are protected by the same non-discrimination principle that protects everyone else, they do not enjoy the highest level of protection that the Constitution owes ethno-racial minorities and thus could not qualify for an exception to the presumptive ban on even private preferences.

I have explained why preferences by public entities differ normatively and empirically from preferences adopted by private ones, and why the law should treat them differently. This means barring government-sponsored preferences except in the relatively narrow remedial situations that the courts now permit, while permitting private ones that can satisfy the two conditions just discussed. This distinction places great weight on the “state action” line, and some will say that the weight is more than it can bear. Nevertheless, the liberal goal of individual autonomy demands that it be drawn and the courts long ago grew accustomed to doing so. The line can be blurry when, as is common, the public and private spheres converge, and one can certainly argue that courts have drawn it poorly in particular cases. That, however, is a different question than whether the line should be drawn at all. I hope I have convinced the reader that it should.

X. CONCLUSION

It would be comforting if the arguments about preferences on one side or the other were compelling and conclusive, but in truth they are not. Most advocates of affirmative action, one suspects, feel some discomfort at the tension (if not contradiction) that the policy creates with the values of individualism and merit that command such powerful, almost universal allegiance in American culture. We can see this in much of the dissimulation about affirmative action and in the support by many advocates for a more targeted and temporary policy. On the other side, even the vast majority of Americans who oppose affirmative action in principle also exhibit some ambivalence about it, seeking to hedge their bets against the dread possibility that social institutions without af-

436. See supra text accompanying note 365 through paragraph accompanying note 381.
affirmative action would be almost lily-white or would further inflame the sense of injustice that many blacks already feel and that most whites acknowledge. In their more candid moments, the opponents may concede that merit is to some degree in the eye of the beholder and that American society has sometimes compromised the merit principle when it concluded that one or another group needed a leg up in order to catch up. Opponents may also acknowledge that the alternative to existing affirmative action programs, at least in higher education, may be something worse because of institutions' determination to reshuffle the deck or dissemble until they get the demographic representation they want. Finally, opponents may recognize that our system of pluralist, interest-group politics is just that, a politics of groups—one in which individuals seek politically-allocated benefits by aligning themselves with others whom they think are similar in relevant respects.

But to say that the arguments over affirmative action are more evenly balanced than most disputants will admit is not to say that these arguments are equally persuasive. The debate over affirmative action is not simply about how the law should allocate scarce resources and opportunities, important as that allocation decision obviously is. An even greater stake, important in voluntary programs as well, is how society should encourage us to think of ourselves, organize ourselves, and present ourselves to others. Viewed this way, the issue is whether, for example, society should promote policies and norms that encourage individuals and groups to compete with one another in comparative victimization, with all of the demoralization, distortion, and dependency that this kind of competition tends to foster. Shaping and communicating these self-understandings, incentives, and interactions are among the most vital functions both of law and of the informal social norms with which law interacts.438

Race is perhaps the worst imaginable category around which to organize group competition and social relations more generally. At the risk of belaboring the obvious, racial categories in law have played an utterly pernicious and destructive role throughout human history. This incontrovertible fact should arouse wonder at the logic of those who view racial preferences as no more troubling than athletic scholarships,439 and at the hubris of those who imagine that we can distinguish clearly enough between invidious and benign race discrimination to engrave this distinction into our constitutional order.440 Vast

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437. E.g., McAdams, supra note 425.
438. For example, Edelman et al., supra note 415, explains how civil rights and affirmative action law have influenced diversity management in organizations, and vice-versa.
439. Justice Blackmun's opinion in Bakke is an example. Post, supra note 233, at 18 (Blackmun "fails to engage Powell's central point, which is that when it comes to state action the country's history has made race and ethnicity special and problematic categories.").
human experience mocks this comforting illusion, as does the fact that most Americans, including many minorities, think racial preferences are invidious, not benign. Whether benignly intended or not, using the category of race—which affirmative action proponents oddly depict as socially constructed and primordial and immutable—to distribute advantage and disadvantage tends to ossify the fluid, forward-looking political identities that a robust democratic spirit inspires and requires. Justice Blackmun's earnest hope that we could get beyond race by emphasizing it has not been borne out.

Quite the contrary. Today, ironically, the proponents of affirmative action have the greatest stake in infusing our private and public discourse with a relentlessly racialist rhetoric and sensibility that, in my view, deform the debate and impede further progress. This vested interest in racialism often deploys the diversity ideal in a dubious way. Christopher Lasch observed that “"[d]iversity’—a slogan that looks attractive on the face of it—has come to mean the opposite of what it appears to mean. In practice, diversity turns out to legitimate a new dogmatism, in which rival minorities take shelter behind a set of beliefs impervious to rational discussion.”

