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Diversity May Be Justified

ANITA BERNSTEIN*

What about diversity as a rationale for affirmative action is compelling enough to justify the hurts it inflicts on individuals? Judges, legislators, public opinion, and implementers of diversity programs in education and the workforce have defended their initiatives either with vague, anodyne, ill-founded paeans or, more often, with silence about what the rationale achieves. They have offered no justification of diversity.

From the premise that any state action that generates (or even risks) harm must be supported with reason, this Article undertakes the task of justification. What makes diversity unique among the rationales for affirmative action, this Article argues, is its power simultaneously to achieve two social goods—the repair of subordination and the strengthening of pluralism—that rest on independent and mutually constitutive jurisprudential bases.

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INTRODUCTION

Institutions struggle to defend their policies of discrimination aimed at liberal ends. When a complainant objects in court to such an initiative, judges are likely to condemn it as a violation of constitutional or statutory rights. Proffered rationales for progressive-minded discrimination—known for decades as affirmative action¹—typically fail.

Maintaining that only “a compelling governmental interest”² will permit state action that takes codified characteristics of an individual into

1. The first use of this phrase in American federal law appears in an executive order signed by President John F. Kennedy soon after he took office. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961) (directing federal contractors to take affirmative action toward equal employment opportunities). Used to describe overt efforts for redress, however, “affirmative action” appeared in print in 1866; it has been applied to civil rights since World War II. See KEVIN L. YUILL, *RICHARD NIXON AND THE RISE OF AFFIRMATIVE ACTION: THE PURSUIT OF RACIAL EQUALITY IN AN ERA OF LIMITS* 33–34 (2006).

2. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

account, and giving private sector employers little room to maneuver around antidiscrimination laws,³ the U.S. Supreme Court has held that a range of reasonable-sounding motivations for affirmative action—including the repair of statistically manifested inequality,⁴ the need for schoolchildren to have role model teachers,⁵ and plausible worries about a disparate-impact discrimination claim in the future⁶—do not justify this measure. A state actor may still implement a group-based remedy for past wrongs,⁷ but courts, led here by the Supreme Court, seldom agree that any historical violation of law justifies sorting persons based on their membership in a class.⁸

Thus affirmative action, barely legal these days, stays alive in American law with the help of one last rationale.⁹ The rationale left standing is diversity, understood descriptively as “those differences in values, attributes, or activities among individuals or groups that a particular society deems salient to the social status or behavior of those individuals or groups.”¹⁰ Understood normatively as a rationale for action, it casts institutional practices that would otherwise violate the civil or constitutional rights of individuals in a positive light. Diversity makes discriminatory behaviors lawful.

Diversity can go only so far in aid of affirmative action. At least three limitations reduce its reach. First, the Supreme Court has deemed

3. A generation ago the Court held that Title VII of the Civil Rights Act permits employers to impose plans that discriminate in favor of protected groups. *Johnson v. Transp. Agency of Santa Clara Cnty.*, 480 U.S. 616, 638 (1987) (upholding a program that favored women); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 204 (1979) (upholding a program that favored racial minorities). On the dwindling strength of these precedents, see Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 *BERKELEY J. EMP. & LAB. L.* 1, 3–4 (2005).

4. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989).

5. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986).

6. *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009).

7. Ronald J. Krotoszynski, Jr., *The Argot of Equality: On the Importance of Disentangling “Diversity” and “Remediation” as Justifications for Race-Conscious Government Action*, 87 *WASH. U. L. REV.* 907, 917 (2010).

8. See Derrick Bell, *Diversity’s Distractions*, 103 *COLUM. L. REV.* 1622, 1625–26 (2003) (attributing this narrow range of acceptability to the consensus-minded jurisprudence of Justice Sandra Day O’Connor).

9. On its fragility, see Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 *YALE L. & POL’Y REV.* 1, 34 (2002) (calling diversity a “rhetorical Hail Mary pass, an argument made in desperation when all other arguments for preferences have failed”); Adam Liptak, *College Diversity Nears Its Last Stand*, *N.Y. TIMES*, Oct. 16, 2011, at SR4 (predicting rejection by the Supreme Court in the 2012 Term); Adam Liptak, *Justices Take up Race as a Factor in College Entry*, *N.Y. TIMES*, Feb. 22, 2012, at A1 (reporting a certiorari decision that “has the potential to eliminate diversity as a rationale sufficient to justify any use of race in admissions decisions”).

10. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 7 (2003). For other definitions, see KATHARINE ESTY ET AL., *WORKPLACE DIVERSITY: A MANAGER’S GUIDE TO SOLVING PROBLEMS AND TURNING DIVERSITY INTO A COMPETITIVE ADVANTAGE* 1 (1995); Maureen J. Giovannini, *What Gets Measured Gets Done: Achieving Results Through Diversity and Inclusion*, 27 *J. QUALITY & PARTICIPATION* 21, 22 (2004) (defining diversity as “any dimension that can be used to differentiate groups and people from one another”).

particular programs defended in the name of affirmative action unconstitutional, foreclosing this rationale from supporting replications.¹¹ Second, on occasion a better justification for affirmative action than diversity will be available to state-actor defendants accused of discrimination in favor of subordinated groups.¹² Third, even when it prevails, the diversity rationale seems to trouble lawyers and judges.¹³ For all its infirmities, however, diversity endures as the strongest rationale to support progressive-minded discrimination when these measures are challenged in court.¹⁴

In hindsight, one could have predicted that this ideal would fare well in American doctrine and discourse.¹⁵ Using diversity as policy adverts to past invidious discrimination—a reality that participants in dialogues about social welfare wish to acknowledge—but also tactfully refrains from accusing anyone of doing wrong. The term invokes mending rather than penalty or detriment, and expansion rather than a painful zero-sum struggle over some scarce good. Diversity invites; it implies welcome.¹⁶

Bounteous connotations evaporate on closer examination, however. Listeners might hear promises in it, but any promises in the term are projections. Diversity means what those who use it want it to mean.¹⁷

The indeterminate legal content of diversity has generated an enormous yet incomplete literature. Writers—including those who like

11. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724–25 (2007) (rejecting the diversity rationale as used in grade-school education); *Gratz v. Bollinger*, 539 U.S. 244, 269 (2003) (invalidating a diversity plan that assigned state-university applicants points for particular characteristics).

12. See, e.g., *United States v. Paradise*, 480 U.S. 149, 166–67 (1987) (approving an affirmative action plan by the Alabama Department of Public Safety to remedy past discrimination); see also *infra* text accompanying notes 60–61.

13. See *Smith v. Univ. Wash. Law Sch.*, 233 F.3d 1188, 1200 (9th Cir. 2000) (condoning a diversity plan as “the narrowest footing upon which a race-conscious decision making process could stand”); *Hopwood v. Texas*, 78 F.3d 932, 941–42 (5th Cir. 1996) (noting a lack of consensus among the Justices about diversity as a compelling governmental interest).

14. Krotoszynski, *supra* note 7.

15. On support in doctrine, see *infra* Part I.A.; on support in discourse, see WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* 12 (2006) (“[D]iversity has become virtually a sacred concept in American life today. No one’s really against it; people tend instead to differ only in their degrees of enthusiasm for it and their ingenuity in pursuing it.”); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 172–75 (2005) (reviewing poll data and commentary published in the popular press).

16. Compare Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1223–24 (1991) (criticizing the diversity rationale for its inattention to historical wrongs), and Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 953 (2001), with Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 98 (1986) (arguing that “a focus on the sins of discrimination” dooms affirmative action measures to partial success).

17. See Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1849 (1996) (“Everybody talks about diversity, but no one knows what it means.”).

affirmative action and those who don't—have called it shallow, hollow, inane.¹⁸ This charge provokes a battle-weary response from the left: Because diversity is now the strongest rationale to support governmental recognition of individuals' membership in subordinated groups, activists should work with what they have rather than waste time mourning the defeat of more pointed political rhetoric.¹⁹ The right also divides on diversity. Some conservative observers attack it as pernicious;²⁰ others extol it;²¹ still others propose that diversity be applied to new interventions.²² To date, no robust account of the diversity rationale—a defense of it that persons disadvantaged by its use can see the reasoning behind²³—has been published. In this Article, I set out to fill the void.

18. *Grutter v. Bollinger*, 539 U.S. 306, 354–55 n.3 (Thomas, J., dissenting); see Delgado, *supra* note 16.

19. Sumi K. Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035, 1052–53 (1997); Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 733–34 (1999) (book review).

20. See, e.g., DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 335 (1995) (“[M]anaging [workplace] diversity’ is an ideological movement masquerading as a booster of corporate performance.”); PETER W. WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 145 (2003) (“[D]iversity [as practiced in higher education] . . . is intellectually threadbare and ethically contemptible.”); Roger Clegg, *Why I’m Sick of the Praise for Diversity on Campuses*, CHRON. HIGHER EDUC., Jul. 14, 2000, at B8 (attacking diversity as contrary to merit).

21. Responding to the Supreme Court’s 2003 decision on affirmative action at the University of Michigan, see *infra* Part I.B., President George W. Bush declared, “I strongly support diversity of all kinds, including racial diversity in higher education.” Neil A. Lewis, *Bush and Affirmative Action: Constitutional Questions; President Faults Race Preferences as Admission Tool*, N.Y. TIMES, Jan. 16, 2003, at A1 [hereinafter *Bush Statement*]; see also *infra* note 22 and accompanying text (implicitly endorsing diversity).

22. Nominees for new diversity categories include religion, see Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action’s Destiny*, 59 OHIO ST. L.J. 811, 862 (1998); viewpoints, see James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL’Y REV. 5, 10 (2005); and conservatives in the academy, see Gary McCaleb, *For the Human Rights Campaign, Diversity Is Not Enough* (Nov. 23, 2011), http://www.americanthinker.com/2011/11/for_the_human_rights_campaign_diversity_is_not_enough.html.

23. See ADVERSITY.NET, <http://www.adversity.net> (last visited Oct. 2, 2012) (website established “for victims of reverse discrimination”). Assessments of affirmative action that focus on persons who feel harmed by its interventions include ROBERT K. FULLINWIDER, *THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS* (1980) (reaching no conclusion on the question of justification); Ken Feagins, *Affirmative Action or the Same Sin?*, 67 DENV. U. L. REV. 421, 422 (1990) (“As a result of affirmative action programs, marginally qualified white males rapidly are replacing black females as the group most frequently discriminated against in American society.”); Lisa Newton, *Reverse Discrimination as Unjustified*, 83 ETHICS 308, 312 (1973) (arguing that benign discrimination is no better than the invidious discrimination that preceded it). For more recent work in this vein, see Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683, 690 n.20 (2004) (gathering sources).

Proponents of diversity occasionally state or imply that diversity does no harm. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (concluding that a challenged affirmative action program in a state university “does not unduly harm nonminority applicants”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (declaring that a hypothetical individual whose competitor enjoyed “a ‘plus’ on the basis of ethnic background” has “no basis to complain of unequal treatment” even if he has lost “the last available seat”); *Employment Opportunity and Affirmative Action FAQs*, UNIV. OF

Claiming that diversity may be justified calls for not only an investigation of how the diversity rationale functions in contemporary American law, but also of the verb “to justify” itself. Justification, the noun form, holds particular sway in criminal and tort law. When functioning as a defense, it tells a victim that the detriment she suffered will not be condemned by the courts because inflicting that harm was the correct course for the defendant.²⁴ Justifying diversity, consistent with justification elsewhere in the law, ought also to address harmed individuals.²⁵

Human beings with names and life plans—Allan Bakke,²⁶ Barbara Grutter,²⁷ Abigail Fisher,²⁸ Jennifer Gratz,²⁹ Frank Ricci,³⁰ and Sharon Taxman,³¹ among others—gained attention from the Supreme Court when they objected to governmental actions that focused detrimentally on a characteristic of theirs recognized by civil rights law. They won certiorari, a scarce prize.³² Diversity rationales helped the institutional opponents they accused, just as self-defense helps human defendants accused of homicide and other crimes.

IOWA, OFFICE OF EQUAL OPPORTUNITY AND DIVERSITY, <http://www.uiowa.edu/~eod/searches/manual/FAQ/index.html> (last visited Oct. 2, 2012) (“Isn’t affirmative action a form of reverse discrimination? No. . . . Learning to value the contributions of women and minorities requires a change in how we think.”); *Equal Employment Opportunity Diversity Frequently Asked Questions*, NATIONAL ARCHIVES, <http://www.archives.gov/eeo/policy/diversity-faq.html> (last visited Oct. 2, 2012) (“Is there a cost benefit to Diversity? We can obtain a cost benefit by measuring such things as improved employee morale, lower turnover rates, higher productivity, fewer hiring costs, and decrease in absenteeism.”). In this Article, I stipulate that the diversity rationale for affirmative action can cause individuals to suffer detriment. See *infra* notes 25–32 and accompanying text.

24. “A defendant who raises a justification defense in a criminal prosecution says, in essence, ‘I did nothing wrong for which I should be punished.’” Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1161 (1987). The exemplar of a justification in criminal law is self-defense. *Id.* at 1161–63 n.22.

25. By “harmed individuals” I mean persons who complain in court about a specific instance of detriment linked to an affirmative action program, not members of dominant groups who feel burdened by affirmative action in the larger society. The latter cohort may have suffered no harm. See generally FRED L. PINCUS, *REVERSE DISCRIMINATION: DISMANTLING THE MYTH* (2003) (arguing that resentment of affirmative action among white men stems from their feeling powerlessness about income and employment patterns rather than prejudice against them for being male and white).

26. *Bakke*, 438 U.S. at 265.

27. *Grutter*, 539 U.S. at 306.

28. *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345).

29. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

30. *Ricci v. DeStefano*, 557 U.S. 577, 563 (2009).

31. *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997).

32. Christine M. Macey, *Referral Is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations*, 22 GEO. J. LEGAL ETHICS 979, 983 n.33 (2009) (noting that in a typical Supreme Court term, the odds of gaining certiorari after filing a petition are about one in a hundred).

As used in court to defend policies that discriminate, the diversity rationale seems to regard injury to plaintiffs as collateral damage and not very interesting or important.³³ But whenever an action, especially an action taken as policy by the state, has imposed harm on persons who have done nothing wrong—turned them away from a job, perhaps, or denied them admission to a selective school—courts that leave this harm unrectified ought to say why. “We had to hurt you for the sake of diversity” is unsatisfactory because it does not tell injured persons enough. If diversity may be justified, then litigants who experienced detriment and then lost in court can receive what the law has owed them all along: a principled reckoning.

Until this explanation emerges, rationales for diversity will resemble excuses more than justifications.³⁴ Diversity differs from criminal-defense excuses in one central respect: Criminal-defense excuses, which dispute the blameworthiness of the defendant, always admit that the conduct had bad effects. Proponents of diversity do not describe what they pursue as harm. Diversity, sings the chorus, is good. Consistent with the criminal-defense understanding of excuses as involuntary,³⁵ however, defenses of diversity sidestep basic questions of accountability and agency.

A judge reading a complaint about an affirmative action scheme might wonder which individuals installed the diversity goal in question, when the diversity-motivated policy became potent enough in practice to vex persons in the circumstances of the petitioner and, should diversity ever prove unproductive for the defendant in the future, who holds the key to turn this engine off. The diversity rationale in its current form takes no interest in the origins of conscious designs by individuals. Like excuse, it emerges in court as an ambient condition rather than a choice that urged decisionmakers to act in a particular way because acting that way was the correct thing for them to do.

The most striking similarity between criminal-defense excuses and diversity is what they lack: Both reach the judiciary with no claim that the challenged behavior honored a moral, legal, or political *imperative*. A criminal defendant who says that a condition like intoxication or duress should excuse conduct on her part—conduct that both fulfilled the elements of a crime and injured someone—does not claim that her

33. See *infra* Part II.B.

34. The excused defendant stands in contrast to the justified defendant, who “emerges from the resolution of his criminal prosecution with his reputation and character intact.” Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1331 (2006). A person who acted with justification did nothing wrong. An excuse, by contrast, acknowledges wrongness: Although it denies the culpability of an actor, it does not extol his behavior. Excuses include duress, insanity, intoxication, somnambulism, and mistake as to justification. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 242–43 (1982). Tort law shares this hierarchy: It recognizes justifications but not excuses as defenses. DAN B. DOBBS, *THE LAW OF TORTS* 157 (2000).

