

Spring 3-1-2001

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Recommended Citation

Martin D. Carcieri, *The Wages of taking Bakke Seriously: Federal Judicial Oversight of the Public University Admissions Process*, 2001 BYU Educ. & L.J. 161 (2001).

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THE WAGES OF TAKING *BAKKE* SERIOUSLY: FEDERAL JUDICIAL OVERSIGHT OF THE PUBLIC UNIVERSITY ADMISSIONS PROCESS

*Martin D. Carcieri**

*In the Beginning, there was Bakke.***

I. INTRODUCTION

*University of California Regents v. Bakke*¹ remains a controversial decision. In *Bakke*, the UC Davis Medical School had set aside up to 16 out of 100 seats in every entering class solely for members of certain racial or ethnic minority groups. In his controlling opinion, Justice Lewis Powell ruled that while such a quota system violates the Equal Protection Clause of the 14th Amendment, race and ethnicity may be used as “one element in a range of factors”² in determining admission.

Whatever else may be said of Justice Powell’s opinion, it is arguably consistent as a matter of political theory: the two key principles on which he rested his decision, and with which he instructed public universities to accommodate, embody quintessential liberal values. On the one hand, he was clear that for several reasons it is the individual, not groups, who holds civil rights such as equal protection.³ On the other hand, he ruled that the promotion of diversity among the student body at public universities is a compelling state interest.⁴ Through the

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** Law School Admission Council, *New Models to Assure Diversity, Fairness, and Appropriate Test Use in Law School Admissions* (December 1999), at 5.

1. 438 U.S. 265 (1978).

2. *Id.* at 314.

3. *Id.* at 289-99. On individualism as a liberal value, see Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 861-62 (1995); Martin D. Carcieri, *The Wages of Taking Bakke Seriously: The Untenable Denial of the Primacy of the Individual*, (forthcoming in the TENN. L. REV.).

4. See 438 U.S. at 311-12. On diversity as a liberal value, Mill, one of liberalism’s

“whole person”⁵ approach, accordingly, Powell sought to allow universities to advance educational diversity while avoiding an undue burden on individuals whose immutable traits do not earn them a preference. Both of these objectives could be advanced by the use of race/ethnicity simply as a tiebreaker to “tip the balance”⁶ in close cases.

The Powell opinion has been criticized,⁷ and it is not clear that educational diversity remains a compelling state interest, if it ever truly was.⁸ Nonetheless, the ruling arguably constitutes a reasonable compromise between basic, conflicting lib-

great prophets, wrote that a liberal education is

[D]irected . . . to a broad development of understanding over the widest possible area of knowledge; . . . it is an education concerned not so much with factual acquisition as with the quality of experience, with truth, not dogma, with discovery in intellectual exploration and the release of individual potential.

F. W. GARFORTH, JOHN STUART MILL ON EDUCATION 18 (1971). When properly administered, diversity encourages toleration, a related liberal value. See e.g., CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE 130, 141 (1996); Deborah C. Malamud, *Race, Culture, and the Law: Values, Symbols and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1691 (1997).

There are, however, serious problems with the diversity rationale. One is the lack of a coherent definition of the diversity in which there is a compelling state interest. Whatever that definition may be, if there is one, a second, related difficulty is the dubious claim that universities are truly committed to the promotion of diversity. See, e.g., Timothy Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L. J. 551 (1998); Carl Cohen, *Affirmative Action in Higher Education: Preference by Race in University Admissions and the Quest for Diversity*, 54 WASH. U. J. URB. & CONTEMP. L. 43 (1998); Scott L. Olson, *The Case Against Affirmative Action in the Admissions Process*, 58 U. PITT. L. REV. 991 (1997); Eugene Volokh, *Diversity, Race as Proxy, Religion as Proxy*, 43 UCLA L. REV. 2059 (1996). Even putting these problems aside, further, the link between race preferences and the promotion of the state interest is a source of difficulty. See, e.g., Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 228 (1999); Jim Chen, *Is Affirmative Action Fair? Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L. J. 811, 814 (1998). Even some proponents of affirmative action concede this. As Bowen and Bok observe, for example, “it would be an oversimplification to assume that all African Americans . . . represent anything resembling one point of view.” WILLIAM G. BOWEN AND DEREK BOK, *THE SHAPE OF THE RIVER* 219 (1998).

5. See Akhil Reed Amar & Neal Kumar Katyal, *Symposium on Affirmative Action: Bakke's Fate*, 43 UCLA L. REV. 1745, 1751 (1996).

6. *Bakke*, 438 U.S. at 316.

7. See e.g., *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996); Lino A. Graglia, *Professor Loewy's "Diversity" Defense of Racial Preference: Defining Discrimination Away*, 77 N.C. L. REV. 1505, 1509-11 (1999); Hall, *supra* note 4 at 592.

8. See *Hopwood*, 78 F.3d at 944-45; *Wessmann v. Gittens*, 160 F.3d 790, 795-800 (1st Cir. 1998); *Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123, 130 (4th Cir. 1999).

eral values and is still widely admired over twenty years after it was handed down.⁹ Accordingly, a basic premise of this article is that Justice Powell's opinion should be faithfully enforced. In spite of its problems, *Bakke* should be taken seriously.