Let us come at the problem of racial preferences in another way. Suppose that we stood behind John Rawls' famous veil of ignorance in order to frame rules of justice for our society. Suppose further that we knew only three things about the society: that legally-countenanced race consciousness had caused incalculable suffering and injustice in the past; that the society still contained many inequalities, some (but not all) of them caused by racism; and that it was seeking to redress these inequalities through various individual and collective actions. Finally, suppose (as the veil image and logic invite us to do) that we were ignorant of our own demographic traits and thus could not frame the rules opportunistically. Under these conditions, how likely is it that we would adopt a rule permitting the government to use race as the basis for allocating scarce resources and opportunities? I think that we would view such a rule as terribly misguided, and that almost any other plausibly fair distribution rule would strike us as both wiser and more just.

Even as traditionally defined, race's correlation with social disadvantage is

441. LASCH, supra note 145, at 17.
443. Within the Rawlsian logic, of course, one could posit that the framers knew additional things about the society's inequality that I believe to be true—for example, that the disadvantaged made enormous progress even before preferences were instituted; that the society firmly believed in the principles of individualism and merit; and so forth. This knowledge, I suggest, would make even more unlikely a behind-the-veil choice for racial preferences. On the other hand, if one posited that current inequalities were caused primarily by racism on the part of the society today (which I do not believe), the choice might be otherwise. But of course such a society would not propose preferences as an option in the first place.
444. My claim that a society behind the veil would not choose such a rule, while contestable, is not refuted by the observation that some societies, including the U.S., have in fact done so. The whole point of the Rawlsian thought experiment, after all, is to test the justice of that choice.
weaker than it once was, and there is every sign that it will weaken further in the future.\textsuperscript{445} By almost any measure, and despite frequent denials of this fact, racism in the United States has declined dramatically in recent decades.\textsuperscript{446}

Those accused (however unfairly) of racism (however innocently) must propitiate public opinion through public rituals of apology and self-abasement—like the earnest District of Columbia official who felt obliged to resign after a barrage of criticism for having used the word "niggardly" in a correct manner.\textsuperscript{447} Data from the 2000 Census will likely confirm that this decline in racism, which has been occurring since at least World War II, is accelerating. The effects of this decline are apparent everywhere. The income of young, intact black families already approaches the income of demographically similar white families. On almost every other social indicator, the black-white gap has narrowed significantly.\textsuperscript{448} For young black women, the gaps have largely disappeared.\textsuperscript{449}

Even these comparisons understate the prospects for closing the black-white gaps in the future, for several reasons. First, much of racism's cruel legacy is permanently impounded in the low education and income levels of retirement-age blacks who grew up under Jim Crow and who, economically speaking, bear little resemblance to their better-educated children and grandchildren. Second, blacks are considerably younger than whites on average and thus are less likely to have reached their peak earning years. Even in residential housing where black isolation has remained stubbornly high; the long decline in residential segregation nationally seems to have continued in the 1990s, particularly in the fastest-growing population areas.\textsuperscript{450}

My point, emphatically, is not to deny that appalling inequalities persist; no informed person could possibly do so with a straight face. Rather, it is to insist that race today is a poor proxy for the conditions affirmative action is supposed

\textsuperscript{445} The 2000 Census reports sharp improvement in absolute levels of living standards among all groups. Schmitt, \textit{supra} note 65.
\textsuperscript{446} \textit{E.g.}, \textit{PATTERSON, supra} note 3, \textit{passim}; \textit{SCHUCK, supra} note 108, at 441 n.17 (citing studies). To choose just one of many indicators of this change, 95\% of Americans say they would vote for a black nominated by their party, up from 38\% in 1958 and 79\% as recently as 1987. GLOVER-BLACKWELL ET AL., \textit{supra} note 143, fig. 2-3.
\textsuperscript{448} \textit{PATTERSON, supra} note 3, at 17-27.
\textsuperscript{449} On the virtual equality of black women on many indicators, see, for example, \textit{ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES} 3-168 (1998). Patterson emphasizes the reasons why it will be difficult to close the black male-black female and black male-white male gaps. \textit{Id}.
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to remedy and that it is steadily becoming an ever cruder and more misleading proxy as multi-racial Americans increase and as intra-group differentiations proliferate. At some point, the arbitrariness of the traditional race-as-proxy-for-egregious-disadvantage becomes so unmistakable and insupportable that it must fail the judicial strict scrutiny test for the constitutionality of race preferences.

Each of the race-related changes I have just discussed adds to the already heavy burden of showing that preferences are also “narrowly tailored” to this end—even assuming, contrary to the earlier analysis, that they can be shown to implement a compelling governmental interest in diversity. In their somewhat different ways and contexts, the Supreme Court in Croson, the Fifth Circuit in Hopwood (the Texas law school case), and the trial court in Grutter (the Michigan law school case) have cast serious doubts on whether race preferences can still meet this demanding constitutional test. As I have tried to show, those doubts are well-justified.