35. Robinson, *supra* note 34, at 242.

duress or intoxication deserves approval. The diversity rationale is almost as timorous. Litigants defend their pursuit as vaguely desirable rather than necessary.

This Article argues that action taken in the name of diversity should be examined with reference to ideals. Which circumstances justify beneficent classifications of persons based on conditions they did not choose, like their race or sex? What justifies imposing detriments on members of correlative groups such as persons classed as white?³⁶ My inquiry acknowledges that in settings where courts recognize diversity as a rationale for affirmative action—mainly education and the workplace—thin or vague rationales for this intervention can be expedient.³⁷ Part I of this Article explores the development of the diversity rationale as it emerged from the Supreme Court. Working from this foundation, the Article next explores the advantages of going light on principle or endorsing diversity as a vague, nonspecific good. When it is not justified—the condition it is in now—diversity suits the needs of numerous constituencies and decisionmakers. Part II, subtitled “The Uses of Blandness,” surveys diversity as an anodyne instrument.

Courts and policymakers need a thick case for diversity too. Once diversity is justified—not excused or condoned as it is at present—then distributions made in its name become not only lawful but also compelling. Individuals might have an enforceable entitlement to particular diversity-driven policies from governments;³⁸ they might have standing to demand these measures in court. Interventions done in the name of diversity that implementers cannot justify, by contrast, misuse the rationale and constitute wrongful discrimination. To the extent that implementing diversity remains optional rather than a legal imperative,

36. One might query whether “groups” include cohorts of persons identified by their class and levels of wealth. If not, why not? See generally MICHAELS, *supra* note 15 (arguing that the diversity rationale for affirmative action functions to bolster inequality and flatter the privileged). I take up—but certainly do not resolve—this challenge below. See *infra* Part III.

37. See Krotoszynski, *supra* note 7, at 912–13 (recognizing the need for implementers to minimize backlash).

38. Although this Article pays occasional heed to diversity as a Title VII rationale used by private employers, its assessment of the diversity rationale focuses on state action. When a private-sector employer imposes detriments in the name of diversity without having once practiced invidious discrimination in current need of rectification, the rationale becomes harder to justify. See generally Jared M. Mellott, Note, *The Diversity Rationale for Affirmative Action in Employment After Grutter: The Case for Containment*, 48 WM. & MARY L. REV. 1091, 1145–46 (2006) (“A few sound judicially crafted exceptions to the equal protection rule for race and more for protected nonrace characteristics . . . are not per se inconsistent with the text of the Equal Protection Clause. Title VII exceptions in the statutory text, however, are nonexistent for racial classifications . . .”). But see *Johnson v. Transp. Agency of Santa Clara Cnty.*, 480 U.S. 616, 628 (1987) (insisting that “taking race into account” is consistent with Title VII, even if an employer has not undertaken to repair its own discrimination). My thesis does support amending, or even repealing, civil rights statutes that ban every kind of unequal treatment based on a person’s membership in a codified list of groups. See generally *infra* Part V.C (discussing implications for government decisionmakers).

decisionmakers ought to reflect on robust versions of this choice along with the anodyne construct that now prevails.

Robust versions of the choice—that is, diversity justified—can emerge at two levels. Part III examines the first, and more familiar, level. It equates antisubordination with corrective and distributive justice. Here diversity is a manifestation as well as an end in itself; it is what results from interventions that strive to repair group-based historical injustice. Part IV, recognizing that in contemporary American courts antisubordination is a nonstarter, explores how diversity resembles other ideals and precepts that pervade contemporary law and government. The analogues gathered in this Part can justify diversity even for those who lack or renounce any commitment to antisubordination.

Arrayed to enlarge support for the diversity rationale, these ideals widen the base on which a diversity rationale rests. They are means as well as ends. Part V concludes the Article by reviewing the diversity rationale with reference to choices for institutions and governments. Affirmative action in this last Part is literally *action* when diversity functions to put agendas into effect. Once it is understood as principled, diversity can guide—rather than merely rationalize—the conduct of state actors who seek fidelity to both justice and equal protection of the laws.

I. DIVERSITY ENTERS DOCTRINE

A. FIVE VOTES IN *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE*

Neither party has prevailed, announced the U.S. Supreme Court in the great affirmative action dispute of its 1977 Term.³⁹ All nine Justices voted. Harry Blackmun, William Brennan, Thurgood Marshall, and Byron White sided with the Regents of the University of California, which had set aside for minority applicants sixteen places in a hundred-student medical school class at the Davis campus. The four signed a joint opinion; three of them wrote separately as well. Warren Burger, Potter Stewart, William Rehnquist, and John Paul Stevens sided with the plaintiff-respondent, a white man who had been refused admission to the medical school class. Omitting reference to the Constitution, this group relied on Title IV of the Civil Rights Act of 1964.⁴⁰

The ninth Justice, Lewis Powell, rejected three rationales proffered by the University of California in defense of its affirmative action plan—rectifying the disproportionately low number of minority medical students, countering the effects of societal discrimination, and trying to provide underserved communities with physicians⁴¹—before finding one

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

40. *Id.* at 417–18 (Stevens, J., concurring and dissenting).

41. Michele S. Moses & Mitchell J. Chang, *Toward a Deeper Understanding of the Diversity*

that he could endorse: Universities, Powell concluded, have a compelling interest in what he called "beneficial educational pluralism."⁴² Two sentences that Powell composed were acceptable to Blackmun, Brennan, Marshall, and White. They formed Part V-C of his opinion, the only passage in *Bakke* to win a majority of votes:

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.⁴³

How could any governmental "consideration of race and ethnic origin" of a person be "properly devised"? Justice Powell expounded on this question, speaking only for himself. Powell contended that variety in a student population generates "speculation, experiment and creation,"⁴⁴ an atmosphere that enhances learning. Multiple "experiences, outlooks, and ideas"⁴⁵ in a class of admitted students is an acceptable agenda for a state-university admissions policy. Because dialogue produced by a diverse student body relates closely to what institutions teach even when it takes place outside the classroom, Powell continued, choosing diversity in admissions is also a matter of academic freedom, "a special concern of the First Amendment."⁴⁶ Powell objected to the Davis policy for its message to Allan Bakke that because of his racial classification he had access to one of only eighty-four places, while his "Negro, Asian, or Chicano" rivals had an "opportunity to compete for every seat in the class,"⁴⁷ the full hundred. Too rigid. Yet Powell approved using group memberships, including race and ethnic origin, to affect distributions from the State of California.

What Powell meant by diversity has been debated for decades. Three value judgments pertinent to the law of equal protection underlie his conclusion. First, heterogeneity is desirable. Second, managers of institutions must hold prerogatives. Third, quotas are at best troubling, if not flat-out unconstitutional.⁴⁸

Rationale, 35 EDUC. RESEARCHER 6, 7 (2006).

42. *Bakke*, 438 U.S. at 317.

43. *Id.* at 320.

44. *Id.* at 312 (1978) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

45. *Id.* at 314.

46. *Id.* at 312.

47. *Id.* at 319-20.

48. Michael Selmi draws similar conclusions, omitting the one about managerial prerogative:

[I]f one wants to know what the law on affirmative action was then or is now, the best place to look would be Justice Powell's opinion, where one would learn that race can be used as one factor among many; quotas are constitutionally impermissible while goals are

These three positions—each of them pointedly silent about segregation and subordination—became the *Bakke* that endured, making the Powell opinion a landmark.⁴⁹ Pre-*Bakke* case law on integration, stretching back even before *Brown v. Board of Education*,⁵⁰ had affirmed the value of what Powell would later call “a diverse student body,”⁵¹ but always with reference to repair. Older cases construing the Equal Protection Clause to support desegregation measures had made reference to unlawful adversity that judges traced to enslavement.⁵²

The University of California, however, had embraced race-based affirmative action not to rectify any admitted-to discrimination in its past, but to enhance its present and future. A policy measure that imposes detriment and benefit on individuals based on a protected characteristic, installed by an entity without simultaneously asserting that it has any historical wrong to repair, characterizes affirmative action as contemporary judges approve it. Post-*Bakke* case law illustrates the phenomenon.

B. POST-*BAKKE* DIVERSITY

After enlisting four colleagues to sign onto his two careful sentences, Justice Powell went on to construe his innovation narrowly. One year after *Bakke*, he disagreed with the Court’s approval of a comprehensive desegregation plan. In his view, the scheme usurped prerogatives that belonged to parents and local school authorities:⁵³ “The primary and continuing responsibility for public education, including the bringing about and maintaining of desired diversity, must be left with school officials and public authorities.”⁵⁴ When a majority of his colleagues approved minority set-aside legislation in 1980, Powell wrote

acceptable; preference programs cannot be used to remedy societal discrimination; no racial classification may be treated as benign; and the role model theory will not justify a program, even though a diverse student body may serve as a compelling justification.

Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 999 (1999) (citations omitted).

49. Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in Grutter*, 15 TEX. REV. L. & POL. 437, 444 (2011) (“[B]efore *Bakke*, the notion that diversity could be a compelling governmental interest was never suggested.”).

50. 347 U.S. 483 (1954).

51. *Bakke*, 438 U.S. at 306. Among the harbingers of diversity as a compelling interest was *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 401 U.S. 1, 16 (1971) (observing that a desegregated classroom can “prepare students to live in a pluralistic society”).

52. Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 593 (2009) (“In *Sweatt v. Painter*, 339 U.S. 629 (1950)] and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950)], . . . we see the Court’s allusion to the democratic and social benefits flowing from a racially diverse student body.”).

53. *Columbus Bd. of Educ. v. Pinnick*, 443 U.S. 449, 479 (1979) (Powell, J., dissenting).

54. *Id.* at 489.

separately to defend this measure as very different from the *Bakke* intervention that he had voted against: *Fullilove v. Klutznick*, he said, rested on detailed findings by Congress that established the necessity of favoring minority contractors.⁵⁵ Powell never made diversity central to another decision before retiring in 1987, nine years after his remarkable articulation of a rationale.

Justice Sandra Day O'Connor took up the diversity baton. In *Wygant v. Jackson Board of Education*,⁵⁶ which found the need to furnish role models for minority children insufficient to support favoring minorities in layoffs, O'Connor suggested that the diversity rationale could have made a difference: Role models and diversity are very different goals, she wrote in a footnote to her concurrence, and the school board had unfortunately omitted diversity in its lower-court arguments.⁵⁷

In *Grutter v. Bollinger*, when the Court held for the first time that diversity is a compelling interest that justifies race-conscious measures by a state actor, Justice O'Connor wrote the 5-4 majority opinion.⁵⁸ *Grutter* permitted the University of Michigan Law School to consider race in admissions. Expanding Justice Powell's appreciation for discursive breadth within education, the *Grutter* majority extolled diversity as central to preparing students for life in society and even to "the legitimacy of American government."⁵⁹ Justice O'Connor cited an amicus brief, signed by military leaders, to support her conclusion that diversity is a matter of national security.⁶⁰

Diversity in the Supreme Court has only held steady, rather than gained, after the leap forward of *Grutter*. The diversity rationale was not strong enough to save affirmative action plans challenged in 2007⁶¹ and 2009.⁶² Although both cases were losses for affirmative action, they honored the diversity rationale.⁶³ And there are no rival rationales for

55. 448 U.S. 448, 516-17 (1980).

56. 476 U.S. 267 (1986).

57. *Id.* at 289.

58. 539 U.S. 306, 325 (2003).

59. See Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1770 (2004).

60. *Grutter*, 539 U.S. at 331.

61. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

62. *Ricci v. DeStefano*, 557 U.S. 577, 563 (2009).

63. In *Parents Involved*, the Court noted that defendant school districts had failed to show that racial classifications were necessary to attain the diversity they sought. 551 U.S. at 724-25. *Ricci*, in which the word "diversity" does not appear, held that a city government could not throw out firefighter tests whose white takers had performed better out of fear of disparate-impact liability in future litigation brought by minority test-takers. 557 U.S. at 563. *Ricci* nevertheless left room for positive discrimination in the future: A state actor may practice race-conscious affirmative action, wrote Justice Anthony Kennedy, when it has "a strong basis in evidence" to support its worry about liability. *Id.*

affirmative action: “Racial classification” and “racial balance,” for example, are terms of opprobrium to the Court.⁶⁴

Meanwhile, lower courts have approved and extended the diversity rationale for workplace affirmative action in the context of law enforcement. The Seventh Circuit agreed that Chicago, “a racially and ethnically divided major city,” needed diversity—more minorities at the sergeant level of its police force—to enhance community trust and cooperation with law enforcement.⁶⁵ Ruling against an aggrieved white police officer who was not given a promotion to inspector, a federal trial court nevertheless commended diversity as a stated goal for the defendant city to pursue.⁶⁶

II. AN ANODYNE RATIONALE, OR, THE USES OF BLANDNESS

Quoting a remark attributed to Randall Kennedy, James Lindgren once wrote that “[n]o one really believes in diversity.”⁶⁷ Proponents who defend diversity have “asserted a rationale they didn’t believe,” Lindgren continued, “because, after *Bakke*, diversity was all that was left to support affirmative action.”⁶⁸ In a much-cited article, Sanford Levinson has claimed that the Supreme Court uses diversity to play the game of Simon Says: When “Simon says, ‘Start talking about diversity—and downplay any talk about rectification of past social injustice,’ then the conversation proceeds exactly in that direction.”⁶⁹

If diversity doesn’t address past social injustice, what then does it address? If the term means nothing, why is it popular? Vagueness accompanying this word might be, as the tech phrase goes, not a bug but a feature. This Part contends that diversity as accepted by the Supreme Court covertly expands the prerogatives of individuals who manage large institutions.

Other uses of the diversity rationale paste smiley faces on a complicated record. As Justice Thomas observed trenchantly in his *Grutter* dissent, enthusiasts do not have good evidence to support their assertion that instilling diversity causes positive social consequences.⁷⁰ Another criticism, attributed above to Levinson but articulated earlier by

64. Nelson, *supra* note 52, at 593.

65. *Petit v. City of Chicago*, 352 F.3d 1111, 1114–15 (7th Cir. 2003). A pre-*Grutter* decision from the same court, authored by Judge Posner, had approved the favoring of an African-American applicant to the position of lieutenant in an Illinois “boot camp” correctional facility; the court concluded that the facility “would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots.” *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996).

66. See generally *Dietz v. Baker*, 523 F. Supp. 2d 407 (D. Del. 2007).

67. Lindgren, *supra* note 22, at 5.

68. *Id.*

69. Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 578 (2000).

70. *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., dissenting).

other scholars, is that diversity rhetoric muffles well-founded complaints about subordination and puts bland good cheer in their place.⁷¹ In this vein, this Part discusses three such anodyne uses of diversity: managerial prerogative, happy empirical claims, and papering over subordination. These uses of diversity as a vague, nonspecific good certainly serve various agendas. They may even achieve good effects. But they do not justify the diversity rationale.

A. DIVERSITY AS A PREROGATIVE FOR MANAGERS

Both proponents of diversity and scholars of affirmative action doctrine have remarked on the enthusiasm for diversity held by American businesses. Prominent corporations have articulated their steadfast support of this value. They have filed amicus briefs laden with praise for diversity.⁷² In “A Statement of Principle,” the chief legal officers of five hundred publicly traded companies endorsed diversity in the sense considered here. Refuting any notion that diversity efforts belong to the left, big business has stood unwaveringly for this precept in the U.S. Supreme Court.⁷³

Employers do not limit their embrace of diversity to amicus briefs and pledges. One report, published in the *New York Times* as an advertising supplement, offered lively features from about two dozen large companies (including the *Times* itself) telling how they integrate diversity into their operations.⁷⁴ Several use diversity as a yardstick when dealing with vendors and suppliers.⁷⁵

Businesses that celebrate diversity do not, however, explore whether these initiatives have led to quantifiable improvements in the short term or in their profits over time.⁷⁶ They describe diversity more with adjectives than numbers.⁷⁷ Although announcements of cost-cutting

71. See *infra* Part II.B.

72. Robert A. Garda, Jr., *The White Interest in School Segregation*, 63 FLA. L. REV. 599, 632 (2011); David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1576 (2004).

