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## **Bakke's Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law**

Rachel F. Moran

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# Bakke’s Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law

Rachel F. Moran\*

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The fortieth anniversary of *Regents of the University of California v. Bakke*<sup>1</sup> is worth commemorating simply because the decision has survived. The United States Supreme Court's opinion upholding the use of race in admissions has had remarkable staying power, even as other programs of affirmative action, for example, in government contracting, have been struck down as unconstitutional.<sup>2</sup> That longevity might seem surprising because *Bakke* set forth an exacting standard of strict scrutiny under equal protection law that renders all race-based classifications suspect, whether government officials are motivated by benign or invidious purposes.<sup>3</sup> That standard is one that few programs can survive, but *Bakke* was a case with two inheritances. In addition to adopting a strict scrutiny test, the Court allowed race to be a factor in admissions because colleges and universities have unique claims to academic freedom under the First Amendment. That autonomy shields their efforts to enroll a diverse student body.<sup>4</sup>

This retrospective on *Bakke* comes at a particularly opportune moment. The decisions upholding affirmative action in higher education have always been close ones, and with the departure of Justice Anthony Kennedy, who has been a crucial swing vote, *Bakke*'s future is uncertain.<sup>5</sup> This Article will show that *Bakke* has long been identified as a race case in the public's imagination, one that reflects ongoing struggles to rectify a history of injustice and a reality of entrenched inequality. Yet, the decision has survived in the courts as an exemplar of the freedom of colleges and universities to experiment with ideas and to nourish the conditions for a healthy democracy. This dual legacy has seldom been recognized: racial equality generates all the press while academic freedom quietly powers the jurisprudence.

This legacy has roots in the case itself. Allan Bakke understood his lawsuit as a challenge to reverse discrimination, and despite the University's efforts to invoke institutional autonomy as a defense

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

<sup>2</sup> See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). For a description of the ongoing controversy surrounding affirmative action, see generally MICHELE S. MOSES, *LIVING WITH MORAL DISAGREEMENT: THE ENDURING CONTROVERSY ABOUT AFFIRMATIVE ACTION* (2016).

<sup>3</sup> See *Bakke*, 438 U.S. at 287-91 (Powell, J.).

<sup>4</sup> See *id.* at 311-15.

<sup>5</sup> See Scott Jaschik, *The Impact of Justice Kennedy*, INSIDE HIGHER ED. (June 28, 2018), <https://www.insidehighered.com/news/2018/06/28/departure-justice-kennedy-could-erase-supreme-court-majority-backing-consideration>; Richard Wolf, *Justice Anthony Kennedy to Retire, Opening Supreme Court Seat for President Trump*, USA TODAY (June 27, 2018, 2:03 PM ET), <https://www.usatoday.com/story/news/politics/2018/06/27/justice-kennedy-retiring-opening-supreme-court-seat/952716001/>.

before the California Supreme Court, the state justices framed the case in purely racial terms. Only when the litigation reached the United States Supreme Court did academic freedom emerge as a significant consideration. This Article contends that for at least some members of the Court, the autonomy accorded to institutions of higher education was directly related to a growing recognition of corporate speech rights under the First Amendment. Indeed, the Justices' internal memoranda made palpable their concern with safeguarding the liberty interests of corporate entities, including colleges and universities.

The incomplete recognition of *Bakke's* two inheritances has had important consequences for its legacy. The failure to elaborate the liberty interests in the case has limited its precedential value when diversity is invoked as a rationale for other forms of race-based decision-making. In dismissing diversity's relevance, the Court has simply treated academic freedom as *sui generis* without analyzing the institutional concerns that animated protections for colleges and universities.<sup>6</sup> At the same time, *Bakke's* liberty jurisprudence has been largely isolated from other areas of First Amendment law, particularly corporate speech rights, which have come to enjoy increasing protection.<sup>7</sup> As a result, *Bakke* has been vulnerable to claims that it is a doctrinal anomaly — distinct from other equal protection precedents that reject a diversity rationale and divorced from other First Amendment decisions that uphold institutional autonomy. In fact, though, *Bakke's* dual inheritances make it difficult to undo the Court's solicitude for academic freedom — and its deference to the circumscribed use of race to enroll a diverse student body — without calling into question the constitutional grounds for ever more vigorous protection of corporate rights.

#### I. BAKKE BEGINS AS A CASE ABOUT RACE AND EQUALITY

When Allan Bakke challenged the medical school admissions process, he could have focused on a clear bias against older applicants.

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<sup>6</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007) (rejecting diversity rationale as basis for use of race in assigning students to public elementary and secondary schools). In *Metro Broad. v. FCC*, 497 U.S. 547, 566-68 (1990), the Court recognized broadcasting diversity as at least an important government interest, but this decision was subsequently overruled because it had adopted an intermediate standard of review rather than strict scrutiny for federal classifications based on race and ethnicity. *Adarand*, 515 U.S. at 225-27.

<sup>7</sup> See Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html>.

Instead, he targeted the University of California, Davis and its special admissions program for underrepresented minorities. In doing so, his complaint became part of a high-profile legal controversy surrounding voluntary efforts to integrate colleges and universities that had not engaged in past racial discrimination. Despite the University's efforts to invoke autonomy interests, questions of race and equality dominated all facets of the litigation before the California courts from the complaint to the amicus briefs to the decisions themselves.

#### A. *How the Bakke Case Began*

When Allan Bakke applied to medical school, he already had achieved success as an engineer but felt that being a physician was his true calling.<sup>8</sup> He undoubtedly believed that he would be a competitive applicant: He had earned a 3.51 grade point average in mechanical engineering at the University of Minnesota, and he had received scores at the ninety-fourth percentile or above on the Medical College Admissions Test with the exception of the general knowledge section, for which he received a score in the seventy-second percentile.<sup>9</sup> In 1972, when he was in his early thirties, Bakke applied to two medical schools and was rejected by both; one school indicated that his age was "above their stated limit."<sup>10</sup> The following year, he applied to the new medical school at the University of California, Davis, as well as ten other schools. He again was rejected by all of them, and one school indicated that his age was a "negative factor."<sup>11</sup> At Davis, Bakke was hampered not only by his age, but by the lateness of his submission. His mother-in-law had become seriously ill, which delayed his application and meant that there were fewer seats left in the entering class.<sup>12</sup> Despite these difficulties, Bakke just missed being accepted by Davis. Even so, his appeal from the denial of admission was unsuccessful.<sup>13</sup>

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<sup>8</sup> See JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 3 (1979); BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 2-3 (1988).

<sup>9</sup> See HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* 46 (2000); DREYFUSS & LAWRENCE, *supra* note 8, at 15-16.

<sup>10</sup> DREYFUSS & LAWRENCE, *supra* note 8, at 16. Bakke had written to nearly a dozen medical schools to inquire about their policies on age. See BALL, *supra* note 9, at 47.

<sup>11</sup> DREYFUSS & LAWRENCE, *supra* note 8, at 16; see also BALL, *supra* note 9, at 54.

<sup>12</sup> See BALL, *supra* note 9, at 54-55; DREYFUSS & LAWRENCE, *supra* note 8, at 13, 21; SCHWARTZ, *supra* note 8, at 5.

<sup>13</sup> See BALL, *supra* note 9, at 54-55; DREYFUSS & LAWRENCE, *supra* note 8, at 13-14, 16; SCHWARTZ, *supra* note 8, at 5-6.

After his rejection, Bakke began to question the medical school's special admissions program, which set aside sixteen percent of the one hundred spots in the entering class for students from disadvantaged backgrounds. On his application, Bakke had not indicated that he suffered a history of economic or cultural disadvantage, nor did he claim to be a member of an underrepresented racial or ethnic group. As a result, he could not compete for these sixteen seats.<sup>14</sup> Bakke's decision to sue was significantly influenced by Peter Storandt, an assistant to the dean of student affairs at Davis's medical school. In response to Bakke's letter expressing concerns about his initial rejection, Storandt not only urged him to reapply but also noted that if he were denied admission again, he "might consider taking [Storandt's] other suggestion, which is then to pursue your research into admissions policies based on quota-oriented minority recruiting."<sup>15</sup> Bakke later met with Storandt to gather information about the special program's operation. As a medical school insider, Storandt would become a "mentor — [Bakke's] coach in filing suit against Storandt's own employer," behavior that ultimately would lead Davis to fire him.<sup>16</sup>

Before reapplying to Davis, Bakke consulted a well-regarded San Francisco attorney, Reynold H. Colvin. A graduate of Berkeley's law school, Colvin previously had sued the San Francisco Unified School District over a decision to exempt minority hires from layoffs under a planned reorganization. When his challenge succeeded, Colvin garnered newfound prominence for his role in what was dubbed the "Zero Quota" case. After Bakke reached out to Colvin, the attorney echoed Storandt's advice, recommending that Bakke reapply and sue only if he was denied admission again.<sup>17</sup> In keeping with these suggestions, Bakke applied for a second time and was once again rejected. This time, the decision was not a close one, in part because of Bakke's efforts to challenge the special program. In particular, Dr. George Lowrey, the dean of student affairs, gave Bakke a very low score on his interview. That interview focused on the school's

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<sup>14</sup> See DREYFUSS & LAWRENCE, *supra* note 8, at 14-15; SCHWARTZ, *supra* note 8, at 6.

<sup>15</sup> DREYFUSS & LAWRENCE, *supra* note 8, at 22; SCHWARTZ, *supra* note 8, at 6-7.

<sup>16</sup> SCHWARTZ, *supra* note 8, at 6; Robert Lindsey, *White/Caucasian — and Rejected*, N.Y. TIMES, April 3, 1977, at 42; see also DREYFUSS & LAWRENCE, *supra* note 8, at 22-23.

<sup>17</sup> See *Anderson v. S.F. Unified Sch. Dist.*, 357 F. Supp. 248, 249-50, 254-55 (N.D. Cal. 1972); BALL, *supra* note 9, at 53, 55; DREYFUSS & LAWRENCE, *supra* note 8, at 33-34. Indeed, Bakke was so committed to bringing suit that he wanted to proceed with his case even if he was admitted to medical school. See DREYFUSS & LAWRENCE, *supra* note 8, at 25-26.

admissions policies, and Lowrey — aware of Bakke's antipathy to affirmative action — found his views on the issues narrow and inflexible.<sup>18</sup> After Bakke's second denial of admission, Colvin immediately filed suit in state court challenging Davis's special program under both federal and state law.

B. *The Bakke Case Is Framed in Racial Terms*

Bakke's lawsuit was framed entirely in terms of race and equality. Bakke alleged that the special program violated his constitutional rights because he was "duly qualified for admission to Medical School and the sole reason his application was rejected was on account of his race, to-wit, Caucasian and white, and not for reasons applicable to persons of every race."<sup>19</sup> According to the complaint,

[A] special admissions committee composed of racial minority members evaluated applications of a special group of persons purportedly from economic and educationally disadvantaged backgrounds; that from this group, a quota of 16%, or 16 out of 100 first-year class members, was selected; that, in fact, all applicants admitted to said medical school as members of this group were members of racial minorities; that under this admission program racial minority and majority applicants went through separate segregated admissions procedures with separate standards for admissions; [and] that the use of such separate standards resulted in the admission of minority applicants less qualified than plaintiff and other non-minority applicants who were therefore rejected.<sup>20</sup>

Although the complaint described other non-minority applicants who were denied admission, Colvin deliberately chose not to file a class action because he wanted the trial court to focus on the harms Bakke himself had suffered. Colvin hoped that this strategy would enable Bakke to be admitted to the medical school as expeditiously as possible.<sup>21</sup>

Donald Reidhaar, another graduate of Berkeley's law school, served as general counsel for the University of California. He was an experienced attorney who had spent the bulk of his career working for

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<sup>18</sup> See BALL, *supra* note 9, at 55-56; DREYFUSS & LAWRENCE, *supra* note 8, at 28-29.

<sup>19</sup> Complaint for Mandatory, Injunctive, and Declaratory Relief at 4-5, *Bakke v. Regents of the Univ. of Cal.*, No. 31287 (Sup. Ct. Cal. 1974).

<sup>20</sup> *Id.* at 4-5.

<sup>21</sup> See DREYFUSS & LAWRENCE, *supra* note 8, at 37.



the university.<sup>22</sup> As a result, he was quite familiar with ongoing disputes about the constitutional legitimacy of affirmative action. Just a few years before Bakke filed his case, Marco DeFunis, a Phi Beta Kappa graduate of the University of Washington, had challenged that institution's law school admissions program. DeFunis alleged that the program had rejected him because less qualified minority applicants were given a preference.<sup>23</sup> The lower court found that the program violated DeFunis's constitutional rights and ordered him admitted.<sup>24</sup> The Washington Supreme Court then reversed the trial court's decision, and many thought that the United States Supreme Court would intervene to clarify the constitutionality of affirmative action in higher education admissions. Justice William O. Douglas granted a stay of the state high court's order, so that DeFunis could continue to attend law school while the Court reviewed his case. Consequently, DeFunis was in his final year of law study when the Justices began their deliberations.<sup>25</sup> The Court ultimately dismissed the case because the controversy was moot: DeFunis would finish law school regardless of how the lawsuit was resolved.<sup>26</sup>

With the dismissal of the *DeFunis* case, the *Bakke* litigation came at a critical moment, offering another opportunity to resolve the constitutionality of affirmative action programs in college and university admissions. Reidhaar undoubtedly appreciated the lawsuit's potential significance, but he nonetheless made decisions that led to a spotty record. His handling of the lawsuit prompted accusations that the University of California was ambivalent about the program and unwilling to wage a vigorous defense. Reidhaar was taken to task for focusing on Dr. Lowrey as his key witness, even though Lowrey had "never worked directly with the [special program] and was therefore not completely familiar with its operations."<sup>27</sup> Critics alleged that the University missed chances to show that the program did not operate as a segregated quota system. In their view, a robust defense would have established that: administrators did not rigidly admit sixteen students per year, regardless of qualifications; the program had considered White applicants, although none met the social and economic criteria

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<sup>22</sup> See BALL, *supra* note 9, at 53-54; DREYFUSS & LAWRENCE, *supra* note 8, at 39.

<sup>23</sup> See *DeFunis v. Odegaard*, 507 P.2d, 1169, 1171-72 (Wash. 1973).

<sup>24</sup> See *id.* at 1172, 1180-85.

<sup>25</sup> See *DeFunis v. Odegaard*, 416 U.S. 312, 315 (1974) (per curiam).

<sup>26</sup> See *id.* at 315-20. On remand, the Washington high court declined DeFunis's request that the lawsuit be converted into a class action to make it a live controversy. See *DeFunis v. Odegaard*, 529 P.2d 438, 440-42 (Wash. 1974).

<sup>27</sup> DREYFUSS & LAWRENCE, *supra* note 8, at 41.

for eligibility; and the program had referred middle-class minority applicants to the regular admissions process.<sup>28</sup>

Other observers attacked Reidhaar for refusing to settle the case when he had the chance.<sup>29</sup> Colvin was eager to get his client into medical school at the earliest opportunity, so shortly before classes were to begin, Colvin informed Reidhaar that he was willing to drop the case if Bakke were accepted. Reidhaar declined Colvin's offer because he believed that the University needed a definitive resolution of affirmative action's constitutionality.<sup>30</sup> Still other critics second-guessed Reidhaar's decision to dispense with a trial at Colvin's request.<sup>31</sup> Colvin had not given up on getting Bakke into the entering class, and he persuaded Reidhaar that the constitutional issues could be addressed expeditiously without a full-scale trial. Instead, the parties would simply appear at a hearing before the trial judge. That decision prompted supporters of affirmative action to worry that the record was insufficiently developed, resulting in an unduly stark and simplistic portrait of the Davis program.<sup>32</sup> The critiques grew increasingly pointed when Reidhaar lost in superior court. The case was tried in Yolo County before Judge F. Leslie Manker, a senior judge sitting by designation.<sup>33</sup> The judge concluded that the special program was impermissible, though he also found that there was insufficient evidence to show that Bakke would have been admitted in the program's absence.<sup>34</sup> Because Bakke wanted to be admitted and the University wanted constitutional vindication, Colvin wryly observed that "What happened . . . was that both sides lost."<sup>35</sup>

### C. *The California Supreme Court Treats Bakke as a Reverse Discrimination Case*

Both Reidhaar and Colvin realized that an appeal from Judge Manker's ruling was imperative. Because the trial court's ruling effectively prevented the University from using affirmative action programs at any of its campuses, Reidhaar sought direct review before

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<sup>28</sup> See *id.*

<sup>29</sup> See *id.* at 48-49.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 59-60.

<sup>32</sup> See *id.*

<sup>33</sup> See BALL, *supra* note 9, at 56.

<sup>34</sup> See *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1156 (1976) (describing lower court opinion).