Interestingly, there is a narrative among affirmative action proponents that *Bakke* has been taken seriously, that public universities have routinely followed the ruling in practice. Professor Olivas, for example, assures us that only "modest racial criteria"¹⁰ are presently used in admissions decisions since "no law school can afford to admit students who cannot do the work."¹¹ Thus, add Amar and Katyal, "diversity has a built-in stopping point, an inherent limit on the amount of permissible affirmative action."¹² As Bowen and Bok explain, universities are unlikely to overreach because "[t]he admissions practices of colleges and professional schools are highly visible Life in such settings has been described by using the analogy of the fishbowl."¹³ Finally, Dworkin assures us, faculty and academic administrators are trustworthy since they "are in no way beholden for power or financial support to any of the communities [that race preferences] benefit."¹⁴

II. THE PROBLEM: *BAKKE* HAS NOT BEEN TAKEN SERIOUSLY

Notwithstanding such rhetoric, it is now well documented that *Bakke* has not been taken seriously. Race/ethnicity has become not simply one of many factors given equal weight in de-

9. As Olivas notes, "[T]he carefully nuanced Powell opinion has proven surprisingly resilient and supple over the two decades since" it was handed down. Michael A. Olivas, *The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1121 (1997). As Bloom adds, "Powell got it right in *Bakke*, and . . . his approach should be reaffirmed on the merits and not simply on the basis of stare decisis." Lino A. Bloom, *Hopwood, Bakke, and the Future of the Diversity Justification*, 29 TEX. TECH L. REV. 1, 65 (1998). See also Samuel Issacharoff, *Bakke in the Admissions Office and the Courts: Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 693-94 (1998); ROBERT POST, *Introduction: After Bakke*, RACE AND REPRESENTATION: AFFIRMATIVE ACTION 13, 20 (Robert Post & Michael Rogin eds., 1998).

10. Olivas, *supra* note 9, at 1092.

11. *Id.* at 1119.

12. Amar and Katyal, *supra* note 5, at 1776-77.

13. BOWEN AND BOK, *supra* note 4, at 286-87.

14. Ronald Dworkin, *Affirming Affirmative Action*, NY REVIEW OF BOOKS, October 22, 1998, at 91, 101 (book review).

termining admission to selective public universities, but rather the main factor. In *Hopwood v. Texas*, for example, the University of Texas law school was proven to have placed far more reliance on African American or Hispanic ancestry than allowed under *Bakke*. As the Fifth Circuit observed:

[T]he law school ran a segregated application evaluation process. Upon receiving an application form, the school color coded it according to race. If a candidate failed to designate his race, he was presumed to be in a nonpreferential category. Thus, race was always an overt part of the review of any applicant's file.¹⁵

For many years, similar procedures were used at the University of California. In 1995, the year before Proposition 209¹⁶ was enacted, the gap between the SAT scores of Caucasians and Asians accepted to UCLA and UC Berkeley and those of Afro-Americans and Hispanics was 250 points.¹⁷ This leaves little doubt that race and ethnicity were relied on far more than simply to "tip the balance" in close cases.

Such practices have also long been used at the University of Michigan, where equal protection challenges to the admissions processes at the undergraduate and law schools are currently pending.¹⁸ In 1995, for example, Lerner and Nagai reported a 230 point gap between the median SAT scores of successful Caucasian and Afro-American applicants and a 130 point gap between the median SAT scores of successful Caucasian and Hispanic applicants to Michigan's undergraduate program.¹⁹

15. *Hopwood*, 78 F.3d 932, 937 (1996). See also, Robert D. Alt, *Toward Equal Protection: A Review of Affirmative Action*, 36 WASHBURN L.J. 179, 191 n. 80 (1997) (as Alt elaborates, "it [was] presumed that other institutions run similar programs, since expert testimony professed to that very fact in an attempt to vindicate the University of Texas . . . The Fifth Circuit was unimpressed with the 'but everybody's doing it' defense."). See also, Gaglia, *supra* note 7, at 1513-16.

16. See CAL. CONST. art. I, § 31.

17. See Michael W. Lynch, *Affirmative Action at the University of California*, 11 NOTRE DAME J.L. ETHICS & PUB. POLY, 139, 148 (1997); STEPHAN THERNSTOM & ABIGAIL THERNSTOM, *AMERICAN IN BLACK AND WHITE* 408 Tbl. 9 (1997). As Lerner and Nagai observe of the 1995 UC Berkeley admissions statistics, "(t)he highest quartile, or 75th percentile score for African Americans is almost equal to the lowest quartile, or 25th percentile score for whites and Asian Americans." Robert Lerner & Althea K. Nagai, *Affirmative Action in Undergraduate Education: The University of California Berkeley, 1993-1995: A Preliminary Report* (visited Oct. 9, 1996) <<http://www.ceousa.org/html/berkeley.html>>.

18. See *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998); *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999).

19. As Michigan professor Carl Cohen adds, "[i]n a system in which one point is

In response to such disclosures, Bowen has insisted that "(c)learly the decisions are not based on race alone."²⁰ Such a reply, however, simply avoids the point. No one claims that

given for an applicant's outstanding essay, 1 point is given for an applicant's exhibition of state-wide leadership and service, and an applicant with an SAT score of 1600 receives 6 points more than an applicant with an SAT scores (sic) of 930, every applicant with 'Underrepresented Racial/Ethnic Minority Identification' gets 20 additional points." Cohen, *supra* note 4, at n.43 (reporting data from the Selection Index Worksheet of the University of Michigan Office of Undergraduate Admissions). *See also*, Bloom, *supra* note 9, at 66, n.535; Alt, *supra* note 14, at 192.