73. Garda, *supra* note 72 (reviewing amicus briefs filed in *Grutter and Parents Involved*). See generally FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009) (arguing that workplace affirmative action originated in managers’ decisions rather than law-based imperatives).

74. See Jason Forsythe, *Leading with Diversity*, N.Y. TIMES, <http://www.nytimes.com/marketing/jobmarket/diversity> (last visited Oct. 2, 2012).

75. See Anjali Chavan, *The “Charles Morgan Letter” and Beyond: The Impact of Diversity Initiatives on Big Law*, 23 GEO. J. LEGAL ETHICS 521, 524–27 (2010) (citing statements issued by Wal-Mart and General Electric).

76. Fay Hansen, *Diversity’s Business Case Doesn’t Add up*, WORKFORCE, Apr. 2003, at 28.

77. See David G. Embrick, *The Diversity Ideology in the Business World: A New Oppression for a New Age*, 37 CRITICAL SOC. 541, 541 (2011) (arguing, based on interviews with Fortune 1000 managers, that corporate leaders who endorse diversity as policy cannot “effectively elaborate on their company’s diversity policies or practices”).

measures emerge routinely from corporate public relations offices and investors associate cost-cutting moves (including layoffs) with positive prospects for the stock price, no publicly traded corporation appears to have ever revealed its decision to abandon a diversity initiative on the ground that it did not pay. Diversity programs in big business sometimes wane, but they appear internally unscrutinized as sources of gain or loss.⁷⁸ Writers who have noted diversity-enthusiasm within American business have also failed to say just why the cheering persists.⁷⁹

It might seem odd that a for-profit corporation would pour time and money into an initiative without concern for its bottom line. Once diversity is understood as a prerogative, however—an option that derives from and demonstrates power—the investment starts to make sense regardless of the results it achieves: “Organizations like having the flexibility of not being put in a box about whether this does or doesn’t work,” as a diversity consultant once put the point.⁸⁰ Because private entities have more freedom than government actors to sort by group-based characteristics, managers know that whatever position they espouse on diversity—for, against, a little, a lot—will likely remain optional. To the extent that employee morale and external perceptions affect corporate performance, an embrace of diversity will please several constituencies. It will also avoid the controversy that vexes affirmative action measures described in reparative terms.

Hence my hypothesis: Other things being equal, diversity as policy gives more prerogatives to individuals who make personnel decisions. Diversity-as-prerogative appeals not only to private-sector business leaders, but also to managers serving as state actors—like Lee Bollinger, for example, who as president of the University of Michigan found his name after the *v.* in two Supreme Court decisions that examined the diversity rationale.⁸¹ Just as corporation managers do not tally up what exactly diversity does for a company’s market capitalization, human resources operations, stock price, or capacity to shift in response to new

78. When researchers at MIT’s Sloan School of Management approached more than twenty Fortune 500 companies to review their diversity efforts, only four said yes. Thomas Kochan et al., *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 HUM. RESOURCES MGMT. 1, 7–8 (2003). Permission from chief executive officers did not assure participation, and the four companies that went along with the study came to it with longstanding relationships with individual researchers. *Id.*

79. Explanations have been superficial. See, e.g., ELISABETH LASCH-QUINN, RACE EXPERTS: HOW RACIAL ETIQUETTE, SENSITIVITY TRAINING, AND NEW AGE THERAPY HIJACKED THE CIVIL RIGHTS REVOLUTION 164 (2001) (attributing diversity enthusiasm to concern about international competitiveness); Andrew Ferguson, *Chasing Rainbows*, WASHINGTONIAN, Apr. 1994, at 35, 38 (claiming that businesses installed diversity training as litigation prophylaxis to look better, should they face discrimination complaints).

80. Hansen, *supra* note 76, at 30 (quoting the president and CEO of a diversity consultancy).

81. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

developments,⁸² persons who make decisions about diversity in the public sector have manifested no desire to gather facts when these facts might tie their hands.

Evidence for the prerogatives hypothesis includes the early-adopter embrace of diversity by one extraordinarily conservative lawyer and judge.⁸³ Justice Powell came to *Bakke* having “forthrightly rejected the idea that blacks had suffered injustice,” writes legal historian Anders Walker.⁸⁴ He even “seemed to believe that whites had themselves become something of a discrete and insular minority, confounded by their black peers and menaced by Soviets abroad.”⁸⁵ In 1966, Powell condemned peaceful civil disobedience as practiced by Martin Luther King, Jr. as “lawless and indefensible.”⁸⁶ A few years later, convinced that “the New Left, the liberal media, rebellious students on college campuses and, most important, Ralph Nader” gravely threatened the American economic system,⁸⁷ Powell launched from his law practice what became “the business community’s campaign to transform the Supreme Court.”⁸⁸ For Justice Powell this intersection—*African Americans have no entitlement to redress for injustice meets managerial capitalism needs more freedom from constraint*—made diversity-as-prerogative an attractive strategy, congruent with conservatism.⁸⁹ Unlike affirmative action as a technology of repair, diversity recognizes no entitlement based on historical injury. It permits power holders to do as they please.

82. See Hansen, *supra* note 76.

83. See generally Janet L. Blasecki, *Justice Lewis F. Powell: Swing Voter or Staunch Conservative?*, 52 J. POL. 530 (1990) (reviewing Justice Powell’s votes). Powell is often recalled as a moderate. See *id.* After one removes his *Bakke* opinion for this purpose, however, Powell’s sole liberal stance of any note is his 1973 vote reading the Fourteenth Amendment to limit what a state may criminalize with respect to abortion. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 346 (1994) (recounting *Roe v. Wade* as an aberration for Powell). On the rest of the record, see Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 LAW & SOC. INQUIRY 273 *passim* (2010) (describing Powell as central to Richard Nixon’s conservative “Southern strategy”).

84. Anders Walker, *Diversity’s Strange Career: Recovering the Racial Pluralism of Lewis F. Powell, Jr.*, 50 SANTA CLARA L. REV. 647, 673 (2010).

85. *Id.*

86. *Id.* at 669 (citing Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 207 (1966)).

87. Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 18, 2008, <http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html>.

88. *Id.*

89. Sanford Levinson notes that when Powell adverted to the First Amendment in support of the diversity rationale, see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (“[U]niversities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas.’”), he envisioned a prerogative rather than a mandate. For example, employees certainly take diverse positions on whether a union would be desirable and on “general economic concerns, such as the relationship between globalization and job security or the future of the welfare state,” but businesses remain free to oppose First Amendment-style diversity with respect to a robust exchange of ideas. Levinson, *supra* note 69, at 589–90.

The prerogatives hypothesis also comports with the civil rights history observation that diversity started to flourish after it gained a foothold among key personnel in both education and employment following the decline of reparations-focused affirmative action.⁹⁰ According to this thesis, the Reagan presidency brought transition to affirmative action in the 1980s. Executive and judicial branches of the U.S. government withdrew from commitments to affirmative action, a stance that continued with the Clinton administration.⁹¹ Foreseeing that affirmative action would fare poorly in the courts, human resources and university administrators switched to a more palatable and flexible alternative. Victories in *Bakke* and *Grutter*, though narrow, confirmed the soundness of a palatability strategy: The transmutation of antisubordination into diversity has endured.⁹²

What is interesting about this thesis is the question it does not explore: What appeal does diversity hold for individuals who govern universities and places of employment? Why do they bother? Diversity postures undoubtedly are cheaper and less controversial than affirmative action, but those virtues do not explain how diversity is better for decisionmakers than doing nothing at all—nothing, that is to say, except trying to comply with antidiscrimination law. Managerial prerogative is an answer to this question about incentives for decisionmakers.

More support for the prerogative hypothesis comes from the conservative origins of race-based affirmative action in the United States.⁹³ Conventional wisdom sites the liberal beginnings of affirmative action policy in a 1961 executive order from President John F. Kennedy.⁹⁴ In the Republican administration preceding Kennedy's, however, a commission led by Vice President Richard M. Nixon determined that private employers had not been doing enough to ensure equal

90. See, e.g., Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST 960, 961–62 (1998) (focusing on equal employment and affirmative action managers in corporations); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 LAW & SOC. INQUIRY 985, 986–88 (2007) (identifying university officials as the source of strength for diversity). For discussion of the personnel thesis in a third venue, see JIANNBIN LEE SHIAO, *IDENTIFYING TALENT, INSTITUTIONALIZING DIVERSITY: RACE AND PHILANTHROPY IN POST-CIVIL RIGHTS AMERICA* (2005) (describing foundations and other nonprofits).

91. Kelly & Dobbin, *supra* note 90, at 971–75.

92. See *infra* Part III.

93. See Benton Williams, *AT&T and the Private-Sector Origins of Private-Sector Affirmative Action*, 20 J. POL'Y HIST. 542, 543–44 (2008).

94. See *supra* note 1. On whether Kennedy ought to be remembered as liberal, compare John F. Kennedy, Acceptance of the New York Liberal Party Nomination (Sept. 14, 1960), available at <http://www.pbs.org/wgbh/americalexperience/features/primary-resources/jfk-nyliberal> (“I’m proud to say I’m a Liberal.”), with John F. Kennedy, CONSERVAPEDIA, http://www.conservapedia.com/John_F_Kennedy (last visited Oct. 2, 2012) (“Kennedy was basically a conservative, but he had to appeal to a primarily liberal base, so he offered symbols for the liberals while following a conservative course in foreign and domestic policy.”).

employment opportunity⁹⁵—a finding that presupposes *some* voluntary affirmative action by business in the pre-civil rights era. Like Powell, whom he appointed to the Supreme Court, Nixon endorsed managerial prerogative.⁹⁶ And like their successor-leaders within American business, managers in this pre-civil rights period supported versions of affirmative action that preserved their freedom to make decisions.⁹⁷

Court-fashioned equal protection doctrine that condemns quotas offers yet more support for the prerogatives hypothesis. Unless one accepts managerial prerogative as a good thing, it becomes hard to say just what about an affirmative-action plan that demands quotas for minorities offends the Equal Protection Clause when a no-quotas plan would not. In the construct now ascendant, the Constitution permits state actors to impose detriments on white persons because of their race⁹⁸ and men because of their sex⁹⁹ but only as long as flexibility—or what might be called vagueness, non-accountability, or even arbitrariness and caprice—accompanies this discrimination. Quotas, which constrain discretion by the state, appear to comport better than flexibility with the rule of law.¹⁰⁰ Diversity doctrine nevertheless perceives the quota, an approach to affirmative action that curbs prerogative, as unconstitutional.¹⁰¹

B. HAPPY EMPIRICAL CLAIMS

Launching the diversity rationale for affirmative action, Justice Powell endorsed the proposition that diversity causes desirable social consequences by reprinting, as an appendix to his opinion, a summary of an admissions policy in use at Harvard University.¹⁰² The president of Harvard at the time that *Bakke* was decided, Derek Bok, went on to say more about the uses of diversity in higher education in a much-cited book co-authored with William G. Bowen, who had served as president at Princeton when Bok led Harvard.¹⁰³ Bok and Bowen, working with an

95. YUILL, *supra* note 1, at 36.

96. See JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA 177–221* (1996) (exploring Nixon's motives).

97. See YUILL, *supra* note 1, at 37; see also TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 12* (2004) (noting partial acceptance of a racial quota imposed on federal contractors by the Public Works Administration in 1933).

98. *Gutter v. Bollinger*, 539 U.S. 306, 343–44 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

99. *Johnson v. Transp. Agency of Santa Clara Cnty.*, 480 U.S. 616, 638 (1987).

100. See FREDERICK F. SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES 276* (2003) (“When ‘the rule of law’ is contrasted with the ‘rule of men,’ the core idea is that individual power, creativity, initiative, and discretion have their dark side.”); see also Jonathan Turley, *Ten Reasons We’re No Longer the Land of the Free*, WASH. POST, Jan. 15, 2012, at B1 (expressing misgivings about governmental “unchecked powers resting on the hope that they will be used wisely”).

101. Selmi, *supra* note 48, at 999.

102. *Bakke*, 438 U.S. at 321.

103. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF*

enormous data set, declared that affirmative action in elite higher education had enhanced the welfare of both minority students and their white classmates.¹⁰⁴

The Shape of the River spurred other researchers post-*Bakke* to investigate the effects of diversity in higher education.¹⁰⁵ Studies cited by the Court in *Grutter* helped to build the constitutional-law rule that pursuing diversity is a compelling government interest.¹⁰⁶ Compelling, explained Justice O'Connor, because exposure to diversity breaks down stereotypes and fosters better understanding of groups; a classroom cannot have too much "variety of backgrounds."¹⁰⁷ Because graduates of diverse institutions emerge better prepared to navigate employment relationships and remunerative activities in a global economy, O'Connor continued, the rationale that supports affirmative action in education carries over into the workforce and even national security.¹⁰⁸

Post-*Grutter* measurements of diversity as a source of social gains continue. Although studies also link diversity in the workplace to gains in employees' productivity, creativity, and quality of decisions reached,¹⁰⁹ education continues to occupy the lion's share of this research. Findings

CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS xxi-xxviii (1998). In February 2012, the U.S. Department of Education reported that it was investigating complaints about race-based preferences at both Harvard and Princeton. See Peter Schmidt, *Harvard Faces New Scrutiny over Alleged Bias Against Asian-American Applicants*, TICKER (Feb. 2, 2012, 10:59 AM), <http://chronicle.com/blogs/ticker/harvard-faces-new-scrutiny-over-alleged-bias-against-asian-americans>.

104. The famed monograph reported on outcomes experienced by more than 80,000 persons who had entered elite institutions as undergraduates in 1951, 1976, and 1989. BOWEN & BOK, *supra* note 103, at 276. "It is not often that empirical research settles any important question of public policy," wrote Harvard sociologist Nathan Glazer, explaining that this book established "a remarkable increase, as a result of [affirmative action in elite-college admissions], in the number of blacks playing important roles in American society, gaining higher incomes, influencing their communities." Nathan Glazer, *A Place for Racial Preferences*, WASH. POST, Nov. 24, 1998, at A19.

105. See, e.g., COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES (Mitchell J. Chang et al. eds., 2003); DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN (Patricia Gurin et al. eds., 2004); DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield & Michal Kurlaender eds., 2001).

106. *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003).

107. *Id.* at 330.

108. *Id.* at 331.

109. See generally CAROL P. HARVEY & M. JUNE ALLARD, UNDERSTANDING AND MANAGING DIVERSITY (5th ed. 2011) (summarizing current research); SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 314 (2007) (reporting on formal, mathematically stated studies that found a positive relation between the "cognitive diversity" of membership in a group and the quality of decisions the group reaches). One example of how cognitive diversity succeeded occurred during World War II, when English cryptographers were finally able to crack a difficult German code by adding new groups of people to their code-breaking team: mathematicians, scientists, classists, chess grand masters, and crossword addicts. FRANS JOHANSSON, THE MEDICI EFFECT: WHAT ELEPHANTS AND EPIDEMICS CAN TEACH US ABOUT INNOVATION 79 (2006). But see CRIS WILDERMUTH & SUSAN GRAY, DIVERSITY TRAINING 16-17 (2005) (stating that the high productivity of demographically heterogeneous groups in the workplace is a myth).

about diversity in education have been overwhelmingly positive;¹¹⁰ new benefits ascribed to it continue to emerge in this literature.¹¹¹

Many empirical claims about diversity—though by no means all—rest on a shaky foundation.¹¹² One flaw marring several studies is that in higher education at least, and probably also in other contexts that engage the diversity rationale, trying to demonstrate that diverse environments cause welfare gains is confounded by self-selection into these environments. Researchers cannot readily distinguish causes from effects. Persons already open to democratic engagement, creative thinking, learning from new people, and other results that researchers have linked to diversity initiatives might have sought diversity out and would have found it if the environments they chose had not offered it to them.¹¹³ This population will turn up overrepresented in settings like integrated campus housing, college courses that attract diverse enrollments, and multicultural workplaces.¹¹⁴

110. MITCHELL J. CHANG, QUALITY MATTERS: ACHIEVING BENEFITS ASSOCIATED WITH RACIAL DIVERSITY 9 (2011) (“It is nearly impossible to find a published study grounded in the field of higher education research that rejects Justice Powell’s diversity rationale.”); Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1243 n.43 (2008) (“Academic opinion is solidly behind the tremendous benefits of diversity for the education of all students.”). In other work, Chang casts his findings about the benefits of diversity in a two-step analysis: First, white students who attend diverse schools are more likely than white students who attend nondiverse schools to socialize with nonwhite peers; from there, “socializing with someone of a different racial group . . . contributes to the student’s academic development, satisfaction with college, level of cultural awareness, and commitment to promoting racial understanding.” Mitchell J. Chang & Alexander W. Astin, *Who Benefits from Diversity in Higher Education?*, DIVERSITY DIG., <http://www.diversityweb.org/digest/w97/research.html> (last visited Oct. 2, 2012) (summarizing findings by Chang).