<sup>35</sup> DREYFUSS & LAWRENCE, *supra* note 8, at 64.

the California Supreme Court. He must have felt confident of his chances before a court then considered one of the most liberal in the nation.<sup>36</sup> The California justices granted Reidhaar's request for review, even though there were concerns that "this was not the ideal case upon which to decide such an important issue."<sup>37</sup> In his brief, Reidhaar emphasized the broad discretion that the University had to craft admissions programs because of the expertise of faculty and administrators as well as a California constitutional provision that granted substantial autonomy to the Regents.<sup>38</sup> He contended that the special admissions program should not be subject to strict scrutiny and clearly passed muster under both Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause.<sup>39</sup> Colvin responded that the Constitution prohibited discrimination against all persons so strict scrutiny had to apply; that is, the program must be necessary to promote a compelling state interest. Colvin argued that the program plainly fell short because it relied on a rigid quota system that excluded Bakke on the basis of race.<sup>40</sup>

This time, both sides enlisted amici curiae to bolster their arguments.<sup>41</sup> B'nai Brith, for example, filed a brief in support of Bakke that described the dangers of quotas and noted that "racial discrimination against whites is a distinctly modern phenomenon."<sup>42</sup> To explain these new dangers, the brief pointed out that "the white majority is pluralistic, containing within itself a multitude of religious and ethnic minorities — Catholics, Jews, Italians, Irish, Poles — and many others who are vulnerable to prejudice and who to this day suffer the effects of past discrimination."<sup>43</sup> Because Whites were not a monolithically privileged group, some members of that group — like Bakke — could be victims of reverse discrimination. On the other side, higher education and civil rights organizations filed amicus briefs in

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<sup>36</sup> See *id.* at 68.

<sup>37</sup> *Id.* at 69.

<sup>38</sup> See Opening Brief of Appellant and Cross-Respondent at 7, 11-15, *Bakke*, 553 P.2d 1152 (1976) (No. 23311).

<sup>39</sup> See *id.* at 16-35.

<sup>40</sup> See Reply Brief of Plaintiff, Respondent and Cross-Appellant at 2-11, *Bakke*, 553 P.2d 1152 (1976) (No. 23311).

<sup>41</sup> See BALL, *supra* note 9, at 58 (three organizations filed briefs in support of Bakke while six filed briefs in support of the University).

<sup>42</sup> Brief of Anti-Defamation League of B'nai B'rith as Amicus Curiae at 9, *Bakke*, 553 P.2d 1152 (1976) (No. 23311).

<sup>43</sup> *Id.* at 10 (quoting Larry M. Lavinsky, DeFunis v. Odegaard: *The Non-Decision with a Message*, 75 COLUM. L. REV. 520 (1975)).

support of the University of California.<sup>44</sup> These briefs emphasized the importance of affirmative action in promoting racial integration for groups that had long suffered exclusion. In the view of these amici, deep racial injuries were not fungible with claims of discrimination by Whites.<sup>45</sup> The amicus briefs on both sides clearly framed the case in terms of race, and even briefs in support of the University did not emphasize academic freedom and institutional autonomy.

It must have come as a terrible blow to the University when the California Supreme Court held 5–1 that the Davis program was unconstitutional.<sup>46</sup> According to Justice Stanley Mosk's majority opinion, the program's goals were laudable but inevitably produced racial division that outweighed any benefits.<sup>47</sup> Despite purportedly benign objectives, the program's "overemphasis on race" meant that the "rewards and penalties, achievements and failures, are likely to be considered in a racial context through the school years and beyond."<sup>48</sup> In support of this view, Mosk noted that Davis's impermissible quota system actually resurrected a process once used to exclude racial and religious minorities.<sup>49</sup> The majority's concerns about racially divisive dynamics were further compounded by the program's logistical challenges. As Mosk's opinion explained, colleges and universities inevitably would encounter difficulties in determining which groups should be eligible. Once those groups were identified, they would develop a vested interest in maintaining the programs in perpetuity.<sup>50</sup> The majority therefore concluded that "the principle that the Constitution sanctions racial discrimination against a race — any race — is a dangerous concept fraught with potential for misuse in

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<sup>44</sup> For briefs on behalf of higher education organizations, see, e.g., Brief of Association of American Law Schools as Amicus Curiae, *Bakke*, 553 P.2d 1152 (1976) (No. 23311); Brief of the Association of American Medical Colleges as Amicus Curiae, *Bakke*, 553 P.2d 1152 (1976) (No. 23311); Brief of Society of American Law Teachers as Amicus Curiae, *Bakke*, 553 P.2d 1152 (1976) (No. 23311). As for briefs on behalf of civil rights organizations, see, e.g., Brief of Mexican American Legal Defense and Educational Fund, *Bakke*, 553 P.2d 1152 (1976) (No. 23311); Brief of National Association for the Advancement of Colored People as Amicus Curiae, *Bakke*, 553 P.2d 1152 (1976) (No. 23311).

<sup>45</sup> See, e.g., Brief of Society of American Law Teachers as Amicus Curiae, *supra* note 44, at 4-7; Brief of Mexican American Legal Defense and Educational Fund, *supra* note 44, at 7-11.

<sup>46</sup> See *Bakke*, 553 P.2d at 1172 (1976), *aff'd in part and rev'd in part*, 438 U.S. 265 (1978).

<sup>47</sup> See *id.* at 1170-71.

<sup>48</sup> *Id.* at 1171.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

situations which involve far less laudable objectives than are manifest in the present case.”<sup>51</sup>

Justice Tobriner, in a lonely dissent, emphasized the pernicious effects of racial animus as well as the need for affirmative action programs to redress these lingering harms. As he wrote: “Two centuries of slavery and racial discrimination have left our nation an awful legacy, a largely separated society in which wealth, educational resources, employment opportunities — indeed all of society’s benefits — remain largely the preserve of the white-Anglo majority.”<sup>52</sup> In his view, affirmative action programs had made only modest inroads in integrating bastions of privilege like America’s colleges and universities, and he chided his colleagues for rejecting a voluntary integration program and thus relinquishing the court’s mantle of leadership in protecting minority rights.<sup>53</sup> Both the majority and the dissent clearly understood *Bakke* as a case about racial equality, though they took diametrically opposite views on what that concept meant.

In the wake of this demoralizing defeat, the University had to petition the United States Supreme Court for review. Because the California Supreme Court’s decision invalidated affirmative action on every campus in the University of California system, Reidhaar once again wanted to expedite the process. To avoid a remand to the trial court, the University conceded that Bakke would have been admitted in the absence of a special program.<sup>54</sup> The California Supreme Court then ordered Bakke’s immediate admission to medical school, but Justice William Rehnquist stayed the order pending Supreme Court review.<sup>55</sup> Confident that the Court would hear the case, Reidhaar secured the assistance of Paul Mishkin, a constitutional law professor at the Berkeley campus, and Jack Owens, a former clerk to Justice Lewis Powell, to assist with preparations, even before the Regents approved a petition for certiorari by an 11–1 vote.<sup>56</sup> When the Court did agree to hear the case, the Regents authorized even more firepower for the University’s legal team, asking former Solicitor General and Harvard Law School professor Archibald Cox to present the oral argument.<sup>57</sup> The very day that the Court granted certiorari,

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1191 (Tobriner, J., dissenting).

<sup>53</sup> *See id.*

<sup>54</sup> *See* BALL, *supra* note 9, at 64; DREYFUSS & LAWRENCE, *supra* note 8, at 91.

<sup>55</sup> *See* BALL, *supra* note 9, at 61.

<sup>56</sup> *See* DREYFUSS & LAWRENCE, *supra* note 8, at 94.

<sup>57</sup> *See id.* at 163.

representatives from the University were in Washington, D.C. trying to convince Solicitor General Wade McCree to intervene in the case.<sup>58</sup> Because of weaknesses in the trial court record, McCree was not eager to get involved, but after canvassing the heads of major federal agencies, he decided that the United States had to become a party to the litigation.<sup>59</sup> That decision would turn out to be something of a mixed blessing for the University.

## II. BAKKE IS TRANSFORMED INTO A CASE ABOUT RACIAL EQUALITY AND ACADEMIC FREEDOM BEFORE THE UNITED STATES SUPREME COURT

When *Bakke* came before the United States Supreme Court, it was framed almost entirely as a case about race and equality. Having lost decisively before the California high court, the University largely dropped its claim to any special autonomy. Indeed, little in the pleadings or amicus briefs would have alerted an astute Court-watcher that *Bakke* would become a case about academic freedom. That profoundly important shift occurred behind the scenes as the Justices exchanged views about the case and situated their decision in an emerging and invigorated jurisprudence of corporate rights.

### A. *Bakke Is Argued as a Race Case Before the United States Supreme Court*

When the Justices considered the petition for certiorari in *Bakke*, the odds of Supreme Court review were not nearly as good as Reidhaar might have imagined. Four members of the Court — Justices William Brennan, Thurgood Marshall, Harry Blackmun, and Chief Justice Warren Burger — opposed taking the case. Brennan led the opposition out of concern that the “quota-like” rigidity of the Davis program would make it vulnerable to constitutional challenge. He preferred to wait for a case with more sympathetic facts that would allow the Justices to endorse an affirmative action program.<sup>60</sup> But five colleagues disagreed, perhaps because the Court recently had been criticized for ducking the issue in *DeFunis*.<sup>61</sup>

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<sup>58</sup> See *id.*

<sup>59</sup> See BALL, *supra* note 9, at 73-74; DREYFUSS & LAWRENCE, *supra* note 8, at 163-64.

<sup>60</sup> See SCHWARTZ, *supra* note 8, at 41-42. In fact, an amicus brief filed by a coalition of fifteen civil rights organizations urged the Justices not to grant certiorari because of the deficiencies in the case record. See BALL, *supra* note 9, at 65.

<sup>61</sup> Indeed, Brennan himself had chided his colleagues, noting that “I can . . . find no justification for the Court’s straining to rid itself of this dispute.” *DeFunis v. Odegaard*, 416 U.S. 312, 349 (Brennan, J., dissenting) (joined by Douglas, White, and

Once on the docket, the *Bakke* case became one of the highest profile lawsuits in the Court's history.<sup>62</sup> After the University's crushing defeat before the California high court, it took a different tack before the United States Supreme Court. The University's brief no longer focused on autonomy and discretion but instead emphasized the need to overcome vestiges of past discrimination, even if the medical school had not itself excluded minority students on the basis of race. Given the school's laudable objectives, the University argued that strict scrutiny should not apply, but even if it did, the program passed muster.<sup>63</sup> By contrast, Colvin continued to highlight the dangers of quotas and reverse discrimination in his submission.<sup>64</sup>

Having reluctantly decided to intervene in the case, the United States submitted a brief that had a fraught political history. McCree, who had been appointed by President Jimmy Carter, was only the second African American to hold the post of Solicitor General.<sup>65</sup> Undoubtedly to the surprise of the University's supporters, he initially endorsed the California Supreme Court's decision to strike down the Davis program. When details of the draft of the United States' brief leaked out, civil rights advocates and the Congressional Black Caucus protested vigorously.<sup>66</sup> To deal with the controversy, Attorney General Griffin Bell became involved, and eventually the United States shifted its position to one of general support for affirmative action. Media stories about the drama surrounding the brief irked the Justices, who feared that the disclosures were designed to sway the Court's decision. Chief Justice Burger and Justice Blackmun both reached out to McCree to complain about the coverage.<sup>67</sup>

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Marshall, J.J.).

<sup>62</sup> When Justice Lewis Powell retired from the Court, he indicated that *Bakke* was his most significant opinion. JOHN C. JEFFRIES, JR., JUSTICE LEWIS POWELL, JR. 456 (1994).

<sup>63</sup> See Brief for Petitioner at 13-25, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811).

<sup>64</sup> See Brief for Respondent at 27-35, 41-52, *Bakke*, 438 U.S. 265 (1978) (No. 76-811).

<sup>65</sup> See BALL, *supra* note 9, at 72; DREYFUSS & LAWRENCE, *supra* note 8, at 165. The first was Thurgood Marshall. See BALL, *supra* note 9, at 72.

<sup>66</sup> See BALL, *supra* note 9, at 74-75; DREYFUSS & LAWRENCE, *supra* note 8, at 166-71. The Congressional Black Caucus was not entirely mollified by changes in the United States' position. The Caucus filed its own amicus brief in *Bakke*, criticizing the United States' brief for its qualified support for affirmative action and its request for a remand. See Brief in Reply of Members of the Cong. Black Caucus, Members of the Congress of the United States in Reply to Brief of the United States, Amici Curiae at 6-12, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 204785.

<sup>67</sup> See SCHWARTZ, *supra* note 8, at 46.

At this point, earlier strategic decisions at the trial court level had some unexpected consequences. Because of the thin record in the case, the United States asked the Court to remand for further fact-finding on several issues: how applicants were compared in the special and regular admissions programs; how the medical school settled on sixteen spaces for the program; whether Asian Americans were properly included in the program; and whether the justifications advanced for the program supported its operation.<sup>68</sup> The prospect of such a delay was hardly attractive to either party. A remand would do little to advance the University's interest in a prompt constitutional resolution, nor would it help Colvin get his client into medical school as quickly as possible.

An unprecedented number of amicus briefs were filed with substantial representation on both sides. According to the amici who supported the University, a principle of strict color-blindness ignored the lingering effects of segregation, particularly in education.<sup>69</sup> These amici emphasized the benign motives behind the program, citing the considerable evidence of severe underrepresentation of minorities in medical schools as well as in other professional and graduate programs.<sup>70</sup> Some contended that the special program was a way to

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<sup>68</sup> See Brief for the United States as Amicus Curiae at 50-74, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187970. Several other amici criticized the record in the case and called for a remand. See, e.g., Brief of Amicus Curiae the Nat'l Conference of Black Lawyers at 1-26, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189533; Brief of Amici Curiae for the Nat'l Urban League et al. at 19-27, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189479. The attacks prompted the University of California to file a brief defending the record in the case. See Reply to Brief of Amici Curiae in Opposition to Certiorari, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187966.

<sup>69</sup> See, e.g., Brief Amicus Curiae of the Law Sch. Admission Council in Support of Petitioner the Regents of the Univ. of Cal. at 9-26, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188017 [hereinafter LSAC Brief]; Brief Amicus Curiae for the Nat'l Ass'n of Minority Contractors and Minority Contractors Ass'n of N. Cal., Inc. in Support of Petitioner at 10-11, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187981; Brief of the Nat'l Fund for Minority Eng'g Students, Amicus Curiae at 14-21, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187995.

<sup>70</sup> See, e.g., Brief Amici Curiae for the Bar Ass'n of San Francisco and the Los Angeles Cty. Bar in Support of Petitioner at 6, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188000; Brief of Howard Univ. as Amicus Curiae at 25-31, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189518; Brief of Amici Curiae in Support of Petitioner for Jerome A. Lackner, M.D., J.D., Director of the Cal. Dep't of Health, and Marion J. Woods, Dir. of the Cal. Dep't of Benefit Payments, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189527; Brief of the Legal Servs. Corp., Amicus Curiae on Behalf of Petitioner at 8-10, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189530; Brief of Amici Curiae Mexican Am. Legal Def. and Educ. Fund et al. at 25-26, 29-32, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 204789; Brief of the NAACP as Amicus Curiae at 6-9, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189517; Brief Amici Curiae for Nat'l



offset the exclusionary effect of narrow reliance on grades and test scores, which were imperfect predictors of professional success.<sup>71</sup> The briefs in support of the Regents generally did not treat the institutional prerogatives of colleges and universities as centrally important with a couple of notable exceptions. The State of Washington and the University of Washington, where the *DeFunis* case had been litigated, argued for the importance of giving institutions of higher education “the opportunity to experiment with a variety of methods to achieve the goal of truly integrated educational programs, truly integrated professions, and truly integrated faculties.”<sup>72</sup>

In addition, four elite private institutions — Columbia University, Harvard University, Stanford University, and the University of Pennsylvania — filed an amicus brief in which they argued that “diversity in the student body has been an important educational objective.”<sup>73</sup> As a result, the amici noted, they relied on holistic review in admitting students. That is, these universities did not look solely at academic indicators but also weighed “factors believed to contribute to diversity and strength of a student body, such as geographical distribution, employment experience, musical skills, extracurricular activities and travel.”<sup>74</sup> The brief emphasized the benefits for the learning environment as well as the need to “diversify[] the leadership of our pluralistic society.”<sup>75</sup> The amici went on to link the importance of a diverse student body to the imperative of affirmative action, observing that these “educational goals . . . cannot be realized by any racially neutral procedure known to us.”<sup>76</sup> Citing the highly selective

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Council of Churches of Christ in Am. et al. at 10-15, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189522; Brief Amicus Curiae for N.C. Ass’n of Black Lawyers at 12-13, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188013.