Lerner and Nagai have also documented similar processes, in which race and ethnicity have been used well out of proportion to the limited permission granted in *Bakke*, at other selective public universities. *See, e.g.*, Robert Lerner & Althea K. Nagai, *Preferences in North Carolina Higher Education* (visited Sept. 11, 2000) <<http://www.ceousa.org/html/nc.html>> (190 point SAT gap between successful Black and white applicants at UNC Chapel Hill in 1995); Robert Lerner & Althea K. Nagai, *Preferences at the University of Virginia: Racial and Ethnic Preferences in Undergraduate Admissions, 1996 and 1999*, (visited Sept. 11, 2000) <<http://www.ceousa.org/html/va2.html>> (190 point black/white SAT gap at UV in 1999); Robert Lerner & Althea K. Nagai, *Affirmative Action in Colorado Higher Education*, <www.ceousa.org/html/colorado.html> (visited Sept. 11, 2000) (205 point black/white SAT gap at CU Boulder in 1995); Robert Lerner & Althea K. Nagai, *Preferences in Washington Higher Education* (visited Sept. 11, 2000) <<http://www.ceousa.org/html/warp.html>> (220 point black/white SAT gap at the University of Washington in 1995).

Further, since the dominant use of race and ethnicity has filtered into elementary and high school admissions and transfer practices as well, there have now been successful equal protection challenges at those levels. *See, e.g.*, *Wessmann v. Gittens*, 160 F. 3d 790 (1998); *Eisenberg ex. rel. Eisenberg v. Montgomery County*, 197 F. 3d 123 (1999). *See generally*, Stephan Thernstrom & Abigail Thernstrom, *Race Preferences: What We Now Know*, COMMENTARY, Feb. 1999, at 44.

These developments should come as no surprise. First, this dynamic has taken place in other public contexts in which race/ethnicity was originally conceived as but "one factor among many" in the allocation of scarce, valuable public benefits. As Justices O'Connor and Kennedy, the centrist bloc on whom the future of public affirmative action arguably rests, have observed of the broadcasting license context, "race is clearly the dispositive factor in a substantial number of comparative proceedings." *Metro Broadcasting v. FCC*, 497 U.S. 547, 630 (1989) (5-4 decision) (O'Connor, J., dissenting). Second, the color coded application process is well established at selective private universities. As the Thernstroms observe of Bok and Bowen's own figures:

[A]mong 1989 applicants to the five private schools studied intensively by Bowen and Bok, only 19 percent of whites with combined SAT scores from 1200 to 1249 were admitted, as against 60 percent of blacks with similar scores; in the next bracket up (1250-1299), 24 percent of whites but 75 percent of blacks were accepted. In these two brackets, then, the black acceptance rate was triple that for whites [In other words], black applicants with scores around 1200 were nearly as likely to be accepted at Bowen and Bok's five institutions as whites with scores of 1500 or better.

Thernstrom & Thernstrom, *supra*, at 45-46 (responding to BOK & BOWEN, *supra* note 4).

20. Quoting Ethan Bronner, *Conservatives Open Drive Against Affirmative Action*, N. Y. TIMES, January 26, 1999, at A10.

race/ethnicity is the *only* factor determining admission to top public universities, for then we might expect to find illiterates at Berkeley and Michigan. The problem is rather that race/ethnicity has become the *predominant* factor in these processes,²¹ and this is flatly inconsistent with the *Bakke* “one of many factors” rule. As even Amar and Katyal concede, “when a racial plus looms so much larger than other diversity factors, an admissions scheme would, it seems, violate the letter and spirit of *Bakke*.”²² Such a concession, in passing, exposes the fallacy of Amar and Katyal’s earlier claim that whatever “built-in stopping point” diversity may have, it is well outside the limits of Powell’s ruling.²³ Likewise, it is now evident that Olivas’ assurance that universities cannot afford to admit students who can not do the work fails to justify current practices. Even if we accept his claim, “whoever can do the work” is simply not the standard that Justice Powell announced.²⁴

III. HISTORICAL REVIEW

It is useful to ask how these practices have come about. As Rosen observes:

[T]he gap between the test scores of white and black candidates is so stark that, to admit more than token numbers of minority candidates, race must be used not as a “plus factor” but as the decisive factor in case after case. . . . If racial “plus factors” are not allowed to loom larger than other proxies for diversity, if *Bakke* is rigorously applied, then the entering class at Texas might be only slightly less white than a color blind system would produce.²⁵

As the Piscataway Brief adds, “[t]he tiebreaker prefer-

21. O’Connor spoke to such a claim in the broadcasting license context: “[t]he Court’s emphasis on the multifactor process should not be confused with the claim that the preference is in some sense a minor one. It is not.” *Metro Broadcasting*, 497 U.S. at 630 (5-4 decision) (O’Connor J., dissenting). Professor Cohen also addresses this confusion. See, Cohen, *supra* note 4, at 19.

22. Amar & Katyal, *supra* note 5, at 1777 n.142.

23. See *id.*

24. Olivas’ claim is a variant of the fallacy that race preferences are defensible so long as those preferred are “qualified” or “fully qualified” or “minimally qualified” rather than best qualified for the benefits being distributed. For a response to this fallacy, see M. Carcieri, *Ten Fallacies of the Affirmative Action Debate*, 1 FLA. COASTAL L.J. 386, 390-392 (2000).