111. One study published in late 2011, for example, reported that “exposure to [fellow] students of diverse backgrounds” makes it more likely that a student will return to school after freshman year, and increases critical thinking. Dan Berrett, *What Spurs Students to Stay in College and Learn? Good Teaching Practices and Diversity*, CHRON. OF HIGHER EDUC. (Nov. 6, 2011, 12:55 PM), <http://chronicle.com/article/What-Spurs-Students-to-Stay-in/129670>.

112. Stanley Rothman et al., *Does Enrollment Diversity Improve University Education?*, 15 INT’L J. PUB. OPINION RES. 8 (2003) (critiquing the methodology of studies that link diversity in higher education with positive effects, and finding that when methodological flaws are corrected, the gains mostly vanish).

113. The absence of an agreed-on definition of diversity adds to this problem. Imagine a white student who puts a high value on racial diversity finding herself on a virtually all-white college campus in a mostly-white town. The student objects to this racial composition, but agrees reluctantly to enroll when her parents tell her they will pay tuition to no other school. She might generate some racial diversity in her social life through off-campus initiatives, and cultivate diversity on fronts other than race—income, sexual orientation, ability/disability—among her peers at school. If after a year or two at college she fits the profile of a diversity-enhanced student, what gets the credit? Published multivariate regressions in the diversity literature offer no hypothesis that I have located.

114. Classmates at the same school, less committed to integration, will in turn be underrepresented in these environments. See generally Note, *Educational Benefits Realized: Universities’ Post-Admissions Policies and the Diversity Rationale*, 124 HARV. L. REV. 572, 572–73 (2010) (arguing that universities practicing affirmative action in admissions should be required to promote interaction among diverse groups post-enrollment).

Individuals emerge from diverse environments manifesting the traits they came in with.¹¹⁵

Aware of the self-selection problem, researchers have attempted to install controls, but their efforts have been mostly unavailing.¹¹⁶ A randomized study of diversity in higher education—where, for example, cohorts would be forced into diverse versus non-diverse dormitories, or compelled to enroll or not enroll in certain courses—could get around self-selection but would clash with customs, if not rules, that assign prerogatives to students. Schools willing to challenge this tradition would need not only student cooperation but also approval of their study design from their institutional review boards before they could proceed.¹¹⁷ Even if a review board would approve the study, which seems unlikely,¹¹⁸ only an eccentric institution would seek to be known for taking away choice in campus housing or course selection.

Moving beyond education into diversity in other settings, diversity research has relied on surveys, confounded by a fundamental problem with self-reported data: survey signaling. Respondents to questionnaires may suppose that paeans to diversity will meet with approval, and that expressing skepticism or distaste will come across as bigotry and give offense.¹¹⁹ A presumed right answer to the questions emerges. Even when participants respond sincerely, they may drift into a position they deem

115. One study exemplifies this problem. The University of Michigan set up an Intergroup Relations Program, inviting first-year undergraduates to enroll. Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. Soc. ISSUES 17, 20 (2004). Key features of this optional program included intergroup communication processes in facilitated discussions. *Id.* at 21. The authors hypothesized that alumni of this program would score higher than fellow students on

perspective-taking, understanding that difference need not be divisive, perception of commonalities in values between their own and other groups, mutuality in learning about their own and other groups, interest in politics, participation in campus politics, commitment to civic participation after college, and acceptance of conflict as a normal part of social life.

Id. The prediction came true. *Id.* at 30.

116. Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCHOL. SCI. 507, 509 (2004) (describing a controlled study that tested a diversity intervention which worked effectively around the self-selection problem, but reported a limited conclusion of small improvements in “integrative complexity”).

117. This constraint applies to all educational institutions that receive federal funding. 45 C.F.R. § 46.101 (2007).

118. Informed consent from subjects would be virtually impossible to obtain, and enrolling students against their will in particular courses or keeping them out of electives they want to take would risk inflicting hard-to-rectify, if not irreparable, harm. *See generally* Mark S. Stein & Julian Savulescu, *Welfare Versus Autonomy in Human Subjects Research*, 38 FLA. ST. U. L. REV. 303 (2011).

119. Two British diversity trainers insist on metrics for the study of a diversity training program in the workplace apart from survey data of trained employees. PHIL CLEMENTS & JOHN JONES, *THE DIVERSITY TRAINING HANDBOOK: A PRACTICAL GUIDE TO UNDERSTANDING AND CHANGING ATTITUDES* 85 (3d ed. 2008). A private entity might look for “business benefits;” a governmental unit might assess public perception “or organizational performance against certain criteria. Whatever the measure, it needs to be specified from the word go.” *Id.*

correct or wish they held.¹²⁰ Survey respondents who are not trying to please their questioner might be trying to please themselves.¹²¹

Another problem with the empirical-effects literature about diversity is the neglected possibility that diversity could cause harm instead of, or in addition to, good. Researchers who investigate diversity look for welfare gains and often find them.¹²² Sometimes they report no gains.¹²³ When studying higher education, however, most researchers do not look for losses,¹²⁴ although negative findings and claims continue to be published.¹²⁵

Time spent in a diverse environment could correlate with bad effects for an individual: shorter life expectancy, worse physical or mental health, lower income, less wealth, lower scores on self-assessment of happiness, or inferior performance in one's occupation. That diversity

120. Patricia Gurin, an acclaimed researcher of diversity in higher education, summarizes two studies that may have been marred by this flaw. Patricia Gurin et al., *The Educational Value of Diversity*, in DEFENDING DIVERSITY 97, 126 (Patricia Gurin et al. eds., 2004). In the first, a majority of law students at Harvard and the University of Michigan said that "most of their classes were better because of diversity" and that they had personally benefited from this diversity." *Id.* at 126. When medical students at Harvard and the University of California at San Francisco medical schools were asked similar questions, they praised diversity at an even higher rate. *Id.* at 127. The studies were published in 2001 and 2003 respectively. *See id.* at 126–27. Students who filled out the questionnaires came of age after *Bakke* had made diversity famous in higher education.

121. *See* CHANG, *supra* note 110, at 15 (reporting on a study that linked "higher levels of cross-racial interactions" with high reports from students about their "self-efficacy, academic skills, and self-change in their capacity to engage with racial-cultural differences"). Another study, published in the *Journal of the American Medical Association*, found that white students attending racially diverse medical schools rated themselves higher than white students at less diverse schools with respect to their competence to care for minority patients. Somnath Saha et al., *Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in U.S. Medical Schools*, 300 JAMA 1135, 1141 (2008). These respondents may have assessed their skills correctly; they might also have been rationalizing their fit inside a school of a particular diversity level, whether low or high.

122. *See* sources cited *supra* notes 105, 109–110, 114, 119.

123. *See supra* note 111.

124. CHANG, *supra* note 110, at 9; Gurin, *supra* note 120, at 127–29 (observing that the only scholarly study purporting to find that higher-education diversity causes harm had actually found only that faculty, students, and administrators were more critical of the quality of education in those schools that serve larger proportions of African American students); *cf.* Levinson, *supra* note 69, at 578 ("[I]t is becoming ever more difficult to find anyone who is willing to say, in public, that institutional or social homogeneity is a positive good and diversity a substantive harm.").

125. *Grutter v. Bollinger*, 539 U.S. 306, 364 (2003) (Thomas, J., concurring and dissenting) (citing studies that find "heterogeneity actually impairs learning for black students"); Sonia R. Jarvis, Brown and the Afrocentric Curriculum, 101 YALE L.J. 1285, 1286 (1992) (observing that African-American children sometimes fare worse in integrated schools "because of discriminatory tracking programs and teachers' negative attitudes toward black children"); *cf.* John R. Lott, Jr. et al., *Peer Effects in Affirmative Action: Evidence from Law Student Performance*, 31 INT'L REV. L. & ECON. 1, 7 (2011) (reporting findings that minority students perform either no better or slightly worse when more fellow minority groups members are in their classes). One scholar has noted harms to members of minority groups when minority-majority schools are closed in the name of integration and their students relocated. Drew S. Days III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 55 (1992).

in education taxes racial minorities with an extra shift of work to benefit the dominant cohort at their school—explaining their culture, assuaging anxieties, and (in the case of admission to selective schools) reassuring skeptics that they were qualified applicants—has long struck critics as a plausible drawback.¹²⁶ Researchers interested in diversity might be disinclined to start with a gloomy premise. But any claim that an intervention enhances welfare is baseless when the claimant has not considered a contrary possibility. Harms from diversity might be absent in education.¹²⁷ They might also be present.

In contrast to their counterparts who study education, researchers of the workplace have associated diversity with negative effects or no effects at all.¹²⁸ One text reports that although numerous studies have sought to prove the hypothesis that diverse groups in the workplace produce better outputs than homogeneous ones, all of these efforts have failed.¹²⁹ A summary of findings about diversity in employment looked at multiple facets of diversity and a range of consequences seeking the impact of diversity on “affective, cognitive, communication, and symbolic processes.”¹³⁰ It found a mixed record.¹³¹ Researchers also attribute strife and dissonance to working with colleagues perceived as different.¹³²

Questionable empiricism can be marshaled to support or refute any proposition, but the diversity rationale is peculiarly vulnerable to this danger. Other uses of data in the law typically emerge when both sides of a dispute agree that facts gathered should inform outcomes. Diversity, however, holds a fragile status even when it rests on solid numbers. Judicial suspicion of discrimination, no matter how benign, will remain in place even if diversity really does generate happy results. For this reason, lawyers and activists opposed to affirmative action can oppose the diversity rationale without having to challenge allegations about the benefits of diversity. Because an affirmative action program can usually be defeated without the refutation of happy empirical claims, its adversaries—unlike adversaries in other fields who confront unwelcome

126. See Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 724–25 (2008).

127. See Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1553 (2011) (“Few could, or do, seriously claim that student diversity can somehow be viewed as an impediment to a high-quality legal education.”); Krotoszynski, *supra* note 7, at 935–36 (“Does anyone think that learning in an all-white, all-male college or university will ever be superior to learning in a comprehensively integrated environment?”).

128. Hansen, *supra* note 76, at 28; David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, in HARV. BUS. REV., Sept.–Oct. 1996, at 1–2.

129. WILDERMUTH & GRAY, *supra* note 109, at 17.

130. Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. MGMT. REV. 402, 402 (1996).

131. *Id.* at 421.

132. Thomas & Ely, *supra* note 128, at 4–5.

data—can let these assertions stand with relative safety, not jeopardizing their chances in court.

Happy empirical claims are politically convenient too. Consistent with the prerogative-for-managers function of the diversity rationale,¹³³ elected officials and other decisionmakers subject to public scrutiny reap advantages from claims about gain. These leaders can present their decisions to favor diversity as driven by social science rather than expediency. If diversity as an instrument functions well to attain noncontroversial ends, then applauding it is more than just an easy choice. Who among us prefers to be unprepared to navigate the global economy, or wants the next generation to feel befuddled and threatened by the unfamiliar? Because the term lacks definitional rigor, one can purport to pursue it while doing very little.

The word hems nobody in and commits to nothing, while leaders can call diversity valuable, even indispensable. Public figures who embrace it gain shelter from political strife when the empirical claims they make present diversity as a nonpartisan social engine, puttering forward and doing good.¹³⁴ Politicians of contrary stripes thus can agree that diversity—undefined, unmeasured, unconstrained—makes a population better off, even when they disagree about what to do in its name and when to stop doing it.¹³⁵ The next Subpart observes that for speakers and listeners, positive rhetoric is more palatable than a protest against injustice.

C. PAPERING OVER SUBORDINATION

Just as happy empirical claims connect the diversity rationale with pleasant social conditions, a tactful silence about subordination and

133. See *supra* Part II.A.

134. See Jones, *supra* note 15, at 177 (“Everyone can feel good. No one need feel threatened or excluded.”).

135. Stances on diversity from the last two U.S. presidents, politicians from opposing parties, illustrate the phenomenon. Compare *Bush Statement*, *supra* note 21 (“University officials have the responsibility and the obligation to make a serious effort to reach out to students from all walks of life Schools should seek diversity by considering a broad range of factors in admissions, including a student’s potential and life experiences.”), with Kathy Kiely, *Making Their Case: Obama Relishes Challenge of a “Difficult Time”*, USA TODAY, Oct. 31, 2008, at 1A (quoting Senator Obama: “I come from a diverse background and so I think I understand a lot of different cultures.”). Once in office, the Obama administration continued to assert empirical claims. On diversity in education, see Press Release, U.S. Dep’t of Education, New Guidance Supports Voluntary Efforts to Promote Diversity and Reduce Racial Isolation in Education (Dec. 2, 2011), <http://www.ed.gov/news/press-releases/new-guidance-supports-voluntary-efforts-promote-diversity-and-reduce-racial-isol> (quoting Attorney General Eric Holder: “Diverse learning environments promote development of analytical skills, dismantle stereotypes, and prepare students to succeed in an increasingly interconnected world.”); on diversity in the workforce, see Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 18, 2011) (“[O]ur greatest accomplishments are achieved when diverse perspectives are brought to bear to overcome our greatest challenges.”).

oppression keeps affirmative action measures optimistic rather than aggrieved. Purporting to look forward rather than backward, diversity “begins with an implicit denial of the defender’s participation in or responsibility for past or contemporary racism,” objects critical race scholar Charles Lawrence.¹³⁶ “Minorities are hired or promoted not because we have been unfairly treated, denied jobs, deprived of our lands, or beaten and brought here in chains,” according to another leader in this field, Richard Delgado. Enter affirmative action, buttressed by the diversity rationale, which “neatly diverts our attention from all those disagreeable details and calls for a fresh start.”¹³⁷

Diversity as a papering-over that obscures, and even denies, subordination occupies a vast literature.¹³⁸ After *Grutter* constitutionalized diversity as a good reason for governmental discrimination—“a compelling interest”¹³⁹—American legal scholarship about affirmative action has had to grapple with the relation between antsubordination, a painful rationale for what Justice Powell called “consideration” of categories like “race and ethnic origin,”¹⁴⁰ and diversity, the alternative motive that treads lightly on “all those disagreeable details.”¹⁴¹ Presently I will have more to say about diversity and antsubordination functioning as both rivals and mutually constitutive efforts toward social progress.¹⁴² For now I note the anodyne nature of the rationale. Diversity is blander than antsubordination.

Diversity is blander not only because the wounds of enslavement and government-sponsored segregation are still raw in the United States, but because of the subordination inherent in layers of wealth and class. “The problem with affirmative action is not (as is often said) that it violates the principles of meritocracy,” writes Walter Benn Michaels, describing diversity in American universities; “the problem is that it produces the illusion that we actually *have* a meritocracy.”¹⁴³ By their presence, writes Michaels, African-American classmates tacitly testify that white students are there “on merit because they didn’t get there at the expense of any black people.”¹⁴⁴ Soothed by a righteous message,

136. Lawrence, *supra* note 16, at 953.

137. Delgado, *supra* note 16, at 1223–24.

138. Bell, *supra* note 8, at 1632–33; Cho, *supra* note 19, at 1052; Delgado, *supra* note 16, at 1223; Lawrence, *supra* note 16, at 953. See generally Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1425 (1990) (commenting on *Bakke*: “Thus, in the name of a diversity that equates race with being a ‘farm boy from Idaho,’ admissions programs could continue to admit students on the basis of race.” (citations omitted)).

139. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

140. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

141. Delgado, *supra* note 16, at 1224.

142. See *infra* Parts III & IV.

143. MICHAELS, *supra* note 15, at 85.

144. *Id.*

beneficiaries of class privilege gain an excuse from having to think about their wealth.

Diversity changes the subject. For Michaels, affirmative action appeals to campus elites because it flatters them.¹⁴⁵ More focused than Michaels on racial subordination, Derrick Bell has agreed that diversity in higher education admissions amounts to “a serious distraction” from the persistence of severe economic disadvantage, a condition that keeps deserving persons out of college.¹⁴⁶

In addition to changing the subject, diversity fosters blandness because it helps to smother whatever conversation about American distributions of wealth might otherwise arise. As Michaels notes acidly, “the kind of diversity produced by a larger number of poor students isn’t exactly the sort of thing a college can plausibly celebrate—no poor people’s history month, no special theme dormitories (i.e., no Poor House alongside Latino House and Asia House) and no special reunions for poor alumni.”¹⁴⁷ The call that anti-racist initiatives announce—“to give up our prejudices”—may sound strenuous, but it coddles privileged persons in comparison to an alternative call for economic equality. Forestalled by diversity talk, such a demand “might require us to give up our money.”¹⁴⁸

III. DIVERSITY AS CORRECTIVE AND DISTRIBUTIVE JUSTICE

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.¹⁴⁹

The origin of any justice-based claim for a group is a historical wrong whose effects persist.¹⁵⁰ In diction made famous by Aristotle, the consequences that oppress the group are violations of both *corrective* and *distributive* justice.¹⁵¹ A corrective justice claim asserts that individuals who are members of harmed groups have suffered unrectified wrongs. A distributive justice claim addresses allocation. Benefits and detriments, it asserts, are held in a wrongful pattern: too much for some and too little for others.¹⁵² Writings on reparations owed for the wrong of slavery

145. *Id.*

146. Bell, *supra* note 8, at 1622, 1632–33.

147. MICHAELS, *supra* note 15, at 89.

148. *Id.*

149. THE FEDERALIST NO. 51, at 324 (James Madison).

150. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 865–67 (1995) (discussing corrective justice and distributive justice rationales for affirmative action in higher education).

151. See generally IZHAK ENGLAND, CORRECTIVE AND DISTRIBUTIVE JUSTICE: FROM ARISTOTLE TO MODERN TIMES (2009) (examining Aristotle’s *Nicomachean Ethics*).

152. See BRON RAYMOND TAYLOR, AFFIRMATIVE ACTION AT WORK: LAW, POLITICS, AND ETHICS 40–42 (1991) (considering corrective-justice and distributive-justice rationales for affirmative action).

explore the jurisprudence of this claim in a race-based context.¹⁵³ Other groups that continue to suffer from unrectified wrongs can hold corrective and distributive justice claims as well.

Understood in terms of corrective and distributive justice, diversity is more of an outcome than a goal. Because more than one axis of oppression exists in the United States and multiple redresses can be undertaken at the same time, rectification of subordination through affirmative action will make any setting more diverse. Consider, for example, efforts deployed to ameliorate the effects of race and sex discrimination in a workplace. Although interventions might seek antisubordination rather than diversity, reparative intervention necessarily installs more variety of race and sex. Even if an intervention addresses only one axis of subordination, such as race alone, it necessarily diversifies the setting.¹⁵⁴

Affirmative action when implemented operates as a source of redistribution, recognizing groups that, due to historical injustice, possess either too much or too little.¹⁵⁵ For this reason, distributive justice relates more directly than corrective justice to the task of justifying diversity as affirmative-action policy. Five precepts, or premises of distribution-focused affirmative action, help to direct and limit intervention. Reviewing these precepts, I consider affirmative action as a source of diversity in recurring settings.

One caution before we begin: Published generalizations about the justice or injustice of affirmative action have struck readers as vague, conclusory, poorly delineated to the point of meaninglessness, or detached from reality.¹⁵⁶ I acknowledge the peril and promise to engage it in the last Part of this Article, which considers diversity as a fact on the ground.

153. See generally Forde-Mazrui, *supra* note 23; Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319 (2004) (exploring distributive justice claims); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003) (reviewing the debate).

154. See Levinson, *supra* note 69, at 586.

155. Robert Nozick, though doubtful that affirmative action might be justified, sketched a rationale:

[A]ssuming (1) that victims of injustice generally do worse than they otherwise would and (2) that those from the least well-off group in the society have the highest probabilities of being the (descendants of) victims of the most serious injustice who are owed compensation by those who benefited from the injustices (assumed to be those better off, though sometimes the perpetrators will be others in the worst-off group), then a *rough* rule of thumb for rectifying injustices might seem to be the following: organize society so as to maximize the position of whatever group ends up least well-off in the society.

ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 231 (1974).

156. See, e.g., Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997) (analyzing flaws of the diversity rationale); Walter P. Jacob, Note, *Diversity Visas: Muddled Thinking and Pork Barrel Politics*, 6 GEO. IMMIGR. L.J. 297, 301 (1992) (discussing the diversity rationale in immigration law).

A. FIVE DISTRIBUTIVE PRECEPTS

Distributive justice makes reference to goods, drawbacks, advantages, disadvantages, opportunities, and restrictions generally, not just “resources” in the material sense.¹⁵⁷ Because nouns in this literature have become cluttered with glosses and secondary meanings that occlude this discussion, I will refer to socially distributed conditions or things as “items,” a less familiar term. To start with the most basic precept: (1) *Persons are entitled to hold their fair share of items.* Holding too much or too many bad items, or too few or too little good items, violates distributive justice.

This generalization, seeking a basic starting point, makes no reference to equality and does not pause over the contrast, made famous by Robert Nozick, of opportunities with results.¹⁵⁸ An individual might hold extraordinarily low or high quantities of wealth, health, power, and so on without necessarily manifesting any violation of distributive justice. Her holding, even if very different from what other people have, could have resulted from distributively just antecedents.

In pursuit of the first precept, positive law reallocates items consistent with some distributive goal. For example, progressive taxation (in principle at least) transfers wealth from the rich to the poor. Environmental regulation burdens one group, industry, to benefit another group, the public.

Law-based redistribution typically takes multiple values into account. Transferring wealth from rich to poor, for example, might comport with an equality-of-resources distributive justice ideal,¹⁵⁹ but other desiderata, both material and nonmaterial, limit this agenda.¹⁶⁰ Accordingly, legislation and judicial decisions that transfer wealth proceed with caution. They do not transfer as much as could be transferred; they limit the reach of government. Distributive justice thus both motivates and limits the redistributions of positive law. Though constrained, positive law undertakes these interventions. Second precept: (2) *Positive law does, and should, endeavor to achieve distributive justice.*

The third precept recognizes social groups, or classes of persons subject to regulation by the law, as central to distributive justice. Rather than defend the precept, here I use it descriptively as an axiom of law in

157. See generally Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1983).

158. NOZICK, *supra* note 155, at 161–66.

159. See Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 1108 (2004).

160. Among them are procedural regularity, the need to consider incentives, and rights or prerogatives that derive from lawful ownership. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 11 (1996) (identifying the Constitution as a source of constraint).

action. American law herds persons into classifications. These groupings extend beyond the protected-class prescriptions and enforcements that it states in its civil rights doctrine; they are pervasive.

Law would be unintelligible without legal statutes that give privileges and detriments to persons based on categories and political subdivisions that assign tasks to members of groups. The ideal of “a government of laws, not of men” becomes coherent only with reference to aggregation: The law strives to treat a person with reference to his category. Mr. Firstname Lastname stands before the law not as a set of one—his unique self—but as a member of some cohort. He must be treated as part of some pertinent class, for example: taxpayers, plaintiffs, appellees, respondents, voters, employers, felons, citizens, parents, or residents of a particular state. Third precept: (3) *The groups to which individuals belong affect their distributive-justice entitlements to items.*

These first three precepts take us to what distributive justice, understood here as an impetus for state action, might wish to achieve. I return to what Aristotle paired with distributive justice in the *Nicomachean Ethics*: corrective justice, understood here as rectification.¹⁶¹ Scholars have labored to distinguish corrective from distributive justice. Cognizant of that distinction, I work where they overlap: Claims rooted in corrective justice identify conditions as unjust and seek intervention as repair. The fourth precept applies corrective justice to redistribution as undertaken through state action: (4) *Group-based detriments contrary to distributive justice ought to be rectified by the law correlatively, in the form of group-based advantage.*¹⁶²

The last precept just noted recognizes the need for distributive schemes to guard against claims that lack a foundation in justice. Recognizing that law-based redistribution may encourage individuals to jettison memberships that do not enrich them, if they can, and assume advantageous ones, equal protection doctrine rightly includes mutability as among the variables that pertain to whether a classification is suspect.¹⁶³ If individuals can drop or pick up membership in a group

161. See generally ARISTOTLE, *NICOMACHEAN ETHICS* (2011).

162. See generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 34–35 (1995) (offering a liberal defense of group rights). Numerous constraints, in both theory and practice, limit the force of this fourth precept. For difficulties in theory, see *supra* note 160 and accompanying text; for difficulties in practice, see *infra* Part V. Nevertheless, this precept underlies every affirmative action plan that aspires to comport with justice. Those who oppose affirmative action categorically must either disclaim any interest in justice, deny the history that affirmative action seeks to ameliorate, or deem an affirmative-action cure worse than the disease of injustice. See *supra* note 20.

163. See *Plyler v. Doe*, 457 U.S. 202, 219 n.19, 220 (1982) (holding that illegal immigrants do not constitute a suspect class because they chose their status; their children, who made no such choice, come closer to suspect-class status); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (including immutability among the criteria for a suspect classification). For a critique of immutability in equal protection doctrine, see Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens, and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1 (2009).

opportunistically, leaving or joining it at little cost, then this group affiliation is relatively shallow; its holdings are unlikely to be a matter of distributive justice.

This prospect yields a fifth precept: (5) *Self-help being more consistent with liberty than action by the state, and action by the state being costly, the law ought to reserve its interventions for persons who cannot readily shed a detrimental group membership or acquire a beneficial one, and it ought to deploy its remedial powers with care.*

Priorities for action under this fifth precept of scarcity will emerge when decisionmakers face tradeoffs. Examples include heft (that is, focusing on group-based detriments that impose onerous rather than trivial burdens on members) and urgency (or, when aware of too many instances of group-based disadvantages than they can readily try to fix at once, decisionmakers ought to focus on what can achieve the most necessary repairs).

B. ANTISUBORDINATION AS A SOURCE OF DIVERSITY

As was noted, diversity and antisubordination overlap in outcome rather than purpose. The two come together when claims made for redistribution to benefit subordinated groups are successful. Here a posited entitlement that meets criteria of the five precepts will justify redress for the group in the form of positive discrimination. The distributive-justice reason for affirmative action is to ameliorate unjust underrepresentation in a favored group. Two questions then arise for implementers: *Which groups ought to be addressed by the scheme?*¹⁶⁴ And *which contexts are suited to justice-focused recognition of group members?*

1. *Which Groups?* Statutory civil rights law, which contains lists of groups that hold claims based on their having been oppressed, at least in the past,¹⁶⁵ is the best place to start answering this question.¹⁶⁶ Corrective and distributive justice can modify these lists via both subtraction and addition. Subtraction from an affirmative action distribution—that is, rendering a group ineligible for beneficent intervention—becomes warranted when a group listed as disadvantaged in a statute has

164. See Sean A. Pager, *Antisubordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action*, 41 U.C. DAVIS L. REV. 289, 291 (2007) (referring to the "Who Question").

165. Arguing that African Americans have a good claim for affirmative action, Kim Forde-Mazrui gives an example of this analysis by first noting detriments experienced by this group and then connecting those experiences to wrongful discrimination. Forde-Mazrui, *supra* note 23, at 695–98 (gathering data about current social welfare); *id.* at 698–707 (relating these detriments to unlawful antecedents).

166. See Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895, 933–34 (2010) (arguing that a "statutory warrant" helps to legitimize the imposition of detriments and benefits on groups).

overcome the oppression that afflicted it¹⁶⁷ or brings no justice-based claim to the transfer proposed in the scheme.¹⁶⁸ When these conditions pertain, the affirmative action plan ought to exclude the group from beneficial redistribution. As for proposed additions, their inclusion is limited by the fifth distributive-justice precept: Because diversity as a rationale for affirmative action can cause harm, it ought to be applied sparingly.¹⁶⁹

Several groups present claims for redistribution in the form of affirmative action. The preeminent civil rights classification, known by the misleading yet familiar rubric “race,” makes reference to injustices that vary depending on historical antecedents and their continuing consequences: Slavery and de jure segregation oppressed African Americans, for example, whereas Native peoples suffered genocide and forced migration.¹⁷⁰ Sex discrimination, another venerable civil rights category, can justify interventions on behalf of not only women but also sexual-orientation and sexual-presentation minorities frequently grouped under acronym rubrics like LGBT. Disability law, our source for “otherwise qualified,” identifies another classification.¹⁷¹

To deserve favorable treatment that displaces someone else, any individual who holds membership in an underrepresented group must be qualified for a place there.¹⁷² If she is unqualified, then her exclusion is not unjust and thus becomes ineligible for distributive-justice rectification. This condition persists even if the group in which she holds membership is underrepresented in the setting with reference to another denominator, such as its proportion in the population at large.

2. *Which Contexts?* Antisubordination as an imperative could plausibly justify extraordinarily ambitious schemes of redistribution, but diversity as our unit of analysis blunts its radical potential. Consider, for example, the premise that title to land in much of the world—in the Western hemisphere in particular—lacks legitimacy because it rests on lawless seizure from, and dispossession of, indigenous peoples. From this relatively uncontroversial starting point one might take bold steps. State

167. Cf. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (expressing hope that the affirmative action measure approved by the Court might no longer be necessary in twenty-five years).

168. See Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943, 987 (2002) (calling the inclusion of Alaska Natives in a Richmond, Virginia affirmative action plan “reflexive or thoughtless”).

169. See *supra* note 128.

170. See generally *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting) (contending that historical wrongs support affirmative action to benefit “African Americans, Hispanics and Native Americans”).

171. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2007).

172. For a thoughtful assessment of how concepts of desert pervade affirmative action, see Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

actors could declare land title null and void, force individuals to vacate the places they think they have rights to control and enjoy, and tear down buildings, industrial sites, and artifices like dams and mines. But because a seizing-and-dispossessing plan does not include diversity as we understand the term—we are considering a social concept concerned with the relative status or groups and individuals¹⁷³—it lies outside the bounds of this discussion. Settings for diversity are necessarily shared and they encompass more than property holdings. To qualify as a diversity setting, a locus must permit members of different groups to coexist at least near one another and often together.¹⁷⁴

Social coexistence, the center of diversity, meets corrective and distributive justice, the basis for affirmative action aimed at redressing subordination, in three overlapping yet distinct ways. First, a subordinated group might have in the past been excluded unjustly from the opportunity to join decisionmaking bodies. Here, affirmative action would make seats at the table of authority available to members of the group. Electoral redistricting installed to increase minority representation in a diverse legislature provides an example of this conjunction of antisubordination with diversity.¹⁷⁵ Corporate board diversity measures also illustrate this category.¹⁷⁶ Gender quotas installed to foster women's political participation offer a third example. In the United States and numerous other countries, certain political bodies—legislatures, political conventions, state political committees—must, according to positive law or party rules, contain a stated minimum percentage of women.¹⁷⁷ Of all the overlaps between diversity and

173. See *supra* note 10 and accompanying text.

174. Because of this concern with coexistence I exclude from this diversity-meets-antisubordination framework those instances of affirmative action that focus on distribution of spoils. Supreme Court decisions offer illustrations. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Although the affirmative action programs evaluated in these decisions may be justifiable on other grounds, their connection to diversity is too attenuated for that rationale to hold.

175. See, e.g., *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

176. Kimberly Krawiec has led this discussion. See Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 770–71 (2011); Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 593–95 (2005); Kimberly Krawiec, *Critical Mass and the Decline of African-American Men on Public Company Boards*, FACULTY LOUNGE (May 8, 2011), <http://www.thefacultylounge.org/2011/05/critical-mass-and-the-decline-of-african-american-men-on-public-company-boards.html>.