<sup>71</sup> See, e.g., LSAC Brief, *supra* note 69, at 45-54; Brief on Behalf of the Am. Med. Student Ass’n as Amicus Curiae at 10-14, *Bakke*, 438 U.S. 265 (No. 76-811), 1976 WL 181280; Brief of the Antioch Sch. of Law Amicus Curiae at 23-30, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189528; Brief of the Black Law Students Ass’n at the Univ. of Cal., Berkeley Sch. of Law as Amicus Curiae at 7-18, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187974; Brief of the Council on Legal Educ. Opportunity as Amicus Curiae at 17-28, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187978; Brief of the Nat’l Emp’t Law Project, Inc., as Amicus Curiae at 4-17, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188019.

<sup>72</sup> Brief of the State of Wash. and the Univ. of Wash. as Amicus Curiae at 27, *Bakke*, 438 U.S. 265 (No. 76-811), 1976 WL 178775.

<sup>73</sup> Brief of Columbia Univ. et al. as Amici Curiae at 12, *Bakke*, 438 U.S. 265 (No. 76-811), 1976 WL 181278.

<sup>74</sup> *Id.* at 12.

<sup>75</sup> *Id.* at 13.

<sup>76</sup> *Id.* at 14.

nature of the admissions process and the disparities in standardized test scores between White and minority applicants, the amici turned to the serious problems of underrepresentation that would result without affirmative action.<sup>77</sup> In her rhetorical analysis of the *Bakke* case, M. Kelly Carr notes that to the extent that the amicus briefs addressed diversity, they often treated it as an artifact of a social justice mission, rather than as an end in itself.<sup>78</sup>

The amici who aligned themselves with Bakke argued that the Davis program relied on a pernicious quota system that wrongly treated Whites as a homogeneous group.<sup>79</sup> That system ignored the fact that White ethnic groups had suffered their own histories of discrimination and therefore should not be subject to reverse discrimination. B'nai Brith and other Jewish organizations pointed to the harms that they had experienced as members of a discrete and insular minority.<sup>80</sup> In addition, the Sons of Italy offered statistics on the underrepresentation of Italian Americans in the professions,<sup>81</sup> and the Polish American Congress suggested that there was no substantial difference between the term "Pollack" and other racial epithets.<sup>82</sup> The Young Americans for Freedom questioned the very notion of a "white majority" because "it assumes the majority group is monolithic, when in fact it is pluralistic" and because "[t]hese dissimilar groups have each endured past discrimination."<sup>83</sup> As a result, there was no viable reason to prefer some groups over others, as Davis's special program did.<sup>84</sup>

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<sup>77</sup> See *id.* at 15-24.

<sup>78</sup> See M. KELLY CARR, *THE RHETORICAL INVENTION OF DIVERSITY: SUPREME COURT OPINIONS, PUBLIC ARGUMENT, AND AFFIRMATIVE ACTION* 106 (2018).

<sup>79</sup> See, e.g., Brief of the U.S. Chamber of Commerce Amicus Curiae at 35-49, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187976; Brief of Amici Curiae for the Comm. on Acad. Nondiscrimination and Integrity and the Mid-America Legal Found. at 75-77, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189551.

<sup>80</sup> See Brief Amici Curiae of Anti-Defamation League of B'nai Brith et al. at 5-6, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188002; see also Brief of Am. Jewish Comm. et al. at 21-22, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188015; Brief of the Queens Jewish Comm. Council and the Jewish Rights Council as Amici Curiae in Opposition to Petitioner at 9, 11, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188014.

<sup>81</sup> See Brief Amicus Curiae for the Order Sons of Italy in America in Support of Respondent at 2-4, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189539.

<sup>82</sup> See Brief of the Polish Am. Cong. et al. as Amici Curiae at 10, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187975.

<sup>83</sup> Brief of Amicus Curiae Young Ams. for Freedom at 10, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187991.

<sup>84</sup> See *id.* at 10-12.

With what one Justice described as “the formidable pile of briefs”<sup>85</sup> in hand, the process of evaluating the constitutionality of affirmative action began. By the time the Justices heard oral argument in the case, they had discussed the issues privately, become acutely aware of the intense public feeling surrounding the case, and realized that they themselves were sharply divided.<sup>86</sup> The dialogue surrounding *Bakke* was so charged that it tested even sturdy old alliances. Over lunch, Justice Brennan asked Justice Marshall if he would be comfortable were his son to apply to medical school and receive special consideration because of his race. Marshall reportedly replied “Damn right, they owe us!”<sup>87</sup> Brennan was surprised by the answer, and Marshall later concluded that “I think [my colleagues on the Supreme Court] honestly believe that Negroes are so much better off than they were before.”<sup>88</sup>

Anticipation ran high on the day of oral argument in the *Bakke* case. Hundreds lined up to get a seat in the courtroom with some arriving as early as 4:00 AM, and many left disappointed when the 400 seats in the courtroom were filled.<sup>89</sup> Allan Bakke, however, was not among the spectators; he preferred to avoid the intense media scrutiny.<sup>90</sup> Those lucky enough to get a seat listened to Archibald Cox begin the argument for the University by informing the Justices that “This case . . . presents a single vital question: whether a state university, which is forced by limited resources to select a relatively small number of students from a much larger number of well-qualified applicants, is free, voluntarily, to take into account the fact that a qualified applicant is Black, Chicano, Asian, or native American in order to increase the number of qualified members of those minority groups trained for the educated professions and participating in them, professions from which minorities were long excluded because of generations of pervasive racial discrimination.”<sup>91</sup>

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<sup>85</sup> SCHWARTZ, *supra* note 8, at 43. Although the pile of briefs was formidable, Justice Lewis Powell read only a select few identified as useful by his law clerk Robert Comfort. See CARR, *supra* note 78, at 122-23.

<sup>86</sup> BALL, *supra* note 9, at 87-88.

<sup>87</sup> *Id.* at 86.

<sup>88</sup> *Id.*

<sup>89</sup> See *id.* at 88-89.

<sup>90</sup> See *id.* at 88.

<sup>91</sup> Oral Argument of Mr. Archibald Cox on Behalf of the Petitioner, in 100 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1977 TERM SUPPLEMENT 623, 623 (Philip B. Kurland & Gerhard Casper eds., 1978) [hereinafter LANDMARK BRIEFS].

In explaining why the Justices should answer that question in the affirmative, Cox emphasized three key realities behind the program: the number of qualified applicants was “vastly greater” than the number of seats in the entering class; a history of racial discrimination had shut minorities out of quality education and access to the professions; and “no racially blind method of selection . . . will enroll today more than a trickle of minority students in the nation’s colleges and professions.”<sup>92</sup> Given these circumstances, Cox insisted that the Davis medical school could voluntarily use race in its admissions process to promote several socially valuable objectives: increasing the number of doctors from underrepresented racial and ethnic groups; augmenting the number of doctors serving minority communities; compensating for past societal discrimination; and enhancing the diversity of the student body.<sup>93</sup> Finally, Cox insisted that the Davis program did not rely on quotas because it was not adopted with invidious intent, did not stigmatize individuals or groups, and did not operate rigidly regardless of the qualifications of individual applicants.<sup>94</sup>

After Cox spoke on behalf of the University, Solicitor General Wade McCree rose to address the Court. He opened with a striking observation that brought home the ongoing significance of racial discrimination, reminding the Justices that “many children born in 1954, when *Brown* was decided, are today, twenty-three years later, the very persons knocking on the doors of professional schools, seeking admission . . . . They are persons who, in many instances, have been denied the fulfillment of the promise of that decision, because of resistance to this Court’s decision . . . .”<sup>95</sup> He contended that the Davis medical school could adopt a special admissions program, regardless of whether it had engaged in past discrimination, in response to a history of racial animus in California and to similar “conduct throughout the nation.”<sup>96</sup> McCree argued that the Court should reach a definitive constitutional conclusion,<sup>97</sup> and in doing so, he sought to deflect some Justices’ efforts to decide the case on statutory grounds.<sup>98</sup> Despite his desire for a constitutional ruling,

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<sup>92</sup> *Id.* at 623-24.

<sup>93</sup> *See id.* at 628-29, 632, 637-8.

<sup>94</sup> *See id.* at 625-27.

<sup>95</sup> Oral Argument of Wade H. McCree, Jr., on Behalf of the United States as Amicus Curiae, in LANDMARK BRIEFS, *supra* note 91, at 639, 639.

<sup>96</sup> *Id.* at 640-41.

<sup>97</sup> *See id.* at 643.

<sup>98</sup> *See BALL, supra* note 9, at 86-87.

McCree acknowledged that some delay might be inevitable. In response to questions from the Justices, McCree discussed the need for a remand, in part to address the propriety of including all Asian Americans in the special program.<sup>99</sup>

Reynold Colvin was the last of the three attorneys to address the Court when he spoke on behalf of Allan Bakke. One Justice recalled that Colvin was “plainly in over his head,” which was “unfortunate” given “the importance of the case” but did provide “comic relief.”<sup>100</sup> Colvin spent a great deal of time rehearsing the facts of the case, rather than analyzing the legal issues.<sup>101</sup> Eventually, Justice Powell was moved to observe that “the university doesn’t deny or dispute the basic facts. They are perfectly clear. We are here — at least I am here — primarily to hear a constitutional argument. You have devoted twenty minutes to laboring a fact . . . .”<sup>102</sup> When Colvin did turn to the constitutional issues, Justice Marshall pointed out that “You are arguing about keeping somebody out, and the other side is arguing about getting somebody in.”<sup>103</sup> Marshall then inquired as to whether there would be a problem if only one seat were set aside in the entering class, and Colvin replied that numbers made no difference in determining whether there was a constitutional violation. In response, Marshall asked whether “underprivileged people have some rights.” Colvin answered that they had “the right to compete,” and Marshall rejoined: “To eat cake.”<sup>104</sup>

B. *Bakke Is Transformed into a Case with Implications for Academic Freedom and Corporate Rights*

The attorneys’ performance during oral argument in *Bakke* was admittedly uneven, but these presentations — whether masterful, mediocre, or even misdirected — seldom decide cases.<sup>105</sup> After the argument, the Justices deviated from their customary practice and circulated memoranda in advance of the first conference. These early exchanges focused on whether the Court needed supplemental

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<sup>99</sup> Oral Argument of Wade H. McCree, Jr., in LANDMARK BRIEFS *supra* note 91, at 642-43.

<sup>100</sup> SCHWARTZ, *supra* note 8, at 53.

<sup>101</sup> See Oral Argument of Reynold H. Colvin on Behalf of the Respondent, in LANDMARK BRIEFS, *supra* note 91, at 644, 644-52.

<sup>102</sup> *Id.* at 652; SCHWARTZ, *supra* note 8, at 53.

<sup>103</sup> Oral Argument of Reynold H. Colvin on Behalf of the Respondent, in LANDMARK BRIEFS, *supra* note 91, at 644, 656.

<sup>104</sup> *Id.* at 656-57.

<sup>105</sup> See SCHWARTZ, *supra* note 8, at 56.

briefing on Title VI of the Civil Rights Act. Justice John Paul Stevens, the newest appointee to the Court, advocated most strongly for the additional briefing and a statutory decision.<sup>106</sup> Justice Byron White and Chief Justice Burger also thought such briefing appropriate, but Justice Powell strongly opposed the idea.<sup>107</sup> In light of the *DeFunis* case, Powell thought that “[a]ny action by us that may be perceived as ducking this issue for the second time in three years would be viewed as a ‘self-inflicted wound’ on the Court.”<sup>108</sup> In his view, the effort to avoid the constitutional question by relying on a “similarly Delphic Title VI” would prove an exercise in futility.<sup>109</sup> The discussion at the first conference did not reconcile these sharply differing views, but the Justices ultimately voted 5–4 to get the additional briefs.<sup>110</sup>

As the Justices continued to exchange memoranda, their initial focus was on questions of racial equality. Soon after the conference, Justice Marshall circulated a memorandum on the relevance of Title VI, though he also was clearly expressing his views on the merits of the case. He reiterated his observation during oral argument that “the decision in this case depends on whether you consider the actions of the Regents as admitting certain students or excluding certain other students.”<sup>111</sup> He reminded the other Justices that the nation’s failure to abide by a principle of color-blindness had produced the “sordid history” that led to the *Bakke* case. In Marshall’s view, “despite the lousy record, the poorly reasoned lower court opinion, and the absence as parties of those who will be most affected by the decision (the Negro applicants), we are stuck with this case.”<sup>112</sup> He reminded his colleagues that “We are not yet all equals, in large part because of the refusal of the *Plessy* Court to adopt the principle of color-blindness. It would be the cruelest irony for this Court to adopt the dissent in *Plessy* now and hold that the University must use color-blind admissions.”<sup>113</sup>

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<sup>106</sup> See BALL, *supra* note 9, at 87; SCHWARTZ, *supra* note 8, at 61.

<sup>107</sup> See SCHWARTZ, *supra* note 8, at 57-61 (describing memoranda circulated by White, Powell, JJ., and Burger, C.J.).

<sup>108</sup> *Id.* at 60.

<sup>109</sup> *Id.*

<sup>110</sup> See *id.* at 62.

<sup>111</sup> Memorandum to the Conference Re: No. 76-811 Regents of the University of California v. Bakke from Justice Thurgood Marshall 1 (Apr. 13, 1978) (emphasis in original) (on file with author).

<sup>112</sup> *Id.* at 3; see also SCHWARTZ, *supra* note 8, at 128-29.

<sup>113</sup> Memorandum to the Conference Re: No. 76-811 Regents of the University of California v. Bakke from Justice Thurgood Marshall, *supra* note 111, at 3; see also SCHWARTZ, *supra* note 8, at 129.

Despite Marshall's trenchant observations, the Justices who rejected the Davis program insisted on color-blindness. Chief Justice Burger believed that under Title VI and the Equal Protection Clause, strict scrutiny must apply to a program that excluded members of the minority or the "majority," a term that he placed in quotes to highlight its uncertain significance.<sup>114</sup> Although Burger found the purposes behind the special program "sound and desirable," he did not think they afforded sufficient justification for the "rigid, plainly racial basis of the Regents' program."<sup>115</sup> In particular, the admissions process did not allow Bakke to compete for sixteen seats in the entering class because minority applicants were evaluated separately from other applicants.<sup>116</sup> Burger rejected the University's claim that there was no other way to achieve the program's goals, though he also believed that the Court should refrain from designing alternative approaches given its lack of expertise in setting admissions standards.<sup>117</sup>

Justice Rehnquist also embraced the imperative of color-blindness. Like Chief Justice Burger, he thought that without a history of past discrimination by the Davis medical school, strict scrutiny must apply because the program treated individual applicants differently on the basis of race.<sup>118</sup> In Rehnquist's view, the Davis program could not be used to redress general societal discrimination because "the right not to be discriminated against is personal to the individual," and Bakke's right to equal protection therefore did not turn on whether "at some other place or at some other time minority group members have been discriminated against."<sup>119</sup> Rehnquist was convinced that the Fourteenth Amendment prohibited "discrimination on the basis of race, any race" because this was "not a permissible basis of governmental action."<sup>120</sup> Although he reserved the question of whether race could be a factor, as opposed to the sole factor, in determining admissions, he thought it difficult to allow any express role for race.<sup>121</sup> Anticipating Justice Powell's perspective on the case, Rehnquist forthrightly rejected the diversity rationale, observing that

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<sup>114</sup> See Memorandum from Warren Burger, C.J., to the Conference 2-3 (Oct. 21, 1977), in SCHWARTZ, *supra* note 8, at 168-69.

<sup>115</sup> *Id.* at 3.

<sup>116</sup> See *id.* at 2, 5.

<sup>117</sup> See *id.* at 4.

<sup>118</sup> See Memorandum from William H. Rehnquist, J., to the Conference 2-6 (Nov. 10, 1977), in SCHWARTZ, *supra* note 8, at 177-81.

<sup>119</sup> *Id.* at 14-15.

<sup>120</sup> *Id.* at 10.

<sup>121</sup> See *id.* at 18.