25. Jeffrey Rosen, *The Day the Quotas Died*, THE NEW REPUBLIC, April 22, 1996, at 21, 25.

ence . . . would be highly inappropriate in university admissions. . . . [M]ore than just tiebreaking is needed to get more than token minority representation in elite academic programs."²⁶ As these comments suggest, mere token numbers of minorities are simply unacceptable to many university officials. Regardless of the limits Justice Powell imposed, his approval of the diversity rationale has become a justification to ensure proportional representation of minorities at elite public institutions. The Supreme Court, however, has never recognized proportional representation as a compelling state interest sufficient to justify race preferences in the allocation of public benefits. In *Metro Broadcasting*, in fact, the O'Connor Four foresaw that the diversity rationale "might be used to justify . . . unconstrained racial preferences, linked to nothing more than proportional representation We cannot deem to be constitutionally adequate an interest that would support measures that amount to the core constitutional violation of outright racial balancing."²⁷ As Roberts and Stratton have thus observed, "we are witnessing in the name of diversity the development of a new constitutional right to proportional representation by race."²⁸

The weakness of Dworkin's assurance that public university officials are trustworthy since they are beholden to none of the communities benefiting from race preferences²⁹ is thus now

26. Charles Alan Wright, Douglas Laycock, & Samuel Issacharoff as Amici Curiae in support of Respondent, *Piscataway Township Bd. Of Educ. v. Taxman*, F.3d 1547 (3d. Cir. 1996), available at 1997 WL 626055 at 17 Westlaw (emphasis added).

27. *Metro Broadcasting*, 497 U.S. at 614 (O'Connor, J., dissenting). Justice Thomas would almost certainly agree, establishing a sitting majority with this view. See, *Adarand Constructors v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., dissenting).

More recently, the First Circuit in *Wessmann*, which was careful to distance itself from the *Hopwood* ruling that diversity is not a compelling state interest, was clear that proportional representation is likewise not a compelling state interest. See *Wessmann*, 160 F.3d at 795-800. For other problems with proportional representation by race as a goal of social policy, see Martin D. Carcieri, *Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-based Reforms*, 9 SETON HALL CONST. L.J. 459, 497, n.151 (1999).

28. P. ROBERTS & L. STRATTON, *THE NEW COLOR LINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY* 128 (1995). For an example of how proportional representation by race and gender at prominent institutions is uncritically assumed to be a constitutionally permissible if not compelling goal of social policy, see David B. Oppenheimer, *Carcieri's Self-Described "Progressive" Critique of the ACLU on Proposition 209: A "Conservative" Response*, 39 SANTA CLARA L. REV. 1153, 1170 (1999). For a response, see, Martin D. Carcieri, *A Progressive Reply To Professor Oppenheimer on Proposition 209*, 40 SANTA CLARA L. REV. 1105 (2000).

29. See *supra* note 14.

clear. Perceived self interest comes in various forms, and justice is a powerful motivating idea. Thus, a combination of the perceived need to purge collective guilt and a vision of social justice as proportional representation are easily sufficient to motivate those in power to break the law.

Once proportional representation of minorities at elite public universities effectively becomes the goal, further, its achievement effectively requires *de facto* quotas.³⁰ Even the Brennan Four, who would have upheld the admissions program at issue in *Bakke*, conceded that, “[f]or purposes of constitutional adjudication, there is no difference between [preferences and quotas].”³¹ Regarding University of California at Irvine’s more recent system of preferences, UC Irvine Chancellor Ralph Cicerone has admitted that, “I think it was coming close to leading us to a quota system.”³²

Under the pressure to “get the numbers up,” then, race has transformed from “one of many” factors into the decisive factor.³³ The constitutionality of the process has been sacrificed for substantive political outcome. The end has come to justify the means, and we now have exactly what the Civil Rights Movement was allegedly trying to move beyond, a racial spoils system in the allocation of public benefits.³⁴

Yet even if we grasp the dynamic at work, it is still important to ask how universities could have escaped undetected for so long. Greve answers, “universities [have done] everything in their power to keep the data secret.”³⁵ Bloom adds that, “most racial preference programs are operated in complete secrecy, making it easy for the public to assume whatever it wants

30. See DARIEN A. MCWHIRTER, *THE END OF AFFIRMATIVE ACTION: WHERE DO WE GO FROM HERE?* 146-47 (1996).

31. *Bakke*, 438 U.S. at 378 (Brennan, J., concurring and dissenting in part).

32. Quoted in A. Cohen, *When the Field is Level*, *TIME*, July 5, 1999 at 30, 32.

33. Like “mission creep” in military operations, this might fairly be called “factor creep,” and the analogy to wartime is compelling. In his dissent in *Korematsu v. United States*, 323 U.S. 214, 247 (Jackson, J., dissenting), Justice Jackson noted the drift from the allowance of a curfew order in *Hirabayashi v. United States*, 320 U.S. 81 (1943) to the approval of an exclusion order in *Korematsu*.

34. Two observations from a prominent civil rights leader are relevant here: “[T]he means we use must be as pure as the ends we seek.” D. Ravitch & Abigail Thernstrom, eds., *The Democracy Reader* 192 (1992) (quoting Martin Luther King, Jr., *Letter from Birmingham Jail*); “[I]n an effort to achieve freedom . . . we must not . . . subvert . . . justice. We must seek democracy and not the substitution of one tyranny for another.” *Id.* at 191 (quoting Martin Luther King, *Stride Toward Freedom*).