177. N.Y. ELEC. L. § 2-110.2 (approving of gender quotas for party leaders of state assembly districts, available if political parties so choose); Lisa Schnall, Note, *Party Parity: A Defense of the Democratic Party Equal Division Rule*, 13 AM. U. J. GENDER SOC. POL'Y & L. 381, 382–84 (2005) (describing quotas for women in national legislatures around the world and the Democratic Party national convention).

affirmative action, seats-at-the-table is the most pointed because it adverts most bluntly to wealth and power.¹⁷⁸

A second overlap between social coexistence on one hand and corrective and distributive justice on the other emphasizes the progressive effects of individuals' contact with diverse cohorts. Like the "happy empirical claims" explored above,¹⁷⁹ this argument for affirmative action posits that diversity generates benefits, but whereas happy empirical claims about diversity tend to avoid politics and controversy, this contention puts antisubordination up front. Its premise is that, other things being equal, a member of a subordinated group is better off in a group that contains members of the non-subordinated cohort: to learn their (dominant) folkways, become familiar and thus less threatening to the ascendant group, gain opportunities to exchange gifts and do favors, and so on. Members of the non-subordinated cohort in this perspective also gain from diversity: They learn, teach, and exchange. Writers have noted that gains to dominant groups occupy *Grutter*: Justice O'Connor celebrated racial diversity as useful to the (white) persons who fill and lead elite universities, big business, and national security.¹⁸⁰ In principle, however, members of subordinated groups also gain from diversity. This category of interchange and exchange describes two major settings where the diversity rationale thrives: education and employment.

A third overlap between justice and diversity relates to the public status of subordinated groups. Here we may return to the concern for speech and expression that impelled Justice Powell to embrace the modern diversity rationale in *Bakke*. Powell, as was noted, pointedly never linked diversity and antisubordination, but his reasoning functions to rectify an injustice: Environments that lack diversity prop up rigid, oppressive, reductive misperceptions of subordinated groups. Whenever groups of persons are excluded from—or are grossly underrepresented in—a setting, their members' voices are less heard. Diversity mixes these persons with dominant cohorts, expressing a progressive message that can effectively rebut misinformation.

The setting of broadcast licenses illustrates this overlap. Decades after the Supreme Court upheld an affirmative action scheme to promote diversity in broadcasting, researchers continue to state that women and

178. This political force emerges in the caution that is manifested whenever advocates press for seats-at-the-table diversity. Corporate board initiatives as practiced in the United States eschew quotas but speak relatively explicitly about subordination; political participation minimums for women, at least in the United States, make no reference to subordination but embrace a quota; race-conscious electoral districts become enacted with neither quotas nor overt statements about subordination. Quotas buttressed by a protest about subordination do not—and apparently cannot—exist in American affirmative action. See *supra* note 48 and accompanying text.

179. See *supra* Part II.B.

180. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003); Garda, *supra* note 72, at 607–08; Nunn, *supra* note 126, at 724.

racial minorities are underrepresented among license holders.¹⁸¹ Observers decry the depiction of both racial minorities and women in media as deficient.¹⁸² These reports suggest a relation between low ownership of this communication technology and poor treatment in the content it disseminates. Put more positively, a transfer of broadcast licenses in favor of racial minorities and women can enhance justice in how these groups appear in public media.

These settings that fill affirmative action debates—education, the workplace, corporate boards, broadcast licensing—present multiple instances of where justice and diversity intersect. For example, although I have offered diversity in university admissions as an example of the second type of overlap—gains made from bringing together dominant and subordinated groups to coexist and learn from one another—diversity in university admissions also illustrates the other two types of overlap: Reallocating places in a selective educational institution changes who sits at the decisionmaking table, the first overlap, and also influences the expressions and representations present in the third.

Constrained by the third distributive precept that encourages parsimony, viewpoint diversity offers a good example of this third possibility. Enlarging the range or quantity of opinions and perspectives might enhance distributive justice. It need not do so, however. Proponents of extending the diversity rationale to variety in viewpoints must demonstrate the gains to distributive justice in what they prescribe. Corporate boards might be a place where this kind of diversity would increase distributive justice.¹⁸³ In other contexts, a person's viewpoint might be too vaguely defined—or too mutable or open to opportunistic embrace or abandonment¹⁸⁴—to withstand an inquiry into its effect on

181. ERIC KLINENBERG, *FIGHTING FOR AIR: THE BATTLE TO CONTROL AMERICA'S MEDIA* 28 (2007) (reporting 2005 statistics about low ownership rates for both minorities and women); Caridad Austin, Note, *Overwhelmed by Big Consolidation: Bringing Back Regulation to Increase Diversity in Programming That Serves Minority Audiences*, 63 FED. COMM. L.J. 733, 734 (2011).

182. Martha M. Lauzen et al., *Constructing Gender Stereotypes Through Social Roles in Prime-Time Television*, 52 J. BROAD. & ELEC. MEDIA, June 2008, at 200; Greg Braxton, *Networks Still Struggling with Diversity, Study Says; Television Children's Advocacy Group Sees Areas for Improvement amid Some Positive Developments*, L.A. TIMES, July 18, 2000, at Part F.

183. One scholar identifies an end similar to distributive justice—"a law and social equity rationale"—that supports increasing the "worldview diversity" of board members. Regina F. Burch, *Worldview Diversity in the Boardroom: A Law and Social Equity Rationale*, 42 LOY. U. CHI. L.J. 585, 597 (2011). According to this rationale, the ascendant worldview inside American boardrooms has been too fond of risk, with deleterious effects on the national economy; more worldview diversity would bring in prudence. *Id.* at 615–20; see Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465, 465 (2007) (reporting on "the white male effect," which posits that "white men fear various risks less than women and minorities").

184. On immutability, see *supra* note 163. Equal protection doctrine recognizes that a characteristic need not be immutable to gain recognition as "suspect." See, e.g., *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (acknowledging uncertainty about the mutability of homosexual

distributive justice. Religious diversity presents another example. Scholars who advocate for it have not yet formed a justice-based argument.¹⁸⁵ Members of religious groups might have a claim in distributive justice for affirmative action, but proponents of this shift in resources need to say why.

IV. JUSTIFYING DIVERSITY WITH ITS ANALOGUES

Advocates for diversity remain coy, or perhaps undecided, about the fundamentals they value. They eschew commitments on such basics as the type of variety they pursue and how much variation within a regulated population will suffice to effect the rationale.¹⁸⁶ We have noted the appeal of this flexibility and indeterminacy to institutional decisionmakers.¹⁸⁷ Though useful on the ground, flexibility and indeterminacy comes at the expense of principle. Attention to contrary virtues—including candor, clarity, and fidelity to ideals—can make diversity principled rather than merely expedient. This Part surveys ideals that diversity advances.

In saying that “diversity advances” various ideals, I do not add to what the last Part called happy empirical claims.¹⁸⁸ Diversity as policy can certainly fail; it can also cause harm. Rather than make promises, then, this Part considers alignments of principle between diversity and other values esteemed in American civic life.¹⁸⁹ They include pluralism, separation of

orientation). Courts, however, expect membership in a claimant’s group to be relatively durable and hard to exit. *See generally* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1489 (2011) (proposing that federal courts interpret statutory employment law to prohibit discrimination on the basis of an immutable characteristic, defined as “(1) a characteristic that is an accident of birth, or (2) a characteristic that is unchangeable or so fundamental to personal identity that workers effectively cannot and should not be required to change it for employment purposes”).

185. *Cf.* Levinson, *supra* note 69, at 601 (arguing that the best justification for affirmative action is a claim of historical mistreatment).

186. Chen, *supra* note 17; Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 883 (1996) (“If *Bakke* was meant to promote diversity of culture *per se*, then it rapidly becomes unmanageable, as scores or hundreds of cultures justly claim equal representation under affirmative action plans . . .”).

187. *See supra* Part II.A.

188. *See supra* Part II.B.

189. Thus although this Part shares common ground with David Orentlicher, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777 (2005), it draws a narrower conclusion. Professor Orentlicher praises diversity, relating it to analogues that I will consider presently—including federalism, separation of powers, and markets—and concludes that diversity “plays a fundamental role in the American structure of government and ideal of a free enterprise economic system because it both promotes good outcomes and prevents socially harmful behavior.” *Id.* at 812. As noted, I worry about happy empirical claims; the “good outcomes” that diversity “promotes” are far from certain. *See supra* Part II.B. Moreover, in my view distributive justice, a topic absent from Orentlicher’s article, is needed to justify diversity regardless of whether one rejects the antisubordination thesis stated in this Part.

powers, and other sources of decentralization. This discussion also considers doctrines in American law that give effect to these values.

A. PLURALISM

Diversity can enhance social and political life by augmenting variety where variety is desirable. The term pluralism refers to this pursuit. Literatures in philosophy, juxtaposing pluralistic moral theories against monistic ones,¹⁹⁰ acknowledge the strengths of both. Monism offers commensurability and cohesion; it supplies a yardstick by which competing alternatives can be measured. Ancient thought, as recorded in the Old and New Testaments as well as writings of the Greeks and their Roman successors, celebrated monism: It had no use for diversity of peoples, beliefs, or values.¹⁹¹ The baleful Tower of Babel states an enduring ancient conception of pluralism as destructive.¹⁹² Throughout history, pluralism as a source of social good has had far fewer adherents than monism.¹⁹³

Yet even antiquity records philosophical support for pluralism as a source of wisdom. When Aristotle—hardly a champion of minorities—asked rhetorically whether “all slavery [is] a violation of nature,”¹⁹⁴ his answer was a resounding “no.” “[F]rom the hour of their birth, some are marked out for subjection, others for rule.”¹⁹⁵ And yet decisions and deliberations gain strength from multiple participants, Aristotle wrote, “just as a feast to which many contribute is better than a dinner provided out of a single purse.”¹⁹⁶

Contemporary arguments that defend pluralism encourage attention to “those differences in values, attributes, or activities among individuals or groups that a particular society deems salient,” which is how Peter Schuck defined diversity.¹⁹⁷ With this understanding as background, I make four claims for pluralism. All pertain to contemporary applications of diversity.

1. *Variation as expansion.* “The common thread is the idea that morality should not be *stifling* in various possible ways,” writes

190. See generally Thomas E. Hill, Jr., *Kantian Pluralism*, 102 ETHICS 743, 743–45 (1992) (contrasting pluralistic and monistic theories).

191. Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1917–19 (2001).

192. *Id.* at 1917.

193. See generally ARLENE W. SAXONHOUSE, *FEAR OF DIVERSITY: THE BIRTH OF POLITICAL SCIENCE IN ANCIENT GREEK THOUGHT* (1992) (exploring political traditions that emphasize unity and harmony).

194. ARISTOTLE'S POLITICS 58 (Benjamin Jowett trans., 1943).

195. *Id.*

196. *Id.* at Book III, Part xi 60; see also SAXONHOUSE, *supra* note 193, at 212–14 (noting that on this point Aristotle diverged from his teacher and mentor, Plato).

197. See *supra* note 10 and accompanying text.

philosopher Thomas E. Hill, Jr.¹⁹⁸ “Pluralist theories, it may be supposed, affirm a less stifling morality insofar as they oppose *unnecessary restrictions* on liberty, *dogmatic assertions* of moral truth, and *moralistic judgments* about other cultures and the life-styles chosen by other individuals.”¹⁹⁹ Whether diversity among groups of persons generates or encourages diversity as resistance to “stifling morality” is of course an unresolved question. Hill’s reference to “moralistic judgments about other cultures,” however, suggests an affirmative answer.²⁰⁰ Interaction causes diverse cohorts of persons to observe one another. Revelations of themselves mixed with exposure to other groups gives them context to understand the relations between the antecedents and behaviors of unfamiliar sectors.

2. *Insights into the veil of ignorance.* Here I refer to the famous construct of John Rawls that, building on work by the economist John C. Harsanyi, asks which opinions and preferences about social welfare individuals would reach when they do not know what their position in their society would be.²⁰¹ Rawls applied to this inquiry “the difference principle,”²⁰² which, he argued, leads these individuals to support welfare-state interventions. Because they could be destitute and powerless, they would choose to guard against misery by accepting constraints and taxes that burden the fortunate cohort.

Diversity as an ambient condition enhances the answers that respondents would give to the hypothetical question. Rawls had invited his readers to ponder deep steppes of ignorance: The human being he posited does not know “his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like.”²⁰³ Behind their veil of ignorance, individuals living in conditions of diversity still do not know their own place and their own fortune in the state-to-be. Exposure to different groups of persons educates them about the stakes in their answer, however; proximity to varied groups gives the Rawlsian respondent insight into characteristics that bear on distributive outcomes.²⁰⁴ Diversity as an ambient condition might also make these

198. Hill, *supra* note 190, at 749.

199. *Id.*

200. *Id.*

201. JOHN RAWLS, A THEORY OF JUSTICE 136 (1971); John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 304, 335 (1953) (broaching the question of “what sort of society one would prefer if one had an equal chance of being ‘put in the place of’ any particular member of the society”).

202. RAWLS, *supra* note 201, at 75–83.

203. *Id.* at 137.

204. Elsewhere I have noted that attention to diversity also opens the questions of whether the veil-of-ignorance premise is coherent and how it pertains to existing sources of identity:

Affiliative *homo sapiens* cannot survive without personal relationships, but group identities

respondents' answers less predictable than what Rawls had presumed.²⁰⁵ The veil of ignorance is more than a metaphor for academics. It explains origins and bases of some policies in place.²⁰⁶ Diversity gives it more substance.

3. *Peace.* Regardless of whether policymakers prescribe, proscribe, or ignore diversity, they live and function in a world filled with human variety. A power holder resisting diversity even by the most egregious means (such as de jure segregation, ethnic cleansing, and genocide) will fail to undo this variegation, and less egregious forms of resistance will have less effect. In this sense, what I have in the previous paragraph called "diversity as an ambient condition" always exists; although I have commended it as a choice, it cannot be avoided. And once diversity is understood as a fixture, it becomes more desirable as a choice, because the installed type of diversity prepares an individual to live better in a world that contains diversity as a fixture.

The philosopher Henry Hardy, writing about moral pluralism, puts the point this way: A person "in the grip of a monist view of morality and politics" will think of his own commitments as universal, never idiosyncratic.²⁰⁷ People who differ will appear

mistaken or flawed rather than as having an equally valid take on life, and this in turn will tend to generate conflict, resentment, suspicion, rejection rather than tolerance, accommodation, receptivity, compromise. But if I am a pluralist I will accept or welcome different moral conceptions rather than feeling threatened by them.²⁰⁸

Let me acknowledge promptly that variety in human demographics is different from variety in moral stances. Not every claim for moral pluralism can be applied to diversity as a social intervention. Hardy is correct to say, however, that "tolerance, accommodation, receptivity, [and] compromise" fit better with pluralism than monism. Diversity,

press harder on the consciousness of subordinated people—such that, as a general rule, white Americans give relatively little thought to their race, American Protestants tend to view their religious identity in spiritual terms rather than as an immutable marker of who they are, and heterosexual men are not much preoccupied with gender and sexual orientation. Every human being is endowed with particularistic traits, but some groups experience their particulars more consciously and intensely than others . . .

Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 468–69 (1997).

205. When Harsanyi asked the same veil-of-ignorance question in 1953, he reached a different answer from the welfare-state response that Rawls had chosen. Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After Eldred*, 19 BERKELEY TECH. L.J. 1315, 1326–28 (2004) (noting that Harsanyi reached his answer by applying utilitarian analysis; he envisioned himself as an average member of the hypothetical society, rather than someone at its ebb).

206. See *id.* at 1327 n.67.

207. Henry Hardy, *Isaiah Berlin's Key Idea*, THE ISAIAH BERLIN VIRTUAL LIBRARY, http://berlin.wolf.ox.ac.uk/writings_on_ib/hhonib/isaiah_berlin%27s_key_idea.html (last visited Oct. 2, 2012).

208. *Id.*

which instantiates pluralism in a social setting, tells individuals that they have to get along.