“[m]embers of minority groups are not less valuable human beings simply because of their minority status and, it would seem to me, are not more valuable either.”<sup>122</sup>

Toward the end of the memorandum, Rehnquist's analysis took an unexpected turn when he discussed the *Bakke* case's implications for liberty as well as equality concerns. In particular, Rehnquist analogized the University's arguments to those rejected in the Court's recent campaign finance decision in *Buckley v. Valeo*.<sup>123</sup> The reference must have come as something of a surprise to colleagues, given that neither the parties nor the amici had cited the case in their briefs, presumably because it seemed inapposite to questions of racial equality.<sup>124</sup> *Buckley* addressed the constitutionality of a Federal Election Campaign Act provision that capped expenditures by any person, including an “individual, partnership, committee, association, corporation, or any other organization or group of persons”<sup>125</sup> seeking to influence the political process. Congress had intended, among other things, to equalize citizens' ability to affect the outcome of elections.<sup>126</sup> The Justices rejected the limits on expenditures because they wrongly curbed political speech.<sup>127</sup> The Court made clear that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .”<sup>128</sup> In Rehnquist's view, the special program at Davis was an equally troubling effort to sacrifice Bakke's liberty interest, that is, his right to compete, to advance a wide-ranging quest for equality.<sup>129</sup> Just as Congress had tried to curb speech rights to make up for the limited voice of some, Davis was claiming that “discrimination based on race can be justified because the opposite type of discrimination has been and possibly still is practiced in other

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<sup>122</sup> *Id.* at 13.

<sup>123</sup> *See id.* at 17-19; *see also* *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

<sup>124</sup> *See* Table of Cases, in *ALLAN BAKKE VERSUS REGENTS OF THE UNIVERSITY OF CALIFORNIA: THE SUPREME COURT OF THE UNITED STATES* 653, 658 (Alfred A. Slocum ed., 1979).

<sup>125</sup> *Buckley*, 424 U.S. at 6, 23-24.

<sup>126</sup> *See id.* at 25-26 (stating that “the prevention of corruption and the appearance of corruption” was the primary goal of the legislation but there were two ancillary goals related to “equaliz[ing] the relative ability of all citizens to affect the outcome of elections” and to “open[ing] the political system more widely to candidates without access to large amounts of money” by containing the cost of political campaigns).

<sup>127</sup> *See id.* at 39-54.

<sup>128</sup> *Id.* at 48-49.

<sup>129</sup> *See* Memorandum from William H. Rehnquist, J., *supra* note 118, at 17-18.



places.”<sup>130</sup> Neither claim, Rehnquist argued, had any convincing constitutional foundation.

In making this argument, Rehnquist was shrewdly positioning a win for affirmative action as a loss for corporate speech, a tactic that posed a serious dilemma for Powell, who was a key architect of the *Buckley* decision. Before joining the Court, Powell penned a memorandum urging American businesses to take a more active role in politics than had previously been the case.<sup>131</sup> Worried that the free enterprise system was under siege from activism on the left, Powell exhorted businesses to “learn the lesson, long ago learned by labor and other self-interest groups. This is the lesson that political power is necessary; that such power must be assiduously [sic] cultivated; and that when necessary, it must be used aggressively and with determination — without embarrassment and without the reluctance which has been so characteristic of American business.”<sup>132</sup> Powell firmly believed that companies must use the courts aggressively to protect their interests, rather than ceding the judicial system to liberals and the left.<sup>133</sup> Powell’s memorandum did not come to light until one year after he was confirmed to the Court, but once widely known, it served as a rallying cry for “the emerging New Right — a coalition of free market advocates and religious conservatives that swept Ronald Reagan into the White House in 1980, pushed for deregulation of industry, and reasserted the influence of business in American politics.”<sup>134</sup>

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<sup>130</sup> *See id.*

<sup>131</sup> *See* Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), [http://reclaimdemocracy.org/powell\\_memo\\_lewis/](http://reclaimdemocracy.org/powell_memo_lewis/).

<sup>132</sup> *Id.*

<sup>133</sup> *See id.*

<sup>134</sup> ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 281 (2018); *see also* John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 *CONST. COMMENT.* 223, 246 (2015) (describing the Court’s jurisprudence as “pav[ing] the way for a corporate takeover of the First Amendment — right in line with Powell’s 1971 memo calling for a new corporate political movement to work its will through the courts”). Others take a more tempered view of the Powell memorandum’s influence. Mark Schmitt argues that the memorandum had “some impact” but did not play the pivotal role that some have described. Mark Schmitt, *The Legend of the Powell Memo*, *AM. PROSPECT* (Apr. 27, 2005), <http://prospect.org/article/legend-powell-memo>. Legal historian Ann Southworth carefully traces the ways in which the memorandum coincided with but did not wholly determine the direction of activism on the right. Although Powell had wanted the Chamber of Commerce to play a leading part in the mobilization effort, it did not do so, and there was little cooperation between free-market and cultural conservatives. *See* ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 15-16 (2008).

The *Buckley* decision was important to Powell because it embodied two pillars of his strategic plan: that businesses should engage in politics and that they should litigate to protect their rights. In pre-conference notes after oral argument in *Buckley*, Powell made clear that “[a]ny limitation on a contribution to a political candidate or committee undoubtedly restricts the exercise of free speech.”<sup>135</sup> In his view, Congress had no constitutional basis to curb that speech through restrictions on campaign expenditures based on a desire to level the playing field. Powell asked: “Are the ‘many’ really denied access now? This has not been my experience in campaigns.”<sup>136</sup> His position was central to the opinion that emerged, given his pivotal role as part of a “drafting team” assembled by Chief Justice Burger to write the *Buckley* opinion.<sup>137</sup>

When Rehnquist alluded to the *Buckley* case in his pre-conference memorandum on *Bakke*, he must have got Powell's attention. In the battle over affirmative action, the Court once again had to confront constitutional tensions between equality and liberty. Powell plainly did not want to undermine *Buckley*, but he also wanted to leave room for the use of race in college and university admissions. Powell therefore faced a quandary: If corporate speech rights could not be constrained in the service of equality, how could Allan Bakke's freedom to compete be sacrificed to promote access for underrepresented minorities? Fortunately for Powell, the diversity rationale that he was crafting provided a satisfactory answer.<sup>138</sup> That rationale focused on improving the learning environment rather than compensating for past injustice. So, instead of rectifying inequality, a diverse student body advanced the university's truth-seeking function through the robust exchange of ideas, thus benefiting all students. At the same time, the academic freedom to pursue diversity was lodged in the university, so its liberty interest could be respected rather than restricted if affirmative action programs were upheld.<sup>139</sup> By conferring constitutional protection on a corporate right to autonomy instead of

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<sup>135</sup> Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 243 (2003).

<sup>136</sup> *Id.* at 249.

<sup>137</sup> *See id.* at 245.

<sup>138</sup> The work on a diversity rationale had already begun before Justice Rehnquist circulated his memorandum. Justice Powell had been in conversation with his law clerk Robert Comfort about this approach from July through October of 1977. *See* CARR, *supra* note 78, at 121-40; JEFFRIES, *supra* note 62, at 468-78.

<sup>139</sup> Justice Powell had previously expressed concerns about the liberal leanings of the professoriate, but he nonetheless remained a staunch defender of academic freedom in colleges and universities. *See* CARR, *supra* note 78, at 130, 137.

an individual right to compete, *Bakke* bolstered rather than betrayed *Buckley*. After the *Bakke* decision, some scholars argued that the diversity rationale should have focused on the empowerment of individuals through substantive participation, rather than on the academic freedom of educational institutions.<sup>140</sup> But, if Justice Powell's opinion in *Bakke* was designed to avoid a direct conflict with *Buckley*, that proposition was a nonstarter.<sup>141</sup>

Shortly after receiving the Rehnquist memorandum, Justice Powell circulated his own analysis, which set forth the diversity rationale and closely resembled the opinion he would write in the case.<sup>142</sup> Focusing first on racial equality issues, he concluded that strict scrutiny should apply because "the special admissions program is undeniably a classification based on race and ethnic background."<sup>143</sup> He worried that "there is no principled basis for deciding which groups will merit 'heightened judicial solicitude' and which will not."<sup>144</sup> Aligning himself with advocates of color-blindness, he believed that it was not always clear when "a so-called preference is in fact benign," in part because of the increasingly pluralistic nature of American society.<sup>145</sup> Drawing on the work of sociologist Nathan Glazer, Powell asserted that "We are indeed a nation of minorities; to enshrine some minorities as deserving of special benefits means not to defend minority rights against a discriminating majority but to favor some of these minorities over others."<sup>146</sup> Powell believed that an exacting strict

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<sup>140</sup> See, e.g., Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 RUTGERS RACE & L. REV. 362, 375-77 (2008) [hereinafter *Rhetorical Neutrality*].

<sup>141</sup> For that very reason, in recent challenges to the Trump administration's decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program, it is the university, rather than the undocumented students themselves, that has cited harm to an interest in achieving a diverse student body. See *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1034 (N.D. Cal. 2018). Of course, students can be the stakeholders in First Amendment conflicts with other students or the institution itself. See, e.g., *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 667-68 (2010). However, this type of dispute does not figure in the *Bakke* analysis, presumably because Allan Bakke had not yet become a member of the university community.

<sup>142</sup> See Memorandum from Justice Lewis F. Powell, Jr., to the Conference 20-26 (Nov. 22, 1977), in SCHWARTZ, *supra* note 8, at 198. Interestingly, the memorandum has the heading for an opinion with the words "1st Draft" at the top of the page. *Id.*

<sup>143</sup> *Id.* at 3-4.

<sup>144</sup> *Id.* at 9.

<sup>145</sup> See *id.* at 9-10.

<sup>146</sup> Ian F. Haney López, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1026 (2007) (citing a passage from NATHAN

scrutiny standard could ensure that constitutional protections did not “vary with the ebb and flow of political forces.”<sup>147</sup>

In applying strict scrutiny, Powell found that the Davis program did not pass muster. There was only one proffered interest that he deemed compelling: the University's desire to enroll a diverse student body.<sup>148</sup> By focusing exclusively on this goal, Powell was able to make the exercise of academic freedom central to the case: Colleges and universities must enjoy the discretion to constitute their own learning communities.<sup>149</sup> Even so, Powell found that the special program was not necessary to achieve that goal because there were viable alternatives to a two-track admissions process based on race.<sup>150</sup> At this juncture, Powell diverged from his conservative colleagues in a significant way. From the outset, Powell was convinced that the Court could not simply strike down the Davis program but instead had to provide guidance on programs that would satisfy constitutional requirements.<sup>151</sup> To that end, he offered up the system of undergraduate admissions at Harvard as a model. Harvard's program considered race as a plus factor but required that all applicants compete with one another for seats in the entering class.<sup>152</sup>

The next day, Justice Brennan shared his memorandum, which focused entirely on racial equality concerns.<sup>153</sup> He made clear that he agreed with the Solicitor General that “Title VI affords no escape from deciding the constitutional issue.”<sup>154</sup> Turning to the equal protection question, he joined Marshall in insisting that “to read the Fourteenth

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GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975) and linking it to the language in Powell's opinion). In *Bakke*, Powell asserted that the United States had become “a Nation of minorities” by the time the Fourteenth Amendment regained its vitality in the twentieth century. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291-92 (Powell, J.).

<sup>147</sup> Memorandum from Lewis F. Powell, Jr., *supra* note 142, at 10.

<sup>148</sup> *Id.* at 16-22.

<sup>149</sup> *See id.* at 20-24. Powell did not attempt to lay out a fully elaborated theory of diversity or of academic freedom. Leading scholars have noted the amorphous boundaries of academic freedom. *See, e.g.*, Mark G. Yudof, *Three Faces of Academic Freedom*, 32 *LOY. L. REV.* 831, 855 (1987). In general, Powell may have preferred flexible standards to bright-line rules as part of a strategy of racial indirection described elsewhere in this volume. Yuvraj Joshi, *Racial Indirection*, 52 *UC DAVIS L. REV.* 2495, 2497 (2019).

<sup>150</sup> Memorandum from Lewis F. Powell, Jr., *supra* note 142, at 22-23.

<sup>151</sup> *See, e.g.*, JEFFRIES, *supra* note 62, at 473, 476-78, 484-85.

<sup>152</sup> Memorandum from Lewis F. Powell, Jr., *supra* note 142, at 23-25.

<sup>153</sup> Memorandum from William J. Brennan, Jr., to the Conference 1-9 (Nov. 23, 1977), in SCHWARTZ, *supra* note 8, at 225, 227-35.

<sup>154</sup> *Id.* at 1.

Amendment to state an abstract principle of color-blindness is itself to be blind to history.”<sup>155</sup> Brennan acknowledged that Whites clearly had protected constitutional rights, but he believed that the Davis program properly sought to correct the embarrassing lack of minorities in medical school without demeaning or stereotyping any individual.<sup>156</sup> Brennan therefore was persuaded that “under any standard of Fourteenth Amendment review other than one requiring absolute color-blindness, the Davis program passes muster.”<sup>157</sup> Shortly after Brennan circulated his memorandum, Justice White indicated that he was in basic agreement with its analysis.<sup>158</sup>

*C. Justice Powell’s Focus on Diversity and Academic Freedom Becomes Pivotal*

After these memoranda circulated, the Justices again met in conference. It was clear that four Justices — Chief Justice Burger and Justices Rehnquist, Stewart, and Stevens — would vote to strike down the Davis program based on either Title VI or the Equal Protection Clause or both. Meanwhile, three Justices — Brennan, Marshall, and White — would vote to uphold the program on constitutional grounds.<sup>159</sup> Powell’s opinion was poised to play a pivotal role, depending on how Justice Blackmun cast his vote. Blackmun had been hospitalized for surgery and did not make his views on the *Bakke* case known for months, much to his colleagues’ consternation.<sup>160</sup> In light of the plainly divergent views on equality and color-blindness, Brennan readily appreciated the potential significance of Powell’s approach. In conference, Powell indicated that he would vote to affirm the California Supreme Court’s decision invalidating the Davis program. Brennan quickly pointed out that the lower court opinion would not allow for a program like Harvard’s, so Powell should vote to affirm in part and reverse in part. Powell agreed, which allowed *Bakke* to become a split decision.<sup>161</sup> The significance of Brennan’s colloquy with Powell became evident when Justice Blackmun finally revealed

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<sup>155</sup> See *id.* at 2.

<sup>156</sup> *Id.* at 3-9.

<sup>157</sup> *Id.* at 10.

<sup>158</sup> SCHWARTZ, *supra* note 8, at 93.

<sup>159</sup> See *id.* at 93-98.

<sup>160</sup> See *id.* at 120-29.

<sup>161</sup> See *id.* at 96-97. A number of memoranda circulated after the conference debating how Powell should vote in light of his views of the case, but he ultimately chose the path that Brennan had suggested. *Id.* at 99-106.

his views.<sup>162</sup> He joined with Justices Brennan, Marshall, and White, reportedly because of Marshall's powerful memorandum on the ongoing injuries of race.<sup>163</sup>

These intense internal judicial deliberations led to the complex lineup that would define the *Bakke* decision. Because four Justices believed that race-conscious programs like the one at Davis were impermissible under Title VI and four Justices believed that the programs were permissible under both Title VI and the Equal Protection Clause, Justice Powell became the decisive figure in the case. Although he wrote only for himself, his opinion came to be identified with *Bakke's* holding.<sup>164</sup> Powell joined four Justices to find that regardless of the medical school's motives, strict scrutiny applied to a classification that distinguished among individuals on the basis of race; the Davis program could not meet that demanding test under the Equal Protection Clause.<sup>165</sup> At the same time, Powell joined with four other Justices to find that some race-conscious admissions programs were permissible. Powell's opinion, however, focused not on the rectification of a history of racial injustice but on the academic freedom to promote a diverse student body. This rationale turned on deference to the University's pedagogical judgments, including those related to the composition of the student body. As Powell explained, programs like the one at Harvard University struck an appropriate balance between treating applicants as individuals and achieving diversity in the general student body.<sup>166</sup>

Due to the significance of the case and the intricacy of the decision, Powell prepared an announcement of *Bakke's* holding that he circulated to colleagues for comment before he read it from the bench. Powell's main concern was that the media properly understand that even though the Court had rejected the Davis program, its decision nonetheless left room for affirmative action to continue in college and university admissions.<sup>167</sup> Powell's efforts paid off. The most prominent

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<sup>162</sup> See generally Memorandum from Harry A. Blackmun, to the Conference 1-13 (May 1, 1978), in SCHWARTZ, *supra* note 8, at 247, 247-59. For a general discussion of the Blackmun memorandum, see SCHWARTZ, *supra* note 8, at 131-36.

<sup>163</sup> See BALL, *supra* note 9, at 121.

<sup>164</sup> See JEFFRIES, *supra* note 62, at 456-57; SCHWARTZ, *supra* note 8, at 152.

<sup>165</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287-91, 319-20 (1978) (Powell, J.). See generally DREYFUSS & LAWRENCE, *supra* note 8, at 207-10 (describing how Powell's opinion aligned with the views of his conservative colleagues).

<sup>166</sup> See *Bakke*, 438 U.S. at 311-20 (Powell, J.). See generally DREYFUSS & LAWRENCE, *supra* note 8, at 211-13 (outlining Powell's analysis of the Davis special admissions program and how it left some room for the use of race in admissions).