35. M. Greve, *A River Runs Dry*, *Policy Review*, April/May 1999, at 4.

about the degree and impact of the preferences.”³⁶ Even race preference advocates concede this. As the authors of the Piscataway Brief admit, for example, “the higher education community . . . interpreted Justice Powell’s test to make constitutionality depend on procedural mechanisms that conceal the actual working of the affirmative action plan.”³⁷ Bok and Bowen’s assurances that universities, operating in a “fishbowl,” would not overreach even if they wanted to,³⁸ are thus exposed as the obfuscation of a corrupt establishment. If admissions committees have been operating in a fishbowl, it is a fishbowl inside a locked room with no windows. As Sniderman and Carmines thus observe:

There is an irony here. For the very criticism that is leveled at the “old boys” network for permitting established elites to conceal publicly indefensible choices under a veil of secrecy has still more force applied to affirmative action. The Achilles Heel of affirmative action, so far as it entails preferential treatment, is precisely that it entails adjudication of qualifications by a small, privileged social group operating so far as possible without scrutiny.³⁹

Yet there is even more. In spite of the measures designed to ensure secrecy, individuals have occasionally uncovered and attempted to publicize evidence of such practices as color-coded application files. University authorities, in turn, have taken steps to retaliate against such whistleblowers.⁴⁰ Thus we have a vicious circle: abuse necessitates secrecy, which in turn enables and reinforces abuse. Standards are stretched, this is lied

36. L. Bloom, *supra* note 4, at 66. As Professor Cohen observes, “documents in which university preferential admissions programs are detailed are commonly hidden, and as at the University of Michigan: “CONFIDENTIAL: INTERNAL USE ONLY.” C. Cohen, *supra* note 4, at n.23. As Alt adds, “hiring and admissions processes are virtually closed to public inspection. As such, universities can commit such flagrant acts of color coding applicant files for years before the applicant becomes aware.” Alt, *supra* note 14, at 187.

37. Piscataway Brief, *supra* note 25, at 17. As Traub reports with respect to the University of California, “one prominent supporter of affirmative action says that the principle imperative of admissions departments in recent years has been ‘opacity.’” J. Traub, *The Class of Prop. 209*, NY TIMES MAGAZINE, May 2, 1999, at 76.

38. See BOWEN AND BOK, *supra* note 4.

39. P. SNIDERMAN & E. CARMINES, REACHING BEYOND RACE 55 (1997).

40. See e.g., Georgetown Law Student Disciplined, Will Graduate, CHRON. HIGHER EDUC., May 29, 1991, at A2; R. Wilson, Student’s Article Rolls Georgetown U. Law Center, CHRON. HIGHER EDUC., April 24, 1994, at A33; F. Robles, Conservative Law Student Brings Furor to Forefront, THE MIAMI HERALD, October 1, 1995, at 1B.

about and the lies upon exposure are covered up. As Pell notes, accordingly, "it was not until state freedom of information laws were used to obtain admissions documents from state schools that it became clear just how far afield many schools had strayed."⁴¹

We now have a sense of the scope of the problem. It is not just that a Supreme Court opinion has been misconstrued. Rather, we have witnessed the profoundly antidemocratic spectacle of unelected, unaccountable bureaucrats and academics secretly imposing their view of racial justice on society and then seeking to punish any exposure of the truth.⁴² The process which purported to carry Justice Powell's ruling into effect has thus become indisputably corrupt. Powell was aware of this risk, and so was careful to insist that "constitutional limitations protecting individual rights may not be disregarded."⁴³ In his attempt to give universities appropriate discretion to promote diversity, however, he felt compelled to assume good faith on their part. While we can admire and sympathize with Justice Powell's confidence, this seems, in hindsight, to have been the great flaw of *Bakke*. Although Powell hoped for principle, what happened was politics, and the constitutional framers could have predicted this. In drafting the Constitution, Madison, Hamilton and Adams did not assume good faith on the part of those exercising public power.⁴⁴ Rather, they designed a system in which those exercising such power, which includes the distribution of scarce, valuable public resources like seats at selective state universities, would be checked by others exercising public power. In assuming good faith, Powell thus departed from the assumptions about human nature that guided the framing of the Constitution, and the results are no longer a secret.

41. T. Pell, Address at Hamilton College (Apr. 5, 1999). See also, Cohen, *supra* note 4.

42. See Hall, *supra* note 4. See also, ALEKSANDR SOLZHENITSYN, LIVE NOT BY LIES, THE DEMOCRACY READER, 207 (Diane Ravitch & Abigail Theinstrom eds. 1992).

43. University of Cal. Regents v. Bakke, 438 U.S. 265, 314 (1978). As Professor Cohen notes, "Powell was no simpleton. He realized well enough that the individualized way of taking race into account for which he was making some room might be abused by unscrupulous administrators, transformed into systematic preference. Being an honorable man, he began with the presumption that others would act honorably as well." Cohen, *supra* note 4.

44. See THE FEDERALIST NOS. 15, 65 (Alexander Hamilton), No. 51 (James Madison); John Adams, *The Prudent Constitutions of America*, in THE PORTABLE CONSERVATIVE READER 51-64 (R. Kirk, ed., 1982).

IV. THE SOLUTION: FEDERAL JUDICIAL OVERSIGHT OF PUBLIC UNIVERSITY ADMISSIONS

If we have clarified the problem, then what is the solution? One response, of course, for which there is ample justification, would be for the Court in an appropriate case simply to reaffirm the *Hopwood* ruling that educational diversity is not a compelling state interest. While this might happen, our premise is that Justice Powell's *Bakke* opinion should be upheld and enforced.⁴⁵ After all, diversity is arguably consistent with First Amendment values, and constitutional law has always been at least as much a matter of the practical accommodation of conflicting interests as the reflection of perfectly coherent principles.⁴⁶ So, let us take *Bakke* seriously, but ask, what are the wages of doing so? What are the implications of an honest attempt to accommodate the individualist and diversity principles?