4. *Moral seriousness.* Similar to how diversity has been misunderstood and misused as a vaguer and cheerier substitute for affirmative action,²⁰⁹ pluralism has been misconstrued: Detractors equate it with relativism.²¹⁰ One noted defense of pluralism against the charge of relativism lends value to the task of making diversity principled. In his last essay, Isaiah Berlin distinguished pluralism from relativism on the ground that “the multiple values [present in pluralism] are objective, part of the essence of humanity rather than arbitrary creations of men’s subjective fancies.”²¹¹ A reader can quibble with the diction—“objective” and “the essence of humanity” have grown fraught since Berlin’s day—but the core stays in place: Not every purported value or preference will deserve recognition within pluralism.²¹² And not every form of variation warrants recognition in a diversity scheme. I shall say more on the point below. For now, the distinction between pluralism, a profound value, and relativism, a shallow one, offers precedent for understanding diversity as principled rather than (or in addition to) anodyne.

B. SEPARATION OF POWERS: REREADING *FEDERALIST NO. 51*

One instance of diversity that enjoys deep public approval is separation of powers.²¹³ The national government in the United States takes a tripartite form—executive, legislative, and judicial—in which the sphere of action for each sector is written into the Constitution and also fills considerable decisional law.²¹⁴ Pluralism within units of government, in this view, generates more strength than would exist in a governmental monolith. *Federalist No. 51*, a foundational document for the United States, defends checks and balances as ultimately more generative of stability than an undivided government, even though the experience of being checked and balanced by two rivals is costly for any sector in the scheme.²¹⁵

209. See *supra* Part II.B.

210. Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 336 (2007) (gathering sources).

211. Isaiah Berlin, *Isaiah Berlin on Pluralism*, UNIVERSITY OF TEXAS, <http://www.cs.utexas.edu/users/vl/notes/berlin.html> (last visited Oct. 2, 2012).

212. By way of example from Berlin: “I like my coffee with milk and you like it without; I am in favor of kindness and you prefer concentration camps.” *Id.*

213. “It is safe to say that a respect for the principle of separation of powers is deeply ingrained in every American.” See *Teaching with Documents: Constitutional Issues: Separation of Powers*, NATIONAL ARCHIVES, <http://www.archives.gov/education/lessons/separation-powers> (last visited Oct. 2, 2012); see also *Separation of Powers—An Overview*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/legislatures/separation-of-powers-an-overview.aspx> (last visited Oct. 2, 2012).

214. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943–44 (2011).

215. THE FEDERALIST NO. 51, *supra* note 149, at 320–25.

Returning to *Federalist No. 51* is instructive for readers who seek precedents for diversity as a rationale for actions that reallocate, because its embrace of variety and divergence among power holders goes well beyond the checks-and-balances threesome familiar from American civics. Its author, identified as James Madison, starts with the individual unit in the scheme: “[E]ach department should have a will of its own.”²¹⁶ Acknowledging that diversity is a source of resentment and pain, Madison recognizes that having a will of one’s own necessarily creates agendas,²¹⁷ and he argues for giving each unit the power to resist what it perceives as encroachments. His famed sentence, “Ambition must be made to counteract ambition,”²¹⁸ is an antithesis of the anodyne diversity surveyed earlier in this Article. Diversity hurts, as Madison knew. It inflicts detriment.²¹⁹

In addition to recognizing pain, *Federalist No. 51* counts many more stakeholders than the three-branches scheme might first appear to include. Diversity flourishes throughout the plan of government presented: Madison finds strength in the diversity of federalism, whereby states and the national government regulate and respond to the population, internal diversity originating inside the branches of government (for example, the divergent districts that send representatives to Congress), and diversity in society itself, which brings variety to inputs and pressures that influence all the branches.²²⁰

Continuing this breadth, separation of powers has an informal meaning extending beyond units of government. Individuals participate in social settings *qua* individuals, but also as members of subgroups. Memberships are ascribed to them, and they in turn ascribe memberships to other individuals—even when they sincerely abjure prejudice, stereotyping, and social hierarchy. When individuals form cohorts, it becomes possible to consider the relative power of each group, trajectories of power in the immediate future, the formation of coalitions, and other identity-forming political conditions. Increasing diversity can increase the types of powers that are amenable to separation, both in the aggregate and for particular cohorts.

216. *Id.* at 321.

217. Agendas extend beyond what the department can do by itself; for example, the department might want another branch of government to take action. *See generally* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011) (praising separation of powers for impelling units and branches of government to challenge one another and thereby overcoming passivity).

218. THE FEDERALIST NO. 51, *supra* note 149, at 322.

219. *See generally supra* notes 25–32 and accompanying text.

220. THE FEDERALIST NO. 51, *supra* note 149, at 324.

C. DIVERSITY AS INSTRUMENTAL TO WEALTH AND SAFETY

In refraining from making a claim that diversity delivers positive consequences,²²¹ this Article has hewn to a belief that any generalization about increasing wealth and safety through diversity must be stated narrowly and with care. Diverging from Part III, which used diversity to argue for intervention aimed at rectification and distributive justice, this Part confines itself to description and eschews recommendations.

Although I refrain from endorsing the contention that diversity delivers wealth and safety, the writings that make this claim help to justify diversity. Because they embrace an agenda more conservative than the left-of-center pursuit related in the last Part, they expand a circle of supporters. At this level diversity transcends ideology; it belongs to no faction.

1. *Wealth.* Building on work by the economist and philosopher Friedrich Hayek that praised the common law—in contrast to the civil law—as a nurturant of markets and economic vitality,²²² legal scholars have argued that the common law is an engine of prosperity that will, *ceteris paribus*, generate more prosperity in a nation-state than the civil law.²²³ For Hayek, civil law is relatively inclined to fetter individual choice, whereas the judges who made the common law in England, fearing incursion by the Stuart monarchs, stood up staunchly for property and contract rights and thus laid a foundation for capitalism.²²⁴ Whether or not Hayek read English history accurately has been debated,²²⁵ but this criticism does not challenge his linkages among markets, libertarian political theory, the United States as a common law jurisdiction, and diversity.

Diversity relates more directly to wealth in modern portfolio theory, which in its most basic application encourages investors to choose multiple types of holdings.²²⁶ Like other analogues to the diversity

221. See *supra* note 122, 188–189 and accompanying text.

222. FRIEDRICH A. HAYEK, 1 *LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER* 81 (1973).

223. See, e.g., Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 523 (2001) (concluding that common law countries experienced faster economic growth than civil law countries during 1960–1992); *id.* at 503–04 (reporting on other research that found stronger investor protections in common law legal systems than their civilian counterparts); Curtis J. Milhaupt, *Beyond Legal Origin: Rethinking Law's Relationship to the Economy—Implications for Policy*, 57 AM. J. COMP. L. 831, 832 (2009) (summarizing, without endorsing, this literature).

224. Mahoney, *supra* note 223, at 504–05.

225. Compare Ronald Hamowy, *F.A. Hayek and the Common Law*, 23 CATO J. 241, 262 (2003) (concluding that Hayek overstated the power of the common law), with Mahoney, *supra* note 223, at 504 (concluding that Hayek's views “are correct as a matter of legal history”).

226. The classic articulation of this idea is Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77, 89 (1952). For a contemporary expression, see *Diversify Your Portfolio*, FIDELITY [https://www.fidelity.com/](https://www.fidelity.com/fixed-income-bonds/build-your-portfolio/diversify-your-portfolio) fixed-income-bonds/build-your-portfolio/diversify-your-portfolio (last visited Oct. 2, 2012) (“This straightforward strategy has many complex iterations, but at its root it's simply about spreading your

rationale surveyed in this Part, as ideology the diversified portfolio enjoys wide support.²²⁷ Legal doctrine reflects and buttresses this enthusiasm: Although American law has no authority to tell individuals where to invest their money, it requires fiduciaries to pursue diversity in the portfolios they control.²²⁸

2. *Safety*. Modern portfolio theory tells investors to diversify their portfolios not so much to reap earnings as to minimize volatility and risk.²²⁹ Diversity in a portfolio narrows the range of what wealth-related consequences can occur. By diluting commitments and scattering attention, it allows for the hedging of bets. Diversity as an investment strategy lives with the possibility of error, just as *Federalist No. 51* accepted the risk that wise or benevolent branches of government would be checked and balanced by foolish or corrupt rival units.

Diversity understood as prudence or bets-hedging emerges in contemporary legal scholarship; “adaptive federalism” in the work of David Adelman and Kirsten Engel offers a useful instance.²³⁰ Adelman and Engel disagree with the claim that each type of environmental harm has its own optimal jurisdiction—for example, that “regulation of intrastate groundwater ought to be regulated by state and local governments, whereas climate change should be addressed at the international level”²³¹—by noting that the search for a unitary regulator “washes out the diversity of local environmental, political, and economic conditions that produce unique sets of selective pressures for environmental regulation.”²³² To Adelman and Engel, the interplay of state and federal environmental regulation resembles a diversified

portfolio across several asset classes and sectors . . .”).

227. See Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287, 314 (1994) (describing the diversified portfolio as favored by “currently popular financial theory”).

228. See, e.g., 29 U.S.C. § 1104(a)(1)(C) (2007) (providing that an ERISA “fiduciary shall discharge his duties . . . by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so”); Uniform Prudent Investor Act § 2 (1994) (applying modern portfolio theory); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 653 (2004) (noting the consensus among judges that trustees’ duty of care obliges them to pursue diversified portfolios).

229. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 281 n.148 (1983); *Diversify Your Portfolio*, *supra* note 226 (observing that diversification “can reduce the risk and volatility in your portfolio, ideally allowing you to achieve returns with less stomach-churning ups and downs along the way”).

230. David E. Adelman & Kirsten H. Engel, *Adaptive Environmental Federalism*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 277–99 (William W. Buzbee ed., 2009) [hereinafter Adelman & Engel, *Adaptive Environmental Federalism*]; David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1796–1800 (2008) [hereinafter Adelman & Engel, *Adaptive Federalism*].

231. Adelman & Engel, *Adaptive Federalism*, *supra* note 230, at 1798 (citation omitted).

232. Adelman & Engel, *Adaptive Environmental Federalism*, *supra* note 230, at 294.

portfolio. Just as diversification in holdings offers safety to investors and sets up stronger prospects for wealth, diversification in power to regulate risks to the environment can generate better rules than either of the sovereigns could have written on its own.²³³

Like popularizers of modern portfolio theory, Adelman and Engel focus on risks and threats. Their illustrations of how redundancy has succeeded focus on dangers to the environment that one jurisdiction overlooked or ignored and another pounced on.²³⁴ Similarly, William Buzbee celebrates local initiatives that filled the void of federal neglect in regulating contaminated industrial wastelands (“brownfield sites”) in urban areas.²³⁵ Diversity in the sources of environmental regulation is, among other things, *more* regulation. Because regulation, in the authors’ view, enhances safety, the diversity they embrace has the desirable effect of inhibiting dangerous conduct.

In this context, consider the larger genre in which “adaptive federalism” finds its home. Robert Ahdieh, describing what he labels “the new federalism,”²³⁶ gathers more than a dozen specimens of the phenomenon as expounded by contemporary legal scholars. The collection presents a variety of overlaps in governance:

Paul Berman’s studies of “cosmopolitan pluralism”; Benedict Kingsbury’s and Richard Stewart’s explorations of global administrative law; George Bermann’s analysis of transatlantic regulatory cooperation; the study of transnational networks by Anne-Marie Slaughter and others; studies of the European Union, including especially work on the judiciary, on “comitology,” and on framework statutes, the open method of coordination, and related paradigms of “soft law”; related to the latter, explorations by Chuck Sabel and others of democratic experimentalism; the varied new governance literature; studies of cross-jurisdictional “engagement”; Greg Shaffer’s research on “transnational transformations of the state”; work on the interaction of international and national tribunals; strands of the latter literature focused on judicial citation of international and foreign authority and on broader questions of legitimacy; the discourse of global constitutionalism; Harold Koh’s studies of transnational legal process; Hari Osofsky’s analysis of multiscalar governance; and a growing literature on increasingly complex dynamics of federalism within the United States, in constitutional law, corporate law, environmental law, and other areas.²³⁷

Ahdieh initially groups these classifications under the rubric of “realities and conceptions of jurisdiction.”²³⁸ Quickly, however, he notes the

233. Adelman & Engel, *Adaptive Federalism*, *supra* note 230, at 1820.

234. *Id.*

235. Adelman & Engel, *Adaptive Environmental Federalism*, *supra* note 230, at 283 (citing William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 122–26 (2005)).

236. See generally Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1 (2007).

237. *Id.* at 2–3 (citations omitted).

238. *Id.* at 1.

inadequacy of that narrow term: The stakes in the fields surveyed include “community definition, sovereignty, and legitimacy.”²³⁹

They also present diversity as safety. Multiple sources of regulation mean more regulation, and from there generate more control. Units recognized as institutions within the law—states (under formal federalism), nation-states (in transnational governance), corporations, legislatures, judicial systems—all hold power within “intersystemic governance.”²⁴⁰ To be sure, diversity in its simplest horizontal form can loosen controls. For example, jurisdictions can compete to become the least demanding place to do business, as “race to the bottom” literatures attest.²⁴¹ Critics associate globalization with freeing businesses to pay lower wages and elude environmental regulations.²⁴²

Yet as new-federalist writings have shown, the number and force of controls on persons and entities is greater than can be counted in formal delineations of regulatory authority. Intersystemic governance means more governance. If more regulation equals more safety, then diversity becomes a source of safety as well as wealth.

D. DIVERSITY IN AMERICAN LAW

1. *Fostering Markets.* Whole fields of American law enforce the proposition that market competition is desirable and warrants encouragement. Preeminent among these fields is antitrust, which proscribes actions by firms in restraint of competition, but others also share the premise: securities law, which demands disclosures that inform the decision to buy stock on a public exchange; consumer law, which posits that buyers of goods and services are entitled to merchantability, truth in packaging and marketing, and the rendering of information; and commercial law, regulated by a comprehensive model statute that set out to mirror and encourage the conditions of healthy markets. The “fresh start” that bankruptcy promises debtors, the recording of real estate holdings (along with their sale prices and other dollar amounts) and security interests in collateral, the enforcement of contracts, the widening types of intellectual property that may be owned and conveyed, the large menu of alternative dispute resolution opportunities available to

239. *Id.* (quoting Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 319 (2002)).

240. The term is Ahdieh's. *See id.*

241. Rosanne Altshuler & Harry Grubert, *The Three Parties in the Race to the Bottom: Host Governments, Home Governments and Multinational Companies*, 7 FLA. TAX REV. 153 (2005); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

242. CHARLES DERBER, *PEOPLE BEFORE PROFIT: THE NEW GLOBALIZATION IN AN ERA OF TERROR, BIG MONEY, AND ECONOMIC CRISIS* 148–51 (2002) (advocating a “global New Deal” in response); Adam Warden, *A Brief History of the Anti-Globalization Movement*, 12 U. MIAMI INT'L & COMP. L. REV. 237, 241–242 (2004) (criticizing the World Trade Organization for indifference to this problem).

businesses, among many other conditions, express enthusiasm for transactions and exchanges.

Markets and diversity are mutually constitutive. Divergent tastes and valuations make transactions possible. The seller of a used car, for example, would rather have the cash value of that commodity than the commodity itself; the buyer prefers the car to the cash; and the deal will close—leaving both seller and buyer better off and increasing wealth—because preferences are different rather than the same. Bigger commercial venues, such as stock exchanges, cause diverse preferences to emerge, influence prices, and be influenced in response. Thus diversity fosters markets. Markets, in turn, foster diversity.²⁴³

2. *Flora and Fauna: Diversity in Environmental Law.* Both domestic and international environmental legal instruments strive to protect diversity. In domestic law, the Endangered Species Act endorses and fosters variety among species of animals and plants.²⁴⁴ Many states add their own endangered species statutes.²⁴⁵ The Convention on Biological Diversity, a treaty opened by the United Nations in 1992, brings diversity to international environmental law and has 168 signatory nation-states.²⁴⁶ Signed, though not ratified, by the United States, the Convention associates environmental diversity with shelter, food, water, the cleanup of wastes, protection against climatic extremes, and sustainability generally.²⁴⁷ Implicitly this treaty posits that losses of genetic variation, extinction of animal and plant species, and declines in the variety of environments—mangroves, coral reefs, rain forest—threaten human life even when the value of any particular loss cannot be quantified or linked directly to a hazard.