<sup>167</sup> See SCHWARTZ, *supra* note 8, at 141.

media outlets, including the New York Times, the Washington Post, and the Wall Street Journal, ultimately conveyed a fair and balanced picture of the outcome, tempering any political fallout that might otherwise have occurred.<sup>168</sup>

### III. BAKKE REMAINS PUBLICLY IDENTIFIED AS A RACIAL EQUALITY CASE BUT SURVIVES IN THE SAFE HAVEN OF ACADEMIC FREEDOM

Because the campaign for civil rights has been a high-profile quest for racial equality, *Bakke* remains entirely identified with these issues in public discourse. Supporters of the case argue that our nation has not yet achieved full inclusion of underrepresented groups in colleges and universities, while opponents contend that affirmative action is nothing more than unjustified reverse discrimination against whites and, more recently, Asian Americans. The Court's endorsement of academic freedom barely gets a mention in these debates over the role of race in college and university admissions. Yet, deference to efforts to promote a diverse student body has saved affirmative action in higher education, even as the Court has rejected other programs of race-conscious decision-making.

#### A. *Bakke Remains a Race Case in the Public Imagination*

Despite the Court's prodigious efforts, *Bakke* and its progeny have not put the affirmative action controversy to rest. In the public imagination, the case remains a dispute about racial equality, as immediately became evident when, on remand, Allan Bakke was admitted to Davis's medical school at the age of thirty-eight. Upon his arrival, Bakke encountered protestors who saw him as a foe of racial inclusion. Even so, he eventually was able to pursue his studies without drawing much attention to himself. After medical school, he secured an internship at the Mayo Clinic and later practiced anesthesiology in Minnesota.<sup>169</sup> An intensely private person, Bakke refrained from commenting on the case, but supporters and opponents

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<sup>168</sup> See, e.g., BALL, *supra* note 9, at 140-41 (describing the reactions of writers at the *New York Times*, *Washington Post*, and *Wall Street Journal*); DREYFUSS & LAWRENCE, *supra* note 8, at 225-27 (detailing the lessened fallout of *Bakke* and the reactions of some nonprofits); JEFFRIES, *supra* note 62, at 493-94 (describing Powell's goal to guide public perception); SCHWARTZ, *supra* note 8, at 151-52 (chronicling the mixed reactions to the decision among publications and activists).

<sup>169</sup> BALL, *supra* note 9, at 173-74; S.J. Diamond, *Where Are They Now?: A Drifter, a Deadbeat, and an Intensely Private Doctor*, L.A. TIMES (Aug. 30, 1992), [http://articles.latimes.com/1992-08-30/news/vw-8207\\_1\\_legal-decisions](http://articles.latimes.com/1992-08-30/news/vw-8207_1_legal-decisions).

of affirmative action nonetheless invoked his name. Defenders of the programs like Senator Ted Kennedy drew unfavorable comparisons between Bakke and Patrick Chavis, a Black doctor who had graduated from Davis medical school at about the same time. While Bakke was serving a predominantly affluent, white community, Chavis was providing needed obstetric and gynecological care to a poor community of color in Los Angeles. Senator Kennedy argued that these divergent career trajectories demonstrated the need for affirmative action. Later, opponents of affirmative action turned the tables when Chavis was accused of malpractice. They attributed his problems to lowered admissions standards and made unflattering comparisons between his shortcomings and Bakke's successful practice.<sup>170</sup>

On the legal front, *Bakke's* critics openly questioned the authoritativeness of Powell's opinion and its diversity rationale, pointedly observing that no other Justices had endorsed his reasoning. These attacks culminated in *Hopwood v. Texas*,<sup>171</sup> in which the Fifth Circuit Court of Appeals declared that *Bakke* was no longer good law and struck down affirmative action in admissions at the University of Texas. In reaching this conclusion, the court described Justice Powell's holding as a "lonely opinion" that was not binding precedent.<sup>172</sup> Citing decisions after *Bakke* that rejected affirmative action in employment and contracting, the Fifth Circuit concluded that diversity no longer qualified as a compelling interest.<sup>173</sup> Even if it did, the *Hopwood* court found that any admissions program that used race as a factor inevitably would devolve into an impermissible quota system. So, a race-conscious program could not be narrowly tailored to advance diversity.<sup>174</sup>

#### B. *The Court Saves Bakke as an Academic Freedom Case*

The United States Supreme Court declined to hear the *Hopwood* case, but a few years later, the Justices decided two companion cases

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<sup>170</sup> See, e.g., Douglas Martin, *Patrick Chavis, 50, Affirmative Action Figure*, N.Y. TIMES (Aug. 15, 2002), <https://www.nytimes.com/2002/08/15/us/patrick-chavis-50-affirmative-action-figure.html>; Richard Pearson, *Dr. Patrick Chavis — Player in Reverse Discrimination Case*, S.F. GATE (Aug. 14, 2002), <https://www.sfgate.com/bayarea/article/Dr-Patrick-Chavis-player-in-reverse-2810140.php>.

<sup>171</sup> 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

<sup>172</sup> *Id.* at 944-45.

<sup>173</sup> *Id.* at 944-48.

<sup>174</sup> *Id.* at 948 n.36. For a general discussion of the *Hopwood* case, see MICHAEL A. OLIVAS, *SUING ALMA MATER: HIGHER EDUCATION AND THE COURTS* 78-86 (2013).



challenging undergraduate and law school admissions at the University of Michigan.<sup>175</sup> These decisions made clear that *Bakke* still created a safe harbor for affirmative action in higher education. In a clear rebuke to the Fifth Circuit, Justice Sandra Day O'Connor's majority opinion in *Grutter v. Bollinger* reiterated that diversity is a compelling interest, one that not only enhances learning on campus but also promotes democratic legitimacy by broadening pathways to leadership.<sup>176</sup> In reaching these conclusions, O'Connor noted that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."<sup>177</sup> That deference was based on the University's evidence of diversity's benefits as well as an awareness that these "complex educational judgments [fall] in an area that lies primarily within the expertise of the university."<sup>178</sup>

Like her predecessor Lewis Powell, Justice O'Connor sought to find the "middle of the road"<sup>179</sup> on affirmative action, and due to her efforts, his opinion was no longer a lonely one. Indeed, Justice Stevens, who had previously voted to strike down the Davis program, now cast his vote to uphold an admissions process that treated race as one factor in selecting among applicants. That vote was essential in creating the 5-4 majority that preserved affirmative action programs at public colleges and universities.<sup>180</sup> After the direct assault in *Hopwood*, the bulwark of academic freedom still stood, arguably offering even more solid protection to affirmative action than had been true before.

The Supreme Court reaffirmed its support for the role of race in admissions yet again in 2016 in *Fisher v. University of Texas*,<sup>181</sup> another challenge to admissions policies at the University of Texas. Immediately after the *Hopwood* case and before the Supreme Court had decided *Grutter*, the Texas legislature adopted a "Top Ten Percent" plan that guaranteed seats in the entering class to the top ten percent of graduating high school seniors in the state.<sup>182</sup> That plan was

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<sup>175</sup> *Gratz v. Bollinger*, 539 U.S. 244, 249-51 (2003) (undergraduate admissions); *Grutter v. Bollinger*, 539 U.S. 306, 312-15 (2003) (law school admissions).

<sup>176</sup> *See Grutter*, 539 U.S. at 328-33.

<sup>177</sup> *Id.* at 328.

<sup>178</sup> *Id.*

<sup>179</sup> *See* JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 217 (2007).

<sup>180</sup> Rachel F. Moran, *The Heirs of Brown: The Story of Grutter v. Bollinger*, in *RACE LAW STORIES* 451, 478 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).

<sup>181</sup> *Fisher II*, 136 S. Ct. 2198 (2016).

<sup>182</sup> *Id.* at 2205. Because of the large numbers of students who could enroll under the plan, the legislature later agreed to allow the University of Texas to scale back the

used to fill up to seventy-five percent of the available seats and yielded substantial diversity.<sup>183</sup> After the *Grutter* decision, the University of Texas revisited the undergraduate admissions process and adopted a new system to select students for the remaining twenty-five percent of the seats in the class. That system weighed race as one factor in evaluating applicants. The University argued that this step was necessary to address ongoing difficulties in achieving a diverse student body.<sup>184</sup>

The new process slightly increased the representation of Black and Hispanic students. The last class admitted to the University of Texas under the Top Ten Percent plan without any consideration of race had included 4.1% African-American and 14.5% Hispanic students. By contrast, the first class admitted under the modified system enrolled 4.6% African-American and 16.9% Hispanic students.<sup>185</sup> The *Fisher* lawsuit challenged the new admissions policy on the ground that the Top Ten Percent plan already provided a satisfactory race-neutral means to achieve a diverse student body. As a result, the University's use of race was neither necessary nor justifiable.<sup>186</sup> In *Fisher I*, the Court continued to pay some deference to colleges and universities but made clear that academic freedom was not tantamount to *carte blanche*. The Justices criticized the lower courts for relying on a "good faith" test to evaluate the use of race in the University of Texas's admissions process. Because the Top Ten Percent plan had yielded substantial diversity in the student body, the Court demanded that the University offer evidence that a race-neutral alternative was not workable.<sup>187</sup>

Even so, the diversity rationale continued to do important work in determining whether the University's admissions process was narrowly tailored to achieve its aims. In *Fisher II*, the Court concluded that the University had offered a "reasoned, principled explanation" for its modest use of race in evaluating applicants. Based on a year-long study of diversity in the student body, the University presented demographic data on Black and Hispanic enrollments, anecdotal evidence that underrepresented students continued to feel isolated on

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plan to the top seven percent of graduating high school classes. OLIVAS, *supra* note 174, at 87.

<sup>183</sup> See *Fisher II*, 136 S. Ct. at 2206; *Fisher v. University of Texas (Fisher I)*, 570 U.S. 297, 305 (2013).

<sup>184</sup> See *Fisher II*, 136 S. Ct. at 2205-06; *Fisher I*, 570 U.S. at 305-06.

<sup>185</sup> *Fisher I*, 570 U.S. at 305.

<sup>186</sup> See *Fisher II*, 136 S. Ct. at 2211-12.

<sup>187</sup> See *Fisher I*, 570 U.S. at 312-14.

campus, and statistical findings on their limited presence in some college classes.<sup>188</sup> In a 4–3 decision, with Justice Kennedy writing for the majority, the Court upheld the University of Texas’s admissions program as a proper exercise of academic freedom.<sup>189</sup> In reaching this conclusion, the Court was persuaded that the University’s adherence to internal policies and practices justified deference to its decisions about the ongoing need for race in the admissions program.<sup>190</sup>

### C. *The Public Continues to Debate Bakke as a Race Case*

The *Fisher* case once again demonstrated the Court’s commitment to diversity in higher education. Even so, the following year the Justice Department’s civil rights division circulated an internal announcement on employing political appointees to challenge programs that engage in “intentional race-based discrimination in admissions.”<sup>191</sup> Later, a Justice Department spokesperson clarified that the hiring was focused on a 2015 complaint to the Office for Civil Rights and the Civil Rights Division that related to alleged discrimination against Asian-American applicants in Harvard University’s undergraduate admissions process.<sup>192</sup> Yet, the Department’s concerns seemed to sweep more broadly than that. In 2018, the Department withdrew federal guidelines designed to assist colleges and universities in making proper use of race in their admissions processes.<sup>193</sup> More recently, the

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<sup>188</sup> See *Fisher II*, 136 S. Ct. at 2211-12 (citations omitted).

<sup>189</sup> See *id.* at 2214-15.

<sup>190</sup> See Mark G. Yudof & Rachel F. Moran, *Race-Conscious Admissions Policies Face More Tests After “Fisher,”* CHRON. HIGHER EDUC. (July 17, 2016), <https://www.chronicle.com/article/Race-Conscious-Admissions/237151> (noting the significance of “punctilious procedure” to the Court’s decision to uphold the Texas admissions policy).

<sup>191</sup> See, e.g., Charlie Savage, *Justice Department to Take On Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html>; Alia Wong, *A Federal Investigation into “Reverse-Discrimination” at Harvard*, ATLANTIC (Oct. 5, 2017), <https://www.theatlantic.com/education/archive/2017/10/a-federal-investigation-into-reverse-discrimination-at-harvard/542220> (noting Trump administration’s support for a challenge to Harvard’s undergraduate admissions program); Mark G. Yudof & Rachel F. Moran, *Affirmative Action: Why Now and What’s Next?*, CHRON. HIGHER EDUC. (Aug. 3, 2017), <https://www.chronicle.com/article/Affirmative-Action-Why-Now/240843>.

<sup>192</sup> Barnini Chakraborty, *N.Y. Times Story on Affirmative Action “Inaccurate,” DOJ Says*, FOX NEWS (Aug. 2, 2017), <https://www.foxnews.com/politics/ny-times-story-on-affirmative-action-inaccurate-doj-says>.

<sup>193</sup> Erica L. Green et al., *Trump Officials Reverse Obama’s Policies on Affirmative Action in Schools*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/trump-affirmative-action-race-schools.html>.

Departments of Justice and Education announced that they are jointly investigating the use of race in undergraduate admissions at Yale University, again focusing on alleged reverse discrimination against Asian-American applicants.<sup>194</sup>

A 2014 lawsuit and the 2015 complaint against Harvard filed with the Office for Civil Rights and the Civil Rights Division allege that the University's admissions process is biased against Asian Americans.<sup>195</sup> The plaintiffs have relied on an internal Harvard report, which finds that if undergraduate admissions were based solely on academic indicators, Asian Americans would make up forty-three percent of the class rather than nineteen percent; Whites, thirty-eight percent rather than forty-three percent; Hispanics, two percent rather than nine percent; and African Americans, one percent rather than ten percent.<sup>196</sup> The Harvard litigation claims that Asian-American applicants have been harmed not only by race-based affirmative action but also by preferences for children of faculty, alumni, and donors as well as for athletes. Moreover, the plaintiffs assert that they have been wrongly disadvantaged by implicit bias in the interviewing process. Asian-American applicants receive the lowest interview scores of any racial or ethnic group, and the plaintiffs contend that these subjective, negative assessments unfairly undercut their academic accomplishments.<sup>197</sup>

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<sup>194</sup> Katie Benner & Erica L. Green, *U.S. Investigating Yale over Complaint of Bias against Asian-American Applicants*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/yale-asian-americans-discrimination-investigation.html>. In addition, the Department of Education recently entered into a consent agreement that requires the Texas Tech University Health Sciences Center to refrain from considering race or ethnicity in admissions. The investigation had begun fourteen years earlier under then President George W. Bush's administration. Anemona Hartocollis, *Texas Tech Medical School, Under Pressure from Education Dept., Will Stop Using Race in Admissions*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/us/texas-tech-affirmative-action.html>.

<sup>195</sup> Complaint at 3, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 308 F.R.D. 39 (D. Mass. 2015) (No. 14-cv-14176-ADB), 2014 WL 6241935. Students for Fair Admissions also filed a suit against the University of North Carolina at Chapel Hill, alleging that it improperly uses race "in a mechanical, formulaic way" to admit underrepresented minorities. Eric Hoover, *That Other Affirmative-Action Case: The Battle over UNC's Admissions Policies Heats Up*, CHRON. HIGHER EDUC. (Jan. 18, 2019), <https://www.chronicle.com/article/That-Other-Affirmative-Action/245519>.

<sup>196</sup> Scott Jaschik, *Smoking Gun on Anti-Asian Bias at Harvard?*, INSIDE HIGHER EDUC. (June 18, 2018), <https://www.insidehighered.com/admissions/article/2018/06/18/harvard-faces-new-scrutiny-over-how-it-evaluates-asian-american>.

<sup>197</sup> *Id.*; see Anemona Hartocollis, *Harvard Rated Asian-Americans Lower on Personality Traits, Suit Says*, N.Y. TIMES (June 15, 2018), <https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html>.

There is potent symbolism in a direct assault on the Harvard plan that Powell held up as exemplary.<sup>198</sup> As the complaint against the University alleges:

The Supreme Court was misled. The admissions plan Harvard advocated for in *Bakke* (the “Harvard Plan”) that promised to treat each applicant as an individual has always been an elaborate mechanism for hiding Harvard’s systematic campaign of racial and ethnic discrimination against certain disfavored classes of applicants. Indeed, the Harvard plan was created for the specific purpose of discriminating against Jewish applicants. . . . Today it is used to hide intentional discrimination against Asian Americans.<sup>199</sup>

The Justice Department has endorsed these concerns. In supporting the plaintiffs’ position, then Attorney General Jeff Sessions announced that “[n]o American should be denied admission to school because of their race.”<sup>200</sup> The plaintiffs and the Justice Department clearly have framed the dispute as one that implicates racial equality and reverse discrimination. Harvard’s response tries to change that framework. Not only does the University deny that it discriminates against applicants on the basis of race, but it also notes that “[c]olleges and universities must have the freedom and flexibility to create the diverse communities that are vital to the learning experiences of every student.”<sup>201</sup> In a case that may wend its way to the United States Supreme Court, the battle lines over affirmative action have been

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<sup>198</sup> Mark G. Yudof & Rachel F. Moran, *Now More than Ever, We Need Diversity in Admissions*, CHRON. HIGHER EDUC. (July 11, 2018), <https://www.chronicle.com/article/Now-More-Than-Ever-We-Need/243897> [hereinafter *Now More than Ever*].