For reasons considered above, we must begin with the premise that admissions committees cannot be trusted. There is no reason to assume that they will act in the good faith that Justice Powell presumed.⁴⁷ In fact, there is every reason to expect otherwise. If the appropriate remedy for a closed process which has yielded unconstitutional abuse is to open it,⁴⁸ then the logical consequence of taking *Bakke* seriously is suggested in the Piscataway Brief, drafted by faculty at "ground zero" of the affirmative action debate.⁴⁹ As they wrote, "[u]niversities could [operate] in ways that are readily administrable and *judicially reviewable*."⁵⁰ I therefore assert that taking *Bakke* seri-

45. Given the present Court's lack of any clear consensus on the issue, much may depend on the outcome of the 2000 national elections, which if any Justices retire soon thereafter, and who will be nominated to replace them. We know that the Senate is evenly divided between Democrats and Republicans. The President will be forced to nominate moderates to fill any Supreme Court vacancies, and so there is no way to predict how any such nominees would rule on this issue.

46. See *Bakke*, 438 U.S. at 312.

47. See *id.*

48. As Dr. King observed, "[l]ike a boil that can never be cured so long as it is covered up but must be opened with all its ugliness to the natural medicines of air and light, injustice must be exposed, with all the tension its exposure creates, to the light of human conscience and the air of natural opinion before it can be cured." See King, *supra* note 33, at 196.

49. James Traub, *Testing Texas*, THE NEW REPUBLIC, April 6, 1998, at 26.

50. Piscataway Brief, *supra* note 25, at 17 (emphasis added). The authors suggested this knowing there was a good chance that the Court would rule against the Piscataway Township. Since their only hope of salvaging affirmative action in any form

ously requires nothing less than federal judicial oversight of the admissions processes at those selective public universities wishing to use race preferences to advance educational diversity.⁵¹ This proposal, of course, raises many questions. This article concludes by identifying and speaking to several of them.

V. OBJECTIONS AND RESPONSE

It might initially be objected that the proposal simply calls for more government, and in particular, more of the least democratic branch of government. I respond first, that it would be disingenuous for modern liberals like affirmative action proponents to stand on the principle of minimal government. They obviously favor activist government when it advances their ends. In any case, since relatively few public universities are selective enough to need race preferences to advance race diversity, excessive governmental intervention is not being advocated.

Yet it will be insisted that Justice Powell himself rejected judicial oversight in this context. Instead, he stressed the importance of the academic freedom of universities in selecting their student bodies, and commentators have underscored the value of such institutional autonomy.⁵² As Loewy writes,

was to suggest a solution that is fair and principled, and not merely partisan, this proposal has the credibility of a statement against interest.

51. This assumes, of course, that selective public universities will still want to use race preferences in admissions in the medium to long run, and this is far from certain. Beyond the influence of practices in post-Proposition 209 California, much may depend on the impact on other states of two pending legal developments in Florida. See, Cohen, *supra* note 4; Traub, *supra* note 49. One is the One Florida Initiative, Governor Jeb Bush's executive order replacing race preferences in public university admissions and race and gender preferences in public contracting and with race and gender neutral measures designed to ensure diversity. See, P. Douglas Filaroski, *All Eyes on One Florida's Effect on Campaign*, FLORIDA TIMES-UNION, March 11, 2000, at B1. The other is the success of the Florida Civil Rights Initiative (FCRI), a proposed state constitutional amendment roughly modeled on California's Proposition 209. While the Florida Supreme Court ruled that the FCRI in its present form violates both the Constitutional and statutory provisions governing citizens' ballot initiatives, and so could not be placed on the November 2000 ballot, FCRI sponsor Ward Connerly has vowed to redraft the FCRI and place it on the 2002 ballot. See T. Csar, *Connerly Postpones Initiative on Race*, FLORIDA TIMES - UNION, May 9, 2000, at A1. Nonetheless, some of the equal protection challenges mentioned above may be in the federal courts for a few years yet, perhaps prompting the Court to revisit the *Bakke* question for the first time in over twenty years. The question may thus remain relevant, if not burning, for at least a couple of years yet.

52. See *Bakke*, 438 U.S. at 314.

"[m]erit . . . is ordinarily determined by institutional needs."⁵³ Malamud adds that, "(i)n the logic of capitalism, the needs of institutions, not individual desert, defines merit."⁵⁴ As Bok and Bowen instruct us, universities have "much broader purposes than simply rewarding students who are thought to have worked especially hard."⁵⁵

I respond first that Powell at least contemplated judicial oversight where constitutional limits are disregarded. As he wrote, "[s]o long as the university proceeds on an individualized basis, there is no warrant for judicial interference with the academic process."⁵⁶ Beyond this, however, the argument from institutional autonomy simply begs the question. Even legislatures in our system are subject to judicial review to ensure that they exercise the public power with which they have been entrusted consistently with the Constitution. A fortiori, the nonelected bureaucrats and academics on public university admissions committees are also properly subject to judicial oversight. In distributing scarce, valuable public resources like seats at selective public universities, they too exercise public power and the facts show that they cannot be trusted to do so in accordance with the constitution. Stressing that, "Constitutional limitations . . . may not be disregarded,"⁵⁷ Justice Powell reminded us that public institutions in a democracy are not autonomous from the Constitution.⁵⁸ Since the presumption of

53. Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity From Affirmative Action in Law School Admissions Process*, 77 N.C. L. REV. 1479, 1492-93 (1999).