On a strictly consequentialist view of affirmative action, reasonable people will surely assess its costs and benefits differently. These differences will reflect not only people’s diverse values, but also their empirical uncertainty on at least two important points: first, how much of blacks’ progress is due to affirmative action, as distinct from migration to better jobs in the north, improved education, reduced discrimination, and other factors; and second, how segregated would American society be if mandatory affirmative action were now eliminated. In some cases, the consequentialist verdict seems quite clear—and clearly negative. For example, affirmative action’s benefits in the spectrum licensing and minority business set-aside programs discussed earlier seem so marginal if not irrelevant to any defensible conception of social justice that they are almost certainly outweighed by the cynicism and abuse (and possible inefficiency) that have widely discredited such programs. Most racial gerrymandering practices under the Voting Rights Act also fail a consequentialist test, not just a constitutional one, albeit for quite different reasons. Class-based and race-based preferences designed to integrate housing also seem to have had disappointing, not to say corrupting, effects. One could cite many other ex-

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451. For a contrary view, see Anderson, supra note 127 (positing that a well-designed program based on integration rationale could satisfy strict scrutiny).
452. See discussion supra at text accompanying notes 38-41.
453. E.g., ROBERT C. ELICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 942-43 (2d ed. 2000) (discussing studies of aftermath of Mount Laurel litigation in New Jersey); Robert C. Ellickson, The Irony of "Inclusionary" Zoning, 54 S. CAL. L. REV. 1167 (1981). The court decree in the Yonkers housing litigation requiring that housing units for low-income blacks be constructed in predominantly white neighborhoods has little to show for its trouble more than 15 years after the decree was entered. See also, e.g., Raso v. Lago, 135 F.3d 11 (1st Cir. 1998) (upholding housing authority’s refusal to honor whites’ right of first refusal on new housing because it would upset authority’s racial balancing goal). This issue is discussed in greater detail in SCHUCK, supra note 6.
amples along the same lines.\textsuperscript{454}

Affirmative action in initial\textsuperscript{455} hiring and college admissions presents much closer cases, for it is in these areas that the evidence best supports the view that blacks as a group gain more from preferences than whites as a group lose. Even here, as we saw, these are precisely the areas in which considerable internal pressure, self-interested as well as ideological, would remain to maintain or increase existing levels of diversity, at least if voluntary affirmative action were constitutionally permissible.\textsuperscript{456} Proponents of affirmative action hope, in Hollinger's words, that we can avoid "mistaking a tactic for a truth."\textsuperscript{457} But after four decades of affirmative action, this understandable hope remains a vain one. The diversity rationale has transformed a temporary, limited tactic into an almost theological orthodoxy that skin color per se confers diversity-value, an orthodoxy affirmed by many elites who should, and do, know better. This is not the first time that hard cases and wishful thinking made bad law and policy.

I have explained why this comparison of group gains and losses from affirmative action, while significant as far as it goes, is both misleading and even irrelevant when we consider how most Americans (black and white) conceive of themselves and compete with each other, how the ethnic composition of the United States is changing so much faster than the law, and how short-term group benefits can turn out to be long-term group costs. For better and for worse, and recognizing the complications and ambiguities, American culture remains highly individualistic and liberal in its values and premises, even at some sacrifice (where compromise is necessary) to its goal of substantive equality.\textsuperscript{458} One need not ignore the illiberal strands in our tangled history, which enslaved, excluded, and subordinated members of despised groups,\textsuperscript{459} in order to conclude that racial preferences increasingly compromise our deeply engrained but incompletely realized commitment to legal-formal equality. The progress of this principle has advanced only through long and heroic struggle. It has served Americans well—even though, tragically, it has not yet served all of us equally well.

\begin{itemize}
\item \textsuperscript{455} I say "initial" because it is much harder to make the case that once minorities are hired or admitted through preferences, have an equal opportunity to perform, and are treated without discrimination, they should receive yet another preference in being considered for promotion or graduate school. This distinction should be especially important to those who favor affirmative action only as a temporary expedient.
\item \textsuperscript{456} See discussion supra notes 309-323 and accompanying text.
\item \textsuperscript{457} HOLLINGER, supra note 26, at 187.
\item \textsuperscript{458} E.g., SEYMOUR MARTIN LIPSET & GARY MARKS, IT DIDN'T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES 282-83 (2000); Alberto Alesina, Rafael Di Tella, & Robert MacCulloch, \textit{Inequality and Happiness: Are Europeans and Americans Different?}, NBER Working Paper No. W8198 (April 2001) (finding a large, negative effect of inequality on happiness measures in Europe but not in the U.S.).
\item \textsuperscript{459} ROGERS M. SMITH, \textit{CIVIC IDEALS} (1997).
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