<sup>199</sup> Complaint, *supra* note 195, at 3. Similar claims appear in the 2015 complaint to the Office for Civil Rights and the Civil Rights Division. COALITION OF ASIAN-AM. ASS’NS, COMPLAINT AGAINST HARVARD UNIVERSITY AND THE PRESIDENTS AND FELLOWS OF HARVARD COLLEGE FOR DISCRIMINATING AGAINST ASIAN-AMERICAN APPLICANTS IN THE COLLEGE ADMISSIONS PROCESS 41 (2015), <http://asianamericanforeducation.org/wp-content/uploads/2015/09/Complaint-Against-Harvard-University.pdf>. According to legal scholar Noah Feldman, Justice Powell was unaware of the anti-Semitic origins of the Harvard plan when he invoked it as a model for college and university admissions. Noah Feldman, *Justifying Diversity*, N.Y. REV. BOOKS (Dec. 6, 2018), <https://www.nybooks.com/articles/2018-12-06/justifying-diversity>.

<sup>200</sup> Nick Anderson, *Justice Department Criticizes Harvard Admissions in Case Alleging Bias Against Asian Americans*, WASH. POST (Aug. 30, 2018), <https://www.washingtonpost.com/education/2018/08/30/justice-dept-criticizes-harvard-affirmative-action-case/>.

<sup>201</sup> *Id.*

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drawn, with opponents focusing exclusively on race and defenders invoking the imperative of institutional autonomy.

Those battle lines suggest that *Bakke's* constitutional framework remains vital to the future of affirmative action in a higher education landscape that is simultaneously strikingly different from and notably similar to the one that the Court faced in 1978. At Davis, non-whites were clearly in the minority at the medical school, while the student body at Harvard today is majority non-white, whether admissions decisions are based on academic credentials or holistic review. Despite this fundamental demographic shift, the legal and political dynamics surrounding affirmative action have remained surprisingly constant, even forty years after *Bakke*.<sup>202</sup> When Allan Bakke sued, Jewish groups challenged the Davis program because it threatened to resurrect a quota system that had harmed Jews' chances of admission at prestigious colleges and universities.<sup>203</sup> Today, Asian-American plaintiffs in the Harvard case argue that tacit quotas subject them to the same kind of unfair treatment that Jews once experienced. In *Bakke*, critics of affirmative action argued that the inclusion of Asian-American applicants revealed the program's underlying incoherence because they were not disadvantaged in the admissions process.<sup>204</sup> The Harvard lawsuit offers an ironic coda to that aspect of the *Bakke* case. The Asian-American plaintiffs today are challenging the legitimacy of Powell's model not by demanding that they be beneficiaries of affirmative action but by asking that they be free of reverse discrimination.

With Justice Kennedy's retirement, there is renewed speculation about the constitutional fate of affirmative action.<sup>205</sup> Given the myriad challenges to Powell's middle path, legal scholar Michael A. Olivas believes that the diversity rationale has "proven surprisingly resilient and supple over the intervening decades," so much so that he believes the *Bakke* decision's "longevity is proof that there is a God."<sup>206</sup> Miracles aside, this Article now turns to *Bakke's* jurisprudential legacy, identifying some largely unappreciated features of the decision that

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<sup>202</sup> Yudof & Moran, *Now More than Ever*, *supra* note 198.

<sup>203</sup> *See supra* notes 42–43, 80.

<sup>204</sup> *See supra* notes 68, 99.

<sup>205</sup> *See, e.g.,* Caleb Gayle, *From Abortion to Affirmative Action, How Trump's Supreme Court Pick Could Change America*, *GUARDIAN* (June 30, 2018, 01:00 AM EDT), <https://www.theguardian.com/law/2018/jun/30/supreme-court-trump-pick-abortion-affirmative-action>.

<sup>206</sup> OLIVAS, *supra* note 174, at 87.

help to explain why it has endured and why its staying power should not be underestimated even today.<sup>207</sup>

IV. WILL ACADEMIC FREEDOM REMAIN A SAFE HARBOR FOR BAKKE IN THE FACE OF A COLOR-BLIND IMPERATIVE?

The fate of *Bakke* and its progeny may well depend on whether these cases are framed entirely in terms of race or whether their implications for institutional autonomy are fully appreciated and elaborated. So far, scholars have emphasized *Bakke's* pernicious consequences for race jurisprudence and equal protection law, while its First Amendment implications have been largely ignored. As a consequence, protections for academic freedom have not been linked to increasingly robust protections for corporate speech rights, even though both spring from the same liberty-based constitutional principles. As a result, the diversity rationale has come to appear anomalous, largely divorced from other parts of the law and seemingly manufactured for the occasion to justify affirmative action in higher education admissions. A thorough analysis of the Court's approach to academic freedom reveals that it would be difficult to reject a norm of deference for colleges and universities when they select students, while taking a hands-off approach to other exercises of institutional autonomy.

A. *Scholars Mainly Analyze Bakke as a Race Case but It Survives as an Academic Freedom Decision*

When scholars reflect on *Bakke*, they typically understand the decision wholly in terms of its implications for equal protection doctrine. According to this view, *Bakke* ushered in a series of decisions that made a rigid and unyielding interpretation of color-blindness the law of the land. Now, whether officials act for benign or invidious purposes, any racial classification is treated as suspect and triggers strict scrutiny.<sup>208</sup> Echoing Justice Marshall's concerns in *Bakke*, critics

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<sup>207</sup> Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1755 (1996).

<sup>208</sup> See, e.g., Koteles Alexander, *Adarand: Brute Political Force Concealed as a Constitutional Colorblind Principle*, 39 HOW. L.J. 367, 373-77 (1995); R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 575-77 (2004); Powell, *Rhetorical Neutrality*, *supra* note 140, at 419; see also Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, 58 U. MIAMI L. REV. 9, 27 (2003) (arguing that sustained conservative opposition led to a rejection of any race-based classification, but also

have decried an anticlassification interpretation of the Constitution as fetishistic formalism that strips cases of their history and context. This rigid approach prevents state and federal officials from experimenting with initiatives that promote inclusion for previously disadvantaged groups.<sup>209</sup> According to law professor Reva Siegel, the jurisprudential turn to color-blindness occurred when the Court shifted from rectifying past discrimination in school desegregation cases to confronting voluntary affirmative action programs.<sup>210</sup> Affirmative action cases were especially problematic, she notes, because “they involved goods that might be understood as limited in quantity and subject to a meritocratic rule of distribution.”<sup>211</sup> Confronted with this new set of circumstances, the Court focused on the harms to disappointed applicants like Bakke who had been completely excluded from a benefit, more specifically the opportunity to attend a particular college or university.<sup>212</sup> Emphasizing these burdens allowed the Justices to apply strict scrutiny, even when college and university administrators were trying to counter the underrepresentation of historically disadvantaged minorities.<sup>213</sup> As Siegel explains, “If the harm of racial discrimination that a disappointed white applicant experienced did not have the elements of ‘stigma’ that a black applicant might experience, . . . that harm was nonetheless of sufficient magnitude to warrant equal protection.”<sup>214</sup>

Legal scholar Ian Haney López contends that Powell promoted a false equivalency between harms to Whites and underrepresented minorities by using a theory of ethnicity to warn of new dangers of discrimination.<sup>215</sup> This approach allowed Powell to elide the significance of racial subordination by emphasizing ethnic pluralism in a “nation of minorities.”<sup>216</sup> By citing cases involving discrimination against Asians and Mexican Americans to make his point, he

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noting that mobilization in support of affirmative action tempered this view somewhat); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1292 (2011).

<sup>209</sup> See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 *STAN. L. REV.* 1, 48-52 (1991).

<sup>210</sup> Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 *HARV. L. REV.* 1470, 1524 (2004) [hereinafter *Equality Talk*].

<sup>211</sup> See *id.*

<sup>212</sup> *Id.* at 1527-28.

<sup>213</sup> *Id.* at 1529-30.

<sup>214</sup> *Id.* at 1530.

<sup>215</sup> López, *supra* note 146, at 1025-28.

<sup>216</sup> See *id.* at 1035.



conveniently overlooked the relevance of “the color line” and “the virulence of racism,” Haney López asserts.<sup>217</sup> Under Powell’s theory of ethnic pluralism, strict scrutiny had to apply to all racial classifications because distinctions between benign and invidious classifications became incoherent. His opinion in *Bakke* celebrated diversity, which reflected his pluralistic vision of ethnicity and transplanted it to the learning environment at colleges and universities.<sup>218</sup> The result, Haney López argues, is that “constitutional race law is a disaster”<sup>219</sup> due to the Court’s “reactionary colorblindness.”<sup>220</sup>

Reva Siegel, by contrast, treats diversity as constitutional camouflage. She believes that the Court “deploys anticlassification discourse to limit and to disguise the expression of antistatutory values.”<sup>221</sup> In particular, Powell’s diversity rationale has permitted the Court to endorse formal color-blindness yet uphold race-conscious admissions by tacitly acknowledging the continuing reality of racial subordination.<sup>222</sup> Siegel argues that the *Grutter* decision built on that rationale by recognizing the importance of according people from all walks of life meaningful pathways to leadership in an authentic democracy. This analysis in effect concedes that without affirmative action in admissions, some groups would be relegated to outsider status or second-class citizenship in a racially stratified society.<sup>223</sup>

Although scholars have focused on *Bakke*’s implications for race and equality, the decision’s limited impact outside of higher education reveals the singular importance of academic freedom in preserving affirmative action in admissions. That point was brought home in *Parents Involved in Community Schools v. Seattle School District*.<sup>224</sup> There, the Court struck down voluntary integration plans that used race as one factor in assigning students to public elementary and secondary schools. The plans were designed, among other things, to promote the benefits of diversity in the learning environment.<sup>225</sup> In

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<sup>217</sup> *Id.* at 1035-36.

<sup>218</sup> *See id.* at 1040-43.

<sup>219</sup> *Id.* at 1061.

<sup>220</sup> *Id.* at 1062.

<sup>221</sup> Siegel, *Equality Talk*, *supra* note 210, at 1540.

<sup>222</sup> *Id.* at 1537-38.

<sup>223</sup> *See id.* at 1538-39.

<sup>224</sup> 551 U.S. 701 (2007). The Court had recognized the value of diversity in broadcast programming, but this decision was subsequently overturned when the Justices adopted strict scrutiny rather than intermediate review for federal policies. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), *overruled in part by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>225</sup> *Parents Involved*, 551 U.S. at 723-26.

applying strict scrutiny, the Court recognized that diversity is a compelling interest but noted the “unique context of higher education.”<sup>226</sup> While college and university administrators’ decisions received substantial deference, the Court found little in history or tradition to suggest that school boards enjoyed a similar license.<sup>227</sup> Without the safe harbor of academic freedom, the Justices found that diversity could not justify race-conscious student assignment plans.<sup>228</sup>

In his concurring opinion, even Justice Kennedy — a crucial swing vote in support of affirmative action in higher education — concluded that school administrators should address concerns about the racial make-up of public elementary and secondary schools through measures that do not differentiate among individual students on the basis of race. For example, school boards could consider race as a factor when drawing school attendance zone boundaries or when selecting construction sites for new schools.<sup>229</sup> The Court’s adherence to a strict color-blindness principle in *Parents Involved*, when shorn of the academic freedom rationale, left considerably less room to consider race than had been true in *Bakke*, *Grutter*, or *Fisher*.<sup>230</sup> The jurisprudential cover for addressing racial inequality that Siegel describes was simply no longer available.

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<sup>226</sup> *Id.* at 722, 724-25.

<sup>227</sup> See *id.* at 724-25. Somewhat ironically, when *Bakke* was decided, Justice Powell’s law clerk wrote a memorandum that cited Powell’s opinion in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), as authority for the academic freedom of educational decision-makers. CARR, *supra* note 78, at 126-27. *Rodriguez* involved a challenge to Texas’s system of financing elementary and secondary schools, and the autonomy of state and local authorities figured prominently in the decision. *Rodriguez*, 411 U.S. at 42-44. The brief filed by the Regents as well as an amicus brief submitted by four elite private universities also justified academic freedom by analogizing it to the autonomy enjoyed by state and local educational policy-makers. The Regents cited *Rodriguez*, Brief for Petitioner, *supra* note 63, at 56, while the amicus brief cited both *Rodriguez* and *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971), which dealt with a school board’s power to implement desegregation. Brief of Columbia Univ. et al., *supra* note 73, at 31-32.

<sup>228</sup> *Parents Involved*, 551 U.S. at 725-33. The Court also dismissed the school districts’ concerns about preventing racial concentration as impermissible racial balancing. *Id.*

<sup>229</sup> *Id.* at 787-89 (Kennedy, J., concurring in part and in the judgment).

<sup>230</sup> See Mary Kathryn Nagle, *Parents Involved and the Myth of the Colorblind Constitution*, 26 HARV. J. RACIAL & ETHNIC JUST. 211, 225-26 (2010).

*B. Bakke Should Be Understood as a Key Precedent About Institutional Autonomy and Explicitly Linked to the Rise of Corporate Speech Rights*

*Parents Involved* makes clear that the outcome of reverse discrimination claims under the Fourteenth Amendment will turn heavily on the weight given to academic freedom claims under the First Amendment.<sup>231</sup> Yet, “*Bakke* receives virtually no mention in any of the leading First Amendment treatises and casebooks.”<sup>232</sup> According to legal scholar Paul Horwitz, *Bakke* “represented a significant shift in the constitutional law of academic freedom: a shift from a concept of academic freedom as an individual right to ‘a concept of constitutional academic freedom as a qualified right of the *institution* to be free from government interference in its core administrative activities, such as deciding who may teach and who may learn.”<sup>233</sup> He believes that the First Amendment implications of *Bakke* and its progeny have been sorely neglected, leaving that constitutional legacy liminal and uncertain.<sup>234</sup> Due to this persistent neglect, Horwitz worries that academic freedom has come to seem like little more than a makeweight manufactured for the occasion, or as he puts it, “the proverbial ticket[] good for one trip only.”<sup>235</sup>

Some scholars have, in fact, dismissed the academic freedom rationale in *Bakke* as a pretext. Richard H. Hiers insists that no “judge, Justice, or commentator [has] explained how institutional academic freedom or autonomy could be grounded upon the First Amendment.”<sup>236</sup> In his view, Powell’s opinion in *Bakke* is a source of “confusion” because it conflates academic freedom with institutional autonomy.<sup>237</sup> According to Hiers, “the Court has never held that educational institutions themselves are entitled to academic freedom under the First Amendment.”<sup>238</sup> Instead, public colleges and

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<sup>231</sup> See Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 464-65 (2005) (explaining that under *Grutter* and *Bakke*, values of academic freedom and educational autonomy gave rise to a greater state interest in diversity).

<sup>232</sup> *Id.* at 465.

<sup>233</sup> *Id.* (citing J. Peter Byrne, *Academic Freedom: A “Special Concern” of the First Amendment*, 99 YALE L.J. 251, 257 (1989) (emphasis added by Horwitz)).

<sup>234</sup> See *id.* at 467-72.

<sup>235</sup> *Id.* at 470. Here, Horwitz draws on Professor Mark G. Yudof’s observation that “the Powell approach to academic freedom . . . was for that day and trip only. . . .” Yudof, *supra* note 149, at 855-56.

<sup>236</sup> Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLIN L. REV. 1, 56 (2007).

<sup>237</sup> See *id.* at 57.

<sup>238</sup> *Id.*

universities must promote the flourishing of faculty and students by protecting their freedom of inquiry.<sup>239</sup> Courts can and certainly should defer to academic expertise, Hiers says, but this is not equivalent to according broad license when reviewing an institution of higher education's own practices and policies.<sup>240</sup>

Despite Hiers' assertion, a careful examination of *Bakke's* history indicates that Powell deliberately chose to invest colleges and universities with First Amendment autonomy rights, rather than to confer those rights on individuals. That choice grew — at least in part — out of a desire to preserve the then-nascent recognition of corporate speech rights. In light of Justice Kennedy's recent retirement from the Court,<sup>241</sup> it is a particularly opportune moment to revisit *Bakke's* vision of academic freedom as elaborated in *Grutter* and reaffirmed in *Fisher*. With Kennedy's departure, there has been speculation that a newly constituted Court will overturn affirmative action in higher education admissions.<sup>242</sup> At the same time, there is a widespread sense that corporate speech rights are secure.<sup>243</sup> Precisely because *Bakke's* First Amendment implications have been largely ignored, there is little sense that these predictions are inconsistent. Yet, if the Court's commitment to corporate rights is robust, it will not be easy to retreat from a principle of educational autonomy for colleges and universities.