54. Malamud, *supra* note 4, at 1708.

55. BOK AND BOWEN, *supra* note 4, at 277.

56. *Bakke*, 438 U.S. at 319, n. 53.

57. *Id.* at 314.

58. In fact, the claim that public universities should be free to employ race (or gender) as they see fit in the distribution of scarce, valuable goods is especially weak since the argument from institutional autonomy is largely invalid even in the private sector, which often has more legal autonomy in such matters. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Trans. Agency, Santa Clara County*, 480 U.S. 616 (1987). Fifty years ago, businesses like law firms routinely told minorities and women, like Sandra Day O'Connor, that they were unhireable because of "institutional needs", i.e., their clients would not take a minority or female professional seriously. See, WILLIAM COHEN AND DAVID J. DANIELSKI, *CONSTITUTIONAL LAW: CIVIL LIBERTIES AND INDIVIDUAL RIGHTS* 403 (4th ed., 1997). Though some may favor a return to the days when the prerogatives of powerful institutions came first and the civil rights of individuals to equal treatment came second, the 1964 Civil Rights Act made such discrimination illegal. See, 42 U.S.C.S. § 2000(e). The Equal Protection Clause, which likewise expressly protects individuals, demands no less.

good faith has been systematically betrayed, the condition underlying the claim to institutional autonomy is not satisfied, and any autonomy rooted in the authority of Powell's opinion has been significantly forfeited.⁵⁹

Yet it might still be objected that there is no need for continuing federal jurisdiction because organizations like The Center for Individual Rights, using the various freedom of information laws, will perform a "watchdog" function. Judicial intervention would thus be unnecessary except on a case-by-case basis. Though he does not advance this particular argument, Professor Bloom has offered a proposal consistent with it. In his view, public universities wishing to rely on *Bakke* as authority to use race preferences in admissions should regularly "publish sufficient data about the process to allow interested and affected constituencies to make an intelligent assessment of what the institution is doing."⁶⁰

This is a sensible policy which would help make Bok and Bowen's "fishbowl theory"⁶¹ a reality. However, while it would certainly be a necessary component of taking *Bakke* seriously, it is not clear that it would be sufficient. In their documented zeal for proportional representation, admissions officials might well risk an unconstitutionally large gap in the objective qualifications of successful applicants from different racial and ethnic groups, gambling that the lack of automatic oversight, the cumbersome process of bringing a legal challenge, and the limited resources of groups like the CIR would effectively preserve the status quo. We must therefore be prepared to do more. Notwithstanding the existence of watchdog groups like the ACLU and the NAACP Legal Defense Fund, after all, the federal courts properly retained jurisdiction over southern public school desegregation where ongoing constitutional violations by defiant public officials had been proven.⁶² If that process was important enough for continuing federal jurisdiction, there is no principled way to distinguish public affirmative action in this regard. Public education and unconstitutional race discrimination are two of the most important concerns of any de-

59. Beyond this, the argument from institutional autonomy seems elitist insofar as any public university applicant whose family has paid taxes to support that university is entitled to an admissions process consistent with the constitution.

60. Bloom, *supra* note 9, at 67. For elaboration, *see*, nn.67-69.

61. *See* BOWEN AND BOK, *supra* note 13.

62. *See* *Brown v. Board of Educ.* (Brown II), 349 U.S. 294 (1955).

mocracy. Their intersection is especially worthy of close supervision.

Yet it might still be claimed that the courts should stay out of the public university admissions process because powerful institutions have ways of achieving their ends regardless of attempts to regulate them. Notwithstanding Justice Powell's controlling opinion, the argument would proceed, institutional resistance and inertia will ultimately win the day, and so we should simply accept this "reality." Bok and Bowen have argued along these lines, warning that, "it is very difficult to stop people from finding a path toward a goal in which they firmly believe."⁶³

While this seems to have the allure of *realpolitik*, an argument based on raw power is simply an abandonment of democratic principle. We are reduced to the claim that the Constitution should be obeyed except by those powerful institutions that do not wish to do so. Fortunately, such an argument did not ultimately prevail when public officials in the South resisted the enforcement of civil rights like educational and voting access for minorities. In response to Bok and Bowen's claim that such officials have ways of doing what they want, Greve observes, "[t]rue enough; that is exactly why Southerners of an earlier generation discovered literacy tests."⁶⁴

It might still be objected that even if judicial oversight is theoretically justified, as a practical matter workable standards for such review could not be established. Any proposed standard, it is true, could be attacked as arbitrary. Yet if oversight is necessary for fidelity to *Bakke*, as I have argued, then we must simply do our best. Again, we know that we must create a compromise that honors and accommodates both the individualist and diversity principles, and so Issacharoff seems correct when he argues that the magnitude of preferences under *Bakke* must be "modest."⁶⁵ As the Brief thus suggests, "the preference could be limited to one standard deviation or fraction of

63. BOK & BOWEN, *supra* note 4, at 288. For slightly different reasons, Amar and Katyal also suggest simply throwing in the towel: since "admissions committees often inevitably know something about the race of an applicant . . . it may make sense to permit [them] to consider what they know anyway." Amar & Katyal, *supra* note 5, at 1773.