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<sup>239</sup> See *id.* (“Arguably, as ‘expressive association,’ academic institutions may invoke First Amendment academic freedom protections on behalf of their faculty and students.”).

<sup>240</sup> *Id.* at 57-58.

<sup>241</sup> Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html>.

<sup>242</sup> Caleb Gayle, *Supreme Court Pick Could Put Forty Years of Affirmative Action Precedent at Risk*, GUARDIAN (July 7, 2018, 3:01 PM EDT), <https://www.theguardian.com/law/2018/jul/07/supreme-court-pick-affirmative-action-precedent>.

<sup>243</sup> See Adam Liptak, *A Clue on His View of Citizens United*, N.Y. TIMES, July 23, 2018, at A12 (“[T]here is every reason to think a Justice Kavanaugh would continue to press one of his old boss's [Justice Kennedy's] signature projects: dismantling campaign finance laws that restrict the ability of people and groups to spend money to influence elections.”). My purpose here is not to evaluate the constitutional legitimacy of the jurisprudence establishing corporate speech rights. Other scholars have offered strong critiques of the Court's decisions in this area. See, e.g., Coates, *supra* note 134, at 266-75 (describing the dangers of corporate rent-seeking behavior under current doctrine). My task instead is to explore whether these precedents can be squared with the rejection of academic freedom that promotes diversity.

### 1. The College or University as an Autonomous Institution

To address the doctrinal relationship between an academic freedom rationale and corporate speech rights, it is useful to draw on Horwitz's three alternative interpretations of the First Amendment interests at stake in *Bakke* and its progeny.<sup>244</sup> The first equates academic freedom with institutional autonomy. According to Horwitz, "that reading assumes that the particular educational goals put forward by a university are less important to the courts than the fact that the goals are propounded by educators making 'complex educational judgments.'"<sup>245</sup> As a result, "provided a university policy is based on genuine academic reasons, it is entitled to act substantially free of governmental interference" so long as it operates "within constitutionally prescribed limits."<sup>246</sup> This strong presumption in favor of a hands-off approach to college and university decision-making is analogous to a libertarian rationale in campaign finance reform cases. Corporate rights to be free of state interference gained significant recognition during the *Lochner* era when the Court repeatedly rejected government regulations as improper intrusions into the operation of the free market.<sup>247</sup> That laissez-faire school of thought did not survive the Great Depression and the rise of the New Deal. On the contrary, throughout the 1930s and 1940s, government intervention appeared essential to avoid a catastrophic economic collapse.<sup>248</sup> By the 1970s, however, Powell's memorandum, aptly entitled "Attack on American Free Enterprise System," called for resurrecting the *Lochner* era's doctrinal commitments, in part by strengthening corporate speech rights. Conservative organizations and libertarian think tanks took up the crusade, and with *Buckley v. Valeo*, Powell and his adherents began

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<sup>244</sup> Yudof, *supra* note 149, at 858 ("We all admire the systematizers and universalists, but in the case of academic freedom we must learn to tolerate a more complex reality.").

<sup>245</sup> Horwitz, *supra* note 231, at 502.

<sup>246</sup> *Id.*

<sup>247</sup> See, e.g., *Grosjean v. Am. Press Co.*, 279 U.S. 233 (1936) (declaring unconstitutional a tax on advertisements in papers with circulation in excess of 20,000 copies if the tax limited the dissemination of information). See generally WINKLER, *supra* note 134, at 255.

<sup>248</sup> CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT NOW MORE THAN EVER* 35-40 (2004).

to enjoy success.<sup>249</sup> As constitutional law scholar Cass Sunstein observes, “*Buckley* is a direct heir to *Lochner*.”<sup>250</sup>

Following *Buckley*, two campaign finance decisions called this laissez-faire perspective into question. In *Austin v. Michigan Chamber of Commerce*,<sup>251</sup> Michigan state law prohibited corporations from using treasury funds to make independent expenditures to support or oppose a candidate for state office. Instead, corporations had to use monies set aside solely for political purposes.<sup>252</sup> Under a strict scrutiny test, the Court first found that Michigan had a compelling interest in preventing corruption in its political campaigns.<sup>253</sup> Because corporations could still contribute from specially designated funds, the Court also held that the statute was narrowly tailored to advance the goal of “eliminating from the political process the corrosive effect of political ‘war chests’ amassed with the aid of the legal advantages given to corporations.”<sup>254</sup> In *Austin*, the corporate identity of the speaker seemed to matter greatly, leading the Court to resist a hands-off approach to regulation.

In *McConnell v. FEC*,<sup>255</sup> the Court confronted new federal campaign finance laws enacted after the *Buckley* decision. Ongoing abuses of the electoral process had convinced Congress that additional regulations were necessary. To that end, new legislation curbed the use of “soft money,” that is, donations to a party that were not earmarked for a particular candidate or purpose, in federal, state, and local elections. These contributions previously had been exempted from limits and disclosures under federal law, leading to loopholes that Congress considered a threat to both the actual and perceived legitimacy of the political process.<sup>256</sup> In addition, Congress imposed disclosure requirements on issue advertisements that had not been covered before. These advertisements provided implied support for candidates through messages about particular issues but did not exhort viewers to vote for the candidates. Issue advertisements often misled voters about

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<sup>249</sup> WINKLER, *supra* note 134, at 302, 336-37. This was true even though the case ironically had been brought by the liberal-leaning American Civil Liberties Union. *Id.* at 336-37.

<sup>250</sup> Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 884 (1987).

<sup>251</sup> 494 U.S. 692 (1990), *overturned by* Citizens United v. FEC, 558 U.S. 310 (2010).

<sup>252</sup> *Id.* at 654-55.

<sup>253</sup> *Id.* at 658-60.

<sup>254</sup> *Id.* at 666.

<sup>255</sup> 540 U.S. 93 (2003), *overturned by* Citizens United v. FEC, 558 U.S. 310 (2010).

<sup>256</sup> *Id.* at 122-26.

the sponsors' identities, which impeded efforts to make an informed choice at the polls.<sup>257</sup> In *McConnell*, the Court mostly upheld the new restrictions because an explosion of soft money was jeopardizing the integrity of the political process.<sup>258</sup>

The decisions in *Austin* and *McConnell* tempered any libertarian impulse in *Buckley*, but the Court's 2009 decision in *Citizens United* changed all that.<sup>259</sup> The conservative wing of the Court handed down a broad-ranging opinion that once again left corporate speech largely unregulated.<sup>260</sup> As Justice Kennedy explained in his majority opinion, "First Amendment protection extends to corporations" because they promote robust democratic discourse.<sup>261</sup> In overturning *Austin* and *McConnell*, the Court concluded that limits on corporate political expenditures improperly "interfere[d] with the 'open marketplace' of ideas protected by the First Amendment."<sup>262</sup> The Justices found that the sole reason to constrain corporate expenditures related to the risk of corruption, which was narrowly defined as quid pro quo corruption, that is, a bribe.<sup>263</sup> In this libertarian vein, the majority rejected an appearance of outsize influence or favoritism as a legitimate basis for interfering with corporate speech rights.<sup>264</sup> Nor could government regulate expenditures based on a concern that captive shareholders would be forced to endorse a corporate message. Instead, the Court believed that dissenting shareholders should remedy that problem "through the procedures of corporate democracy."<sup>265</sup>

Whatever one's views on the propriety of the 2009 decision in *Citizens United*, its laissez-faire approach clearly supports educational autonomy for colleges and universities and the deference that comes with it. To dispense with academic freedom as a basis for upholding

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<sup>257</sup> *Id.* at 126-29.

<sup>258</sup> *Id.* at 146-53, 155-56.

<sup>259</sup> WINKLER, *supra* note 134, at 357.

<sup>260</sup> See *Citizens United v. FEC*, 558 U.S. 310, 339-41 (2010). See generally WINKLER, *supra* note 134, at 357-58.

<sup>261</sup> *Citizens United*, 558 U.S. at 342-43.

<sup>262</sup> *Id.* at 354.

<sup>263</sup> *Id.* at 359.

<sup>264</sup> *Id.* at 359-61.

<sup>265</sup> *Id.* at 362 (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)). Some commentators have questioned the efficacy of corporate democracy in addressing dissenting shareholders' concerns. See, e.g., Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 *YALE L.J. ONLINE* 53, 56-58 (2009), <http://yalelawjournal.org/forum/citizens-not-united-the-lack-of-stockholder-voluntariness-in-corporate-political-speech>.

affirmative action in admissions, the Court would somehow have to find that this form of institutional autonomy is inferior to speech — at least political speech — under the First Amendment. There are certainly hierarchies of First Amendment rights; for instance, commercial speech enjoys less protection than political speech.<sup>266</sup> But here, the question is whether an associational right to constitute the institution through the choice of students is less protected than the right to engage in political speech. As a purely logical matter, any effort to subordinate the right of expressive association to a speech right is hard to credit. After all, for organizations, the creation of a speech community — the collective speaker, if you will — has to be antecedent, indeed foundational, to speech itself. The Court already has acknowledged this fact, noting that “implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>267</sup>

The Court has repeatedly expressed respect for colleges' and universities' associational rights. In *Rumsfeld v. Forum for Academic and Institutional Rights*,<sup>268</sup> the Court recognized that law schools have a right of expressive association. There the Justices held that because “[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others,” it is imperative that the government refrain from “restrict[ing] individuals' ability to join together and speak.”<sup>269</sup> This right of expressive association protects an institution's freedom to include and to exclude members from the community,<sup>270</sup> the very power that Justice Marshall described during the deliberations about *Bakke* forty years ago.<sup>271</sup> The *Rumsfeld* decision ultimately upheld a federal requirement that military recruiters be granted access to law schools' on-campus job interviewing process. According to the Justices, the requirement did not intrude on a right of expressive association because the recruiters were “outsiders who come onto the campus for the limited purpose of trying to hire

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<sup>266</sup> See David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 79 (2017) (arguing that the Court has recognized high-value and low-value speech but needs to acknowledge the full spectrum of speech).

<sup>267</sup> *Roberts v. U. S. Jaycees*, 468 U.S. 609, 622 (1984).

<sup>268</sup> *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006).

<sup>269</sup> *Id.* at 68.

<sup>270</sup> *Id.*

<sup>271</sup> See *supra* notes 103, 111 and accompanying text.



students.”<sup>272</sup> The boundaries of the speech community simply were not at stake, as they were in *Bakke*, *Grutter*, and *Fisher*.

In a related vein, the Court has shown deference to institutions of higher education in structuring the terms of association in their communities. In *Christian Legal Society v. Martinez*,<sup>273</sup> a religious student organization at a public law school sought to exclude gays and lesbians from membership because they would not sign a “Statement of Faith” regarding their sexual conduct.<sup>274</sup> This exclusionary practice violated the law school’s requirement that student organizations “allow any student to participate, become a member, or seek leadership in the organization, regardless of [her] status or beliefs.”<sup>275</sup> Based on this “all comers” policy, the administration rejected the organization’s application for official recognition, which in turn prevented the group from receiving financial support, publicizing events in the school newsletter, having an organizational email account provided by the school, or using the school’s logo. However, the organization was still able to get access to classrooms, bulletin boards, and chalkboards on an informal basis.<sup>276</sup>

The student organization unsuccessfully argued that the law school’s decision violated First Amendment rights of expressive association and free speech. The Court held that the law school could set boundaries for the use of its limited public forum, that the all comers policy was viewpoint-neutral, and that the organization still could pursue its expressive aims by other means.<sup>277</sup> The Justices’ analysis of the case was “shaped by the educational context in which it arises”<sup>278</sup> because “[a] college’s commission — and its concomitant license to choose among pedagogical approaches — is not confined to the classroom, for extracurricular programs are, today, essential parts of the learning process.”<sup>279</sup> For that reason, the Court approached its constitutional task with “special caution”<sup>280</sup> because the law school’s decisions about student organizational policy were “due decent respect.”<sup>281</sup> Decisions like these demonstrate that the Justices have

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<sup>272</sup> *Rumsfeld*, 547 U.S. at 69.

<sup>273</sup> 561 U.S. 661 (2010).

<sup>274</sup> *Id.* at 672.

<sup>275</sup> *Id.* at 671 (citing law school’s nondiscrimination policy).

<sup>276</sup> *Id.* at 669-70, 673.

<sup>277</sup> *Id.* at 680-83.

<sup>278</sup> *Id.* at 685.

<sup>279</sup> *Id.* at 686.

<sup>280</sup> *Id.* at 687.

<sup>281</sup> *Id.* In reaching this conclusion, the Court noted that the law school’s all comers

consistently accorded colleges and universities considerable deference in constituting their speech communities. These rights of expressive association create space for colleges and universities to determine their membership and to establish conditions that enable speech communities to flourish. There is no reason to believe that these rights enjoy any less protection under the First Amendment than corporate speech rights.

## 2. The College or University as a Democracy-Promoting Institution

In addition to the educational autonomy rationale set forth in *Bakke*, Horwitz offers a second explanation for the protection of academic freedom. This explanation turns on *Grutter*, which goes beyond *Bakke*'s focus on the pedagogical benefits of diversity to emphasize the significance of inclusive pathways to leadership in an authentic democracy. Far from adopting a laissez-faire rationale, *Grutter* sets forth "a substantive vision of the university as fulfilling an important *democratic* function."<sup>282</sup> Under this view, colleges and universities are obligated to "provid[e] upward mobility to a diverse cadre of future leaders."<sup>283</sup> Educational autonomy is an end in itself under a libertarian view, but *Grutter* instrumentalizes academic freedom in the service of larger democratic values.<sup>284</sup> This perspective on affirmative action is elaborated in Justice Stephen Breyer's account of "active liberty."<sup>285</sup> For Breyer, active liberty is distinct from laissez-faire libertarianism because the Court must weigh the impact of unrestricted liberty on the Constitution's democratic objectives. The government pursues these objectives when "it avoids concentration of too much power in too few hands; it protects personal liberty; it insists that the law respect each individual equally; and it acts only upon the basis of the law itself."<sup>286</sup> Because courts must balance the individual's

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policy was consistent with but broader than the state's nondiscrimination mandate. For that reason, the law school's autonomy interests played a significant role in upholding the policy. *Id.* at 689-90. The parties had previously stipulated to this expansive version of the policy, and the Court refused to adopt a narrower interpretation that tracked state policy. *Id.* at 675.

<sup>282</sup> Horwitz, *supra* note 231, at 549.

<sup>283</sup> Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 175 (2003).

<sup>284</sup> Horwitz, *supra* note 231, at 549-50.

<sup>285</sup> STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15-16 (2005).

<sup>286</sup> *Id.* at 8-9.

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interest in being free of government intrusion against the imperative of safeguarding the nation's democratic foundations, a strictly libertarian view of the Constitution is not possible.<sup>287</sup>

Far from relying on absolutes like formal color-blindness, Breyer's approach to active liberty is contextual and consequentialist.<sup>288</sup> In his view, the *Bakke* decision established "a liberty-based claim" that "the Constitution grants universities especially broad authority to determine for themselves the composition of their student bodies."<sup>289</sup> In addition, however, *Grutter* appealed to "principles of solidarity, to principles of *fraternity*, to principles of active liberty" that are "necessary to maintain a well-functioning participatory democracy."<sup>290</sup> As a result, *Grutter* illuminated the anti-democratic implications of doing away with affirmative action:

Too many individuals of all races would lack experience with a racially diverse educational environment helpful for their later effective participation in today's diverse civil society. Too many individuals of minority race would find the doors of higher education closed; those closed doors would shut them out of positions of leadership in the armed forces, in business, and in government as well; and too many would conclude that the nation and its governmental processes are theirs, not ours. If these are the likely consequences — as many knowledgeable groups told the Court [in *Grutter*] that they were — could our democratic form of government then function as the Framers intended?<sup>291</sup>

In Breyer's account, the courts pay deference to college and university administrators not only because of their academic freedom to shape the learning environment but also because of their unique role in promoting a healthy democracy.

Breyer believes that active liberty has a similar role to play in corporate speech cases. In his view, *Austin* and *McConnell* properly held that the Court should not "apply a strong First Amendment presumption that would almost automatically find the [campaign finance] laws unconstitutional."<sup>292</sup> Rather, the Court must carefully weigh "a campaign finance law's negative impact upon those primarily

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<sup>287</sup> *Id.* at 6-12.