64. Greve, *supra* note 34, at 4.

65. Issacharoff, *supra* note 9, at 693-94.

a standard deviation, on the primary admissions predictor.”⁶⁶

Thus, let us assume that public universities continue to use the SAT as one of their primary admissions indicators.⁶⁷ Even assuming a standard deviation of 5% at a university where the mean SAT score is 1300 for Caucasians and Asians (and 400 is the minimum possible SAT score), a 45 point differential between the mean scores of whites and Asians on the one hand and those of the minorities receiving preferences on the other would be the maximum allowed. If this still seems unfairly to “exclude” promising minorities, we must remember two things. First, 1255 would simply be the mean SAT score for all members of the minority groups receiving a preference, so that for every minority admitted with a score of 1300, one could be admitted with a 1210. Second, a minority who scores, for example, 1180 and is still rejected under this arrangement from his first choice university is hardly condemned to illiteracy. He will unquestionably be accepted elsewhere, where he will likely ex-

66. Piscataway Brief, *supra* note 25, at 17-18.

67. It is sometimes objected that standardized test scores are illegitimate measures of potential. As Chancellor Tien puts it, “merit can not be defined solely on the basis of grades and test scores.” C. L. TIEN, *A Personal Perspective on Affirmative Action*, Post and Rogin, *supra* note 9, at 379, 380. See also Olivas, *supra* note 9, at 1069-80, 1118; Lani Guinier & Susan Sturm, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996) at nn.68-69; Yxta Maya Murray, *Merit Teaching*, 23 HASTINGS CONST. L. Q. 1073, 1112 (1996).

This is contested, however, and even some supporters of affirmative action concede some legitimacy to standardized tests. As Issacharoff notes, “there is ample evidence of the usefulness of index scores in law school admissions in terms of predicting at least first year performance.” Issacharoff, *supra* note 65, at 676, fn. 16. Bok and Bowen admit that, “in helping selective institutions screen out applicants who seem unlikely to be able to complete the academic work, grades and scores are undoubtedly of critical importance.” BOK & BOWEN, *supra* note 4, at 25 (emphasis added). Brest and Oshige also admit that criteria like standardized tests are fairly good predictors. Brest & Oshige, *supra* note 3, at 857. See also, Adrian Woolridge, *A True Test*, THE NEW REPUBLIC, June 15, 1998, at 18; Volokh, *supra* note 4, at 2064 n.12; Tamala M. Edwards, *College Prep from Day One*, TIME, July 5, 1999, at 32, 33.

Even if standardized test scores are not perfect indicators of promise, it must be admitted that race is no better an indicator. Moreover, affirmative action proponents’ position cannot be that SAT and LSAT scores are completely subjective indicators of excellence, for then they should have no difficulty with seats at Berkeley, Texas and Michigan going to the lowest scoring rather than the highest scoring minorities, and I have seen none of them admit this.

Yet it may still be objected that some universities are considering the elimination of standardized test scores in their admissions processes, relying only on grades and extracurricular activities. I respond that it is not clear that this will be widespread, but if it is, a similar formula to that suggested by the Piscataway Brief could be devised. The judges would simply look at whatever the admissions committees looked at in attempting to gauge applicant’s objective skills.

cel. Furthermore, this will be true for those Whites or Asians displaced by preferred minorities who score below the mean for nonpreferred admittees at the first choice school. The assumption that one must attend Berkeley or Virginia or Michigan to receive a good education and promising life prospects is unfounded, and this illustrates why university admissions constitute a relatively defensible context for the use of modest race preferences: the burdens imposed on nonminorities are not as severe as those imposed on them in the public employment or contracting contexts. Whereas good jobs and lucrative contracts are relatively scarce resources, there is no shortage of educational opportunities for students at the level of ability we are considering.

This brings us full circle. It might finally be objected, as Rosen suggested, that *Bakke's* rigorous enforcement would yield only token numbers of minorities at top public universities.⁶⁸ As a consequence, the argument would run, judicial oversight of the admissions processes at these institutions would undermine the advancement of the compelling state interest in educational diversity.

Taking *Bakke* seriously, however, reveals that this is not the case. As Justice Powell wrote, "[t]he diversity that furthers a compelling state interest encompasses a . . . broad . . . array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."⁶⁹ The assumption that substantial diversity is impossible without proportional representation of select races and ethnicities is thus without foundation in *Bakke*, and appropriately so. Not only does race not determine how one thinks, but there are perspective-forming obstacles like divorce, physical disability, early family death, and poverty that many minorities have never known yet which many whites have. Even to the extent that race and ethnicity are important (though not strictly necessary) elements in educational diversity, further, the rigorous judicial enforcement of *Bakke* would simply redistribute many minorities to second- and third-tier institutions, promoting the diversity associated with race there. Where this "cascading effect" occurs, as in post-Proposition 209 California,⁷⁰ it is not clear, on

68. See Rosen, *supra* note 24.

69. *Bakke*, 438 U.S. at 315.

70. See Cohen, *supra* note 4, at 30, and Traub, *supra* note 36, at 46.

balance, that anyone has been treated unjustly.

VI. CONCLUSION

I have proposed the establishment of federal judicial oversight of the admissions processes at those selective public universities wishing to use race preferences to advance educational diversity under the authority of *Bakke*. Objections to this proposal on grounds that it has drawbacks amount to nothing conclusive. It is well documented, as we have seen, that constitutional limits are frequently disregarded when the public university admissions process is not effectively supervised. As an instance of checks and balances, judicial oversight of this process would be consistent with the overall scheme of constitutional democracy.⁷¹ Even if the judges are inclined to defer to admissions committees' judgments, especially in close cases, the very fact that a relatively disinterested third party is looking over the committees' shoulders should inspire them to take *Bakke* seriously.

71. If one prefers to call our form of government a republic, Madison reminds us that a republican form of government is one in which all public power is derived directly or indirectly from the people. See MADISON, THE FEDERALIST NO. 39, *supra* note 43, at 241.