<sup>288</sup> *Id.* at 6.

<sup>289</sup> *Id.* at 80 (emphasis in original).

<sup>290</sup> *Id.* at 82 (emphasis in original).

<sup>291</sup> *Id.* at 83.

<sup>292</sup> *Id.* at 48.

wealthier citizens who wish to engage in more electoral communications and its positive impact upon the public's confidence in, and ability to communicate through, the electoral process."<sup>293</sup> Of course, *Citizens United* overturned *Austin* and *McConnell*, impliedly rejecting arguments based on active liberty. In response, Breyer joined Justice Stevens' dissent, which warned that:

The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve. It will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.<sup>294</sup>

The affirmative action and campaign finance cases have plainly diverged when it comes to Breyer's notion of active liberty and its regard for democratic aims. One should not, however, conclude that the laissez-faire approach to corporate speech in *Citizens United* nullifies prior recognition of colleges' and universities' singular democracy-promoting characteristics.<sup>295</sup> Regardless of the Justices' views on political speech and the marketplace of ideas, the Court can still conclude that institutions of higher education are critically important gateways to civic inclusion and leadership. In fact, in 2016, *Fisher II* did just that, seven years after the high-profile decision in *Citizens United*. Apparently, the majority considered the history and mission of institutions of higher education persuasive in finding that they have vital democratic-regarding properties.<sup>296</sup>

### 3. The College or University as a First Amendment Institution

Horwitz posits a third and, for him, preferred explanation for academic freedom's role in *Bakke* and *Grutter*, one that focuses on colleges and universities as First Amendment institutions with a particularly important role in advancing free speech. He concedes that

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<sup>293</sup> *Id.* at 49.

<sup>294</sup> *Citizens United v. FEC*, 558 U.S. 310, 475 (2010) (Stevens, J., dissenting).

<sup>295</sup> *But cf.* Horwitz, *supra* note 231, at 555-56 (noting that the approach in *Grutter* may seem increasingly anomalous as the Court endorses a hands-off approach to government regulation of speech).

<sup>296</sup> *Fisher II*, 136 S. Ct. 2198, 2210 (2016).

the Court has generally been indifferent to a speaker's identity in evaluating speech rights. Even so, Horwitz believes that *Grutter* "may provide ammunition for a broader effort to overturn an institutionally agnostic, top-down approach to the First Amendment in favor of one that builds from the ground up."<sup>297</sup> To that end, he argues that colleges and universities exemplify the kind of institutions that promote public discourse as a core aspect of their mission. In his view, First Amendment institutions should enjoy deference because their internal processes safeguard an interest in robust public dialogue while setting permissible constitutional limits.<sup>298</sup> By giving leeway to these institutions, the Court enables them to serve as trustworthy sites for democratic experimentalism.<sup>299</sup> According to Horwitz, the affirmative action cases are consistent with this interpretation because they permit decentralized innovation to promote public discourse by treating the boundaries of permissible constitutional action as flexible and accommodating.

There is no doubt that Horwitz's preferred rationale faces a steep uphill battle in the Court. The campaign finance cases have undercut the prospects for acknowledging unique First Amendment institutions. In *Citizens United*, the majority hewed to its agnosticism about speakers' identities. As the Court explained, "[p]olitical speech is indispensable to decision-making in a democracy and this is no less true because the speech comes from a corporation rather than an individual."<sup>300</sup> The Justices went on to find that "the First Amendment absolutely and categorically prohibits any regulation of speech that distinguishes on the basis of the speaker's corporate identity."<sup>301</sup> The Court therefore rejected any special treatment of media corporations but nonetheless paid some attention to their special nature.

Before the *Citizens United* decision, federal campaign finance law had exempted media corporations from limits on corporate independent expenditures.<sup>302</sup> Even as the Justices disavowed any

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<sup>297</sup> See Horwitz, *supra* note 231, at 569.

<sup>298</sup> *Id.* at 571-74.

<sup>299</sup> *Id.* at 575-76.

<sup>300</sup> *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

<sup>301</sup> *Id.* at 341. In dissent, Justice John Paul Stevens noted that the Court had allowed the government to regulate speech differently based on the identity of the speaker, for example, imposing special limitations on the speech rights of prisoners, students, employees, foreigners, and members of the military. *Id.* at 420-23 (Stevens, J., dissenting).

<sup>302</sup> The Court had previously recognized the unique significance of media corporations in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666-68

media exemption, they observed that “[t]he First Amendment was certainly not understood to condone the suppression of political speech in society’s most salient media.”<sup>303</sup> On the contrary, the Framers’ goal was to fight the repression of the press that had taken place in England and the colonies.<sup>304</sup> The Court ultimately concluded that any legal distinction between media and non-media corporations was too difficult to administer in a world of mergers and acquisitions and diversified corporate enterprises. Even so, the Justices’ discussion made clear that media corporations occupy a particularly important place in the flourishing of the First Amendment, making it essential to protect their complex corporate forms from special regulation.<sup>305</sup> In fact, media outlets continue to enjoy unique protections in other areas, such as defamation and shield laws, expressly because of their critical role in advancing public discourse.<sup>306</sup>

If media corporations have special discourse-promoting properties, then colleges and universities can make a plausible claim that they do as well based on their unique traditions of academic freedom. Should this argument succeed, courts would defer to college and university decisions that result from institutional policies and practices designed to allow public discourse to flourish. The diversity rationale is, of course, couched precisely in these terms as a way to stimulate the robust exchange of ideas on campus and in the larger society. If the Court ever decides to recognize unique First Amendment institutions, as Horwitz hopes, colleges and universities should be strong contenders for the designation.

As a doctrinal matter, then, the First Amendment should continue to offer significant protection to academic freedom, whether as a form of educational autonomy, an exercise of active liberty, or a prerogative of discourse-promoting institutions. That freedom in turn should

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(1990). Legal scholars have argued that his agnosticism about speakers’ identities is belied by earlier precedents. See, e.g., ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 71-76 (2014); WINKLER, *supra* note 134, at 367; Randall P. Bezanson, *Whither Freedom of the Press?*, 97 *IOWA L. REV.* 1259, 1263 (2012).

<sup>303</sup> *Citizens United*, 558 U.S. at 353.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 352-53. Legal scholar Richard L. Hasen describes his own initial resistance to the media exemption and explains how the very reasons the Court cited regarding the media’s role in promoting public discourse convinced him that exceptional treatment is both appropriate and necessary. RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 126-32 (2016).

<sup>306</sup> HASEN, *supra* note 305, at 132-37.

make the Court hesitant to apply strict scrutiny aggressively, as though institutions of higher education have no particular expertise in making decisions about admissions. So long as a college or university has a well-researched and well-reasoned rationale for the use of race in weighing applicants' relative merits, the Justices should accord substantial deference to that determination. Of course, a poorly analyzed and inadequately designed admissions program will not meet the requirement of narrow tailoring, but rejecting the outcomes of a carefully executed and thoroughly documented admissions process will pay lip service to academic freedom while undermining it. Any move that renders academic freedom a fiction must be at odds with the Court's support for protecting corporate speech rights based on a laissez-faire approach to regulation. If anything, the case for deference to colleges and universities is stronger, given that *Bakke*, *Grutter*, and *Fisher* have consistently recognized not just institutional autonomy claims but also the democracy-promoting traditions that have been a hallmark of institutions of higher education. Should the Court ultimately come to value discourse-promoting First Amendment institutions as well, the case for academic freedom becomes even more persuasive.

#### 4. The Public/Private Distinction and the Academic Freedom Rationale

One concern about this analysis of academic freedom is whether the public or private status of colleges and universities should matter in evaluating First Amendment protections. The public/private distinction is, of course, highly relevant to the Fourteenth Amendment, which prohibits public but not private actors from denying any individual the equal protection of the laws.<sup>307</sup> Even so, in the field of higher education, it has been widely assumed that private institutions that receive government funding are bound to abide by the same nondiscrimination standards as public colleges and universities.<sup>308</sup> Indeed, the recent actions against Harvard and Yale reflect this very understanding.<sup>309</sup>

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<sup>307</sup> See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 269-79, 291-95 (1991) (describing the Court's shifting approaches to the state action requirement in cases involving racial discrimination).

<sup>308</sup> See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2345 (2000) (noting that *Bakke* held that the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 are co-extensive, so private universities receiving federal funds at a minimum would be bound by Title VI).

<sup>309</sup> See Complaint of Students for Fair Admissions, *supra* note 195, at 119 (seeking

By contrast, the Court's jurisprudence on free speech suggests that the identity of the speaker is far from dispositive when it comes to First Amendment rights. As a result, it is not clear why protections for academic freedom should vary, depending on whether a college or university is public or private.<sup>310</sup> After all, conceptions of academic freedom in the United States were modeled on the experience of German universities, which were public and demanded autonomy from the State to ensure the integrity of their operations. At the outset, American universities faced somewhat different challenges. As institutions that were mostly private, their leaders mainly feared intrusion by lay governing boards, not state officials. Whether public or private, though, some degree of independence has always been seen as critical to fulfilling the institutional mission of colleges and universities.<sup>311</sup>

The laissez-faire model of institutional autonomy is unlikely to deny academic freedom to institutions based on their public or private nature. In fact, in the most high-profile affirmative action cases, the Court has recognized the autonomy claims of public universities, like the University of California, the University of Michigan, and the University of Texas. An ethic of institutional deference ought to have at least the same purchase at private schools. When the democracy-building features of higher education described in *Grutter* are factored in, public college and university systems can cite their special role in training individuals to fulfill civic duties as well as to meet workplace demands.<sup>312</sup> However, private universities perform these functions as well, and there is every reason to presume that they are effective in

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a declaratory judgment that "any use of race or ethnicity in the educational setting violates the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964").

<sup>310</sup> If anything, concerns about federalism and state sovereignty might strengthen a public college or university's claim to autonomy. For example, recently Congress voted to impose federal taxes on some private universities' endowments but not on public universities' endowments. Andrew Kreighbaum, *Final GOP Deal Would Tax Large Endowments*, INSIDE HIGHER EDUC. (Dec. 18, 2017), <https://www.insidehighered.com/news/2017/12/18/large-endowments-would-be-taxed-under-final-gop-tax-plan>. It is possible that there was a concern that levying such a tax on public institutions, if severe enough, could interfere with their core operations, thus infringing on the prerogatives of state governments. Because the Court has found the distinction between states' governmental and proprietary activities unworkable, the doctrine of intergovernmental tax immunity has been applied broadly. See Ellen P. Aprill, *Excluding the Income of State and Local Governments: The Need for Congressional Action*, 26 GA. L. REV. 421, 426-29 (1992) (describing the evolution of the doctrine).

<sup>311</sup> Horwitz, *supra* note 231, at 474-77.

<sup>312</sup> Rachel F. Moran, *City on a Hill: The Democratic Promise of Higher Education*, 7 UC IRVINE L. REV. 73, 75-80 (2017).



promoting democratic aims and building pathways to leadership. So again, there seems to be little basis to distinguish between public and private schools. Precisely because the mission, structure, and functioning of public and private institutions have become so similar,<sup>313</sup> there is also no apparent basis for making any bright-line distinctions should the Court choose to recognize First Amendment institutions that play a unique role in promoting public discourse. Whether public or private, institutions of higher education are committed to stimulating robust dialogue through their research, teaching, and service.<sup>314</sup>

Under any rationale for upholding diversity based on academic freedom, it is hard to imagine federal courts differentiating between public and private institutions. Even so, there is a crucial political distinction between these two types of schools. Public colleges and universities are directly answerable to state officials and the electorate, while private ones are not. The aftermath of *Bakke* and *Grutter* illustrates this point. In response to the Court's rulings, voters in California and Michigan approved popular referenda that banned any consideration of race in admissions at state institutions of higher education. There were unsuccessful legal challenges to both ballot measures. In *Coalition for Economic Equity v. Wilson*,<sup>315</sup> the California plaintiffs contended that the prohibition violated equal protection and was preempted by federal civil rights law.<sup>316</sup> In *Schuette v. Coalition to Defend Affirmative Action*,<sup>317</sup> the lawsuit also raised equal protection concerns, this time alleging that the state of Michigan had become a party to discrimination by banning the use of race in government decision-making.<sup>318</sup>

*Wilson* had nothing to say about academic freedom, but the Supreme Court did address concerns about institutional autonomy in *Schuette*. After noting that the Michigan constitution confers plenary power on the trustees of public universities, Justice Kennedy's

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<sup>313</sup> Richard A. Matasar, *Private Publics, Public Privates: An Essay on Convergence in Higher Education*, 10 U. FLA. J.L. & PUB. POL'Y 5, 6-19 (1998). *But cf.* Rex R. Perschbacher, *The Public Responsibilities of a Public Law School*, 31 U. TOL. L. REV. 693, 693-94 (2000) (questioning Matasar's claims in the law school context). *See generally* Rachel F. Moran, *Clark Kerr and Me: The Future of the Public Law School*, 88 IND. L.J. 1021, 1027-42 (2013) (describing the debate between Matasar and Perschbacher, analyzing the relative merits of their positions, and identifying unresolved questions).

<sup>314</sup> *See* Horwitz, *supra* note 231, at 587.

<sup>315</sup> 122 F.3d 692 (9th Cir. 1997).

<sup>316</sup> *Id.* at 701-11.

<sup>317</sup> 572 U.S. 291 (2014).

<sup>318</sup> *Id.* at 298-301.

plurality opinion emphasized the First Amendment right of voters to engage in self-government. As he explained:

It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. . . . These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.<sup>319</sup>

For the plurality, a public college or university's educational autonomy had to be subordinate to the democratically expressed will of the electorate, much as *Citizens United* made a corporation's speech rights subordinate to the will of its shareholders.

Even with his focus on active liberty, Justice Breyer concurred in the judgment because "decisionmaking [was] moved from an unelected administrative body to a politically responsive one."<sup>320</sup> For him, democratic-regarding values clearly cut in favor of enhanced political accountability. In dissent, Justice Sonia Sotomayor reached a different conclusion because she took issue with these characterizations of the referendum's impact on the allocation of state power. In her view, the University's board of trustees was a group of elected and politically accountable actors authorized to make a wide range of decisions about university operations, including admissions.<sup>321</sup> As she explained, the referendum improperly targeted affirmative action, divesting the board of its discretion to make race-related admissions decisions but otherwise leaving its powers intact. According to Justice Sotomayor, this decidedly narrow shift in the board's authority reordered the political process in a way that impermissibly burdened minorities' ability to participate.<sup>322</sup> Her objections therefore derived less from solicitude for academic freedom and more from distrust of a plebiscite that singled out race for special treatment. In fact, academic freedom has been largely neglected as a rationale for insulating public

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<sup>319</sup> *Id.* at 313.

<sup>320</sup> *Id.* at 337 (Breyer, J., concurring in the judgment).

<sup>321</sup> *Id.* at 353-54, 361-64 (Sotomayor, J., dissenting).

<sup>322</sup> *Id.* 353-54, 391-92.

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institutions of higher education from popular mandates imposed by elected officials and voters. In this respect at least, the autonomy claims of public and private colleges and universities have diverged, with public schools answerable to politicians and voters and private schools answerable to their boards of trustees.<sup>323</sup>

#### CONCLUSION

In *Bakke*, Justice Powell found a middle way to uphold affirmative action in higher education admissions. Powell's diversity rationale is still intact after forty years and has even been expanded by recognizing the role of colleges and universities in promoting inclusive democratic leadership. The decision's longevity seems surprising when the Court's holding is equated with the rise of formal color-blindness and the application of strict scrutiny to all racial classifications, whether invidious or benign. However, a closer examination of the case's history reveals that much of its staying power turns on the Court's simultaneous recognition of academic freedom and the need to accord deference to college and university decision-makers.

Far from being a doctrinal aberration, *Bakke's* recognition of academic freedom is linked to increased recognition of corporate autonomy rights under the First Amendment. Even as the Court's jurisprudence on racial equality has become rigid and effete, its precedents on corporate speech have grown increasingly protective of an organization's right to be free of government interference. In that same spirit of liberty, the Justices have accorded institutions of higher education flexibility to experiment with different approaches to the use of race in admissions. Academic freedom has been affirmative action's safe harbor, even as debates over the meaning of racial equality rage on. Whether this refuge survives will depend heavily on whether advocates can persuade the Court to preserve this First Amendment paradigm not just for corporations that influence campaigns but also for institutions of higher education that shape ideas, leaders, and democratic discourse.

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<sup>323</sup> Cf. Yudof, *supra* note 149, at 855, 857 (doubting that *Bakke's* conception of academic freedom fundamentally alters the allocation of political authority over public universities).