Like diversity as an affirmative action rationale, diversity in environmentalism could be misperceived as a rhetorical rather than substantive development. Activists started to talk about biodiversity, one might suppose, because established nouns like “pollution” or

243. Being aware of the array of goods on offer, in other words, opens individuals to newer possibilities and encourages them to prefer variety over homogeneity. Markets and market-thinking also support diversity as a rationale for affirmative action. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (associating racial and ethnic diversity in the classroom with a more robust marketplace of ideas); *supra* notes 72–79 and accompanying text (observing that corporation managers endorse workplace diversity as tending to improve sales and commercial relations).

244. The statute is understood to have this goal. See Anna T. Moritz et al., *Biodiversity Baking and Boiling: Endangered Species Act Turning down the Heat*, 44 *TULSA L. REV.* 205, 234–35 (2008); John Copeland Nagle, *The Effectiveness of Biodiversity Law*, 24 *J. LAND USE & ENVTL. L.* 203, 204 (2009).

245. Robert B. McKinstry Jr. et al., *Legal Tools That Provide Direct Protection for Elements of Biodiversity*, 16 *WIDENER L.J.* 909, 914 (2007) (lamenting that the authors' home state, Pennsylvania, is not among them).

246. *List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/convention/parties/list> (last visited Oct. 2, 2012).

247. SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, *SUSTAINING LIFE ON EARTH: HOW THE CONVENTION ON BIOLOGICAL DIVERSITY PROMOTES NATURE AND HUMAN WELL-BEING* (2000).

“conservation” had grown dull, or perhaps to leverage the faddish popularity of diversity in other contexts like education or the workplace. Even if this genesis of the term is accurate, however, diversity in environmental law amounts to much more than just another buzzword. Environmental diversity does not limit itself to the tallying of plant and animal classifications. It can be defined, codified, and measured by legislators and researchers.²⁴⁸ It favors plurality, variety, multiplicity, and divergences; it disfavors uniformity and homogeneity.

V. JUSTIFYING DIVERSITY IN ACTION

The preceding Parts have defended diversity as a rationale for positive discrimination at two levels: first, as corrective and distributive justice, the defense offered in Part III, and, second, as congruent with well-accepted tenets, norms, policies, and political conditions as elaborated in Part IV. We may now consider how theory reckons with diversity reality on the ground. Toward that end, this Part discusses three instances of diversity in action.

A. QUESTIONS OF ADMINISTRABILITY

Here we look at diversity as the last rationale standing, the only broadscale reason for discrimination that the U.S. Supreme Court currently condones.²⁴⁹ As expressed in the Court’s foundational jurisprudence on point, the Powell opinion in *Bakke*, diversity is a uniquely nimble instrument. It sidesteps the hurt and division associated with remembering subordination and group-based oppression.

Its power to evade is both a flaw and a virtue.²⁵⁰ Several progressive writers who oppose the diversity rationale for, among other things, its failure to grapple with historical injustice, favor it on the ground that there is no alternative. Reminiscent of the 2004 town hall meeting where Defense Secretary Donald Rumsfeld infamously told U.S. soldiers stationed in Kuwait that “you go to war with the Army you have,”²⁵¹ these supporters of affirmative action would have preferred a different device but accept the one available. They have concluded that diversity is easier than antistatutory to administer: less provocative, less controversial, more optimistic. Looking forward rather than backward, and adverting to positive rather than negative conditions, it reaches

248. See generally Nagle, *supra* note 244 (defining biodiversity and comparing a selection of statutes to investigate how well they achieve this goal).

249. See *supra* notes 9–14.

250. Malamud, *supra* note 156, at 950–66 (exploring this point with reference to affirmative action for relatively prosperous African-American recipients).

251. William Kristol, *The Defense Secretary We Have*, WASH. POST, Dec. 15, 2004, at A33.

persons who would otherwise refuse to consider any rationale that makes reference to distributive justice.²⁵²

Papering over subordination can be an attractive practical alternative to acknowledging it. For anti-discrimination activists, writes Sumi Cho, diversity will have instrumental uses: It can “put a happy face on racial oppression” and it does not “require anyone to stipulate to white, heterosexual, or male privilege, thereby increasing chances for reaching the broadest possible membership base.”²⁵³ Other scholars express more frustration and dismay about papering-over as the winning strategy for affirmative action.²⁵⁴

Diversity as an anodyne rationale has the virtue of easing administrability.²⁵⁵ Happy empirical claims might lack rigor, but many are plausible enough. Even if the enhanced consequences of diversity that researchers have celebrated might have occurred even without the diversity initiative because open-minded people seek out varied human environments and enjoy them, this possibility is more than a simple misreading of correlation as causation.

For example, the premise that diversity in education or the workforce enhances skills and performance—a virtual truism—probably encourages some number of individuals to reach out a bit and add more demographic variety to their lives. Other things being equal, this outreach increases welfare. Similarly, if the diversity rationale is a managerial prerogative,²⁵⁶ then managers who like prerogatives will be drawn to diversity. Some will have good intentions and put good consequences incidentally into effect.

Accordingly, activists who favor affirmative action out of a commitment to principle, described in this Article as corrective and distributive justice, may achieve some of what they want through rhetorical deployment of diversity. Other persons, such as managers of entities, may find anodyne diversity easier to articulate and achieve than any other rationale for group-focused intervention. Vague criteria and blandness become advantages in action.

At the same time, emphasizing variety rather than justice has costs and dangers. Spokespersons who err on the side of vacuity out of caution forgo the chance to convince receptive individuals of a justice-based imperative. On the other end of the receptivity spectrum, even diversity

252. See generally Sullivan, *supra* note 16.

253. See Cho, *supra* note 19, at 1052. Persuaded that tactical advantage outweighed ideological accuracy, as an activist student Cho signed on to join the Boalt Coalition for a Diversified Faculty, even though she had preferred a more confrontational, backward-looking name for the group: “Boalt Caucus for a Desegregated Faculty.” *Id.*

254. Bell, *supra* note 8; Lawrence, *supra* note 16.

255. My thanks to Nelson Tebbe for making a good case on this point.

256. See *supra* Part II.A.

at its blandest might be insufficient to make a distributive scheme acceptable to the constituencies affected, leaving diversity just as unadministrable as affirmative action framed as antisubordination. Different circumstances must yield divergent levels of administrability for different characterizations of what diversity is doing.

Reformers and planners who consider diction and rhetoric for their diversity schemes will, and in my view should, take conditions like receptivity into account.²⁵⁷ Having two categories of justification available—the justice contention of Part III buttressed by the analogies of Part IV—gives these implementers choices about what to emphasize when they describe their plan to constituencies.

Administering diversity must be a work in progress—and not only for managers. On the empirical front, for example, researchers continue to investigate diversity. Evidence for the assertion that diversity achieves gains is likely to mount, or at least evolve, and proponents of a scheme must keep abreast of what social scientists find.²⁵⁸ As administrators, they deal in discomfort as well as optimism: Diversity upends complacency, broaches the occasional tough question, denies majority-group members some of their old privilege, and pushes individuals to try something new.

B. WHEN THE ANTISUBORDINATION AND VARIETY UNDERSTANDINGS OF DIVERSITY CONFLICT

Decisional law on the diversity rationale tends to comport with the justifications presented in both the preceding Parts: When the rationale succeeds, courts conclude that it was right for complainants to have suffered detriment, even though these persons were discriminated against on the basis of an ascribed group membership that they did not choose. The correctness of this result takes two distinct forms explored in the two preceding Parts. First, the complainants' group—being classed as white is the paradigm here—has enjoyed unjustly expanded access to the benefit in question. Second, these complainants ought to have been turned away, other things being equal, because their group membership leaves less room for variety in a setting where divergences are desirable. Members of different groups would have added multiplicity and plurality to a collective, but our complainant brings only more of the same. The trouble with justifying diversity with reference to both distributive justice or antisubordination, on the one hand, and variety or pluralism on the other, is that the use of diversity as a rationale for affirmative action can align with the first justification yet offend the second and vice versa.

257. See Krotoszynski, *supra* note 7, at 912–13 (adverting to the risk of backlash).

258. For a good survey of which diversity initiatives work and do not work in a particular employment context, see Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011).

Disputes from higher education admissions illustrate this nonalignment. Contemporary admission policies manifest worry that absent discriminatory intervention, female and Asian-American applicants would enroll in excessively high numbers.²⁵⁹ Diversity as variety supports this intervention;²⁶⁰ distributive justice opposes it.²⁶¹ A refusal to practice this affirmative action inverts the problem: Non-Asian or male complainants who needed a preference to qualify and yet were treated the same as Asian and female applicants could protest the university's disregard for heterogeneity in denying them admission, even though withholding favoritism was correct as a matter of distributive justice.

Implementers have no choice but to balance ad hoc the two understandings of diversity as a rationale for affirmative action, recognizing that they hold unequal weight. Justice-antisubordination will likely be more urgent than variety because the repair of an ongoing historical wrong outranks goals that would correct no unjust exclusion. Variety becomes more compelling, however, whenever the magnitude of historical injustice that oppressed a group is relatively slight. Instances of subordination are not created equal.

C. A CASE STUDY

In October 2011, California governor Jerry Brown announced that he would decline to sign a new piece of legislation. He expressed torment. The bill Brown vetoed had set out to resist a controversial anti-affirmative action initiative, Proposition 209, approved in 1996 by California voters. As amended by Proposition 209, the California Constitution prohibits the state from discrimination or preferential treatment based on "race, sex, color, ethnicity, or national origin" in "public employment, public education, or public contracting."²⁶²

Proposition 209 foes had scored a victory in September 2011 when the California legislature passed a bill authorizing the two state university systems "to consider race, gender, ethnicity, and national origin, along with other relevant factors, in undergraduate and graduate admissions, to the maximum extent permitted by the 14th Amendment

259. Ilya Somin has expounded on this problem in a series of blog posts. Ilya Somin, *Asian-American Applicants and Competing Rationales for Affirmative Action in Higher Education*, THE VOLOKH CONSPIRACY (Oct. 17, 2009, 1:54 AM), <http://volokh.com/2009/10/17/asian-american-applicants-and-competing-rationales-for-affirmative-action-in-higher-education>; Ilya Somin, *Immigrant Students and the Tension Between Two Rationales for Affirmative Action*, THE VOLOKH CONSPIRACY (Feb. 5, 2007, 11:50 PM), <http://volokh.com/posts/1170741033.shtml>; Ilya Somin, *Preferences for White Males and the Diversity Rationale for Affirmative Action*, THE VOLOKH CONSPIRACY (Mar. 2, 2011, 12:29 AM), <http://volokh.com/2011/03/02/preferences-for-white-males-and-the-diversity-rationale-for-affirmative-action>.

260. See *supra* Part III.

261. See *supra* Part IV.

262. CAL. CONST. art. I, § 31(a).

to the United States Constitution, Section 31 of Article I of the California Constitution [the codification of Proposition 209], and relevant case law.”²⁶³ The bill went to the governor for signature. “I wholeheartedly agree with the goal of this legislation,” Brown declared,²⁶⁴ before giving two reasons for his veto decision. First, separation of powers doctrine means the courts, not the legislature, get to “determine the limits of Proposition 209.”²⁶⁵ Second, the pro-209 side would not sit still in response to the bill; it would “file more costly and confusing lawsuits.”²⁶⁶

Diversity as justified in this Article renders this explanation for the veto inadequate. Perhaps the new bill did indeed clash too deeply with Section 31, the codification of Proposition 209, to pass state constitutional muster. Yet the bill specifically limited its reach: It insisted that whatever it authorized had to comport with Proposition 209. Contrary to the veto message, this bill did not decree new limits; it set out to stay within them. Moreover, nothing in separation of powers doctrine gives the executive more power than the legislature to draw conclusions about what each branch may do. By voting for the bill, the Legislature had expressed a view about its constitutional constraints. A contrary view by the governor holds no more weight. The second reason, a worry of stirring up “costly and confusing lawsuits,” is not only unprincipled but unrealistic: Lawsuits over the diversity rationale for affirmative action have been proceeding undeterred in California since *Bakke*,²⁶⁷ and any veto message that claims “wholeheartedly [to] agree” with what the killed bill seeks to do ought to refrain from calling anything else confusing.

Justifying diversity would have informed the veto-or-sign dilemma. It could have changed the outcome. The governor’s two reasons for his veto have enough gravitas to engage with diversity only if we stay at the anodyne level.²⁶⁸ If diversity amounts to nothing more than prerogatives for managers and whitewash over a history of subordination, along with vague tacked-on assertions about improved consequences, then the veto message answers shallowness with shallowness. If, by contrast, diversity honors and gives effect to principled claims for the reallocation of goods, as I have argued in Part III, or if diversity as “a fundamental American

263. S.B. 185, 2011–12 Leg. Sess. (Cal. 2011).

264. See Robin Wilkey, *SB 185 Vetoed: Jerry Brown Vetoes Affirmative Action-Like Bill*, HUFFINGTON POST (Dec. 8, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/10/09/sb-185-vetoed_n_1002099.html.

265. *Id.*

266. *Id.*

267. For a sampling of the controversy as presented to California courts, see Bob Egelko, *Brown Joins Prop. 209 Challenge*, S.F. CHRON., Jan. 17, 2012, at C1 (reporting the progress of a federal action against this initiative); *San Jose Officials, Liberal Elite Try to Stop Prop. 209*, SAN JOSE MERCURY NEWS, Nov. 10, 1996, at 7P (reporting lawsuit filed promptly after voter approval).

268. See *supra* Part II.B.

principle”²⁶⁹ shares in the esteem enjoyed by fundamentals in the United States like pluralism, decentralization, and markets, as Part IV contended, then legislation enabling an affirmative action measure that enhances diversity deserves a careful response.

State executives who accept the thesis of this Article should read a diversity-enhancing affirmative-action bill with attention to distributive justice before deciding to veto or sign it. Our hypothetical governor knows that an affirmative-action reallocation could fail this criterion for desert. Legislatures sometimes err: A proposed transfer might reward a group that has no real entitlement, hurt the taken-from cohort with unwarranted severity, or waste time and money by focusing on a trivial characteristic. A bad diversity-promoting affirmative-action transfer—a transfer inconsistent with distributive justice—is one that either does not ameliorate present effects of past injustice or instills only a vacuous heterogeneity, reminiscent of Isaiah Berlin’s “I like my coffee with milk and you like it without; I am in favor of kindness and you prefer concentration camps.”²⁷⁰

Of course, only executive officers in government—state governors and presidents of the United States—grapple with the veto-or-sign dilemma. Yet justifying diversity also guides the actions of individuals who are not state actors. In California, for instance, Jerry Brown had faced a precursor to his veto question: As a California voter in 1996 holding no elected office he had the choice, in the seclusion of a polling place, to oppose or support an amendment to the state constitution that banned benign as well as invidious discrimination. Other states have also put affirmative action to the electorate in the form of proposed constitutional amendments.²⁷¹ These initiatives gain attention when they succeed, but others have quietly failed to engage enough voter support and disappeared.²⁷² Public opinion has mattered. Apart from state action, many individuals have a voice on affirmative action proposals in their workplaces, local schools, civic volunteering, or alumni participation in university life.

The exercise of affirmative-action justification works similarly for voters, nonstate decisionmakers, and public-sector executives like Jerry Brown. Our deliberator reviews a proposed instance of affirmative action

269. Orentlicher, *supra* note 189.

270. See *supra* note 212.

271. See Barbara Hoberock, *Battle Is Looming on State Question*, TULSA WORLD, Nov. 6, 2011, at A24 (reporting successes for affirmative-action opponents in Michigan, Nebraska, Arizona, and Washington).

272. See *Missouri Anti-Affirmative Action Initiative*, AMERICAN CIVIL LIBERTIES UNION (Apr. 4, 2008), <http://aclu.org/racial-justice/missouri-anti-affirmative-action-initiative> (reporting on an effort that failed for lack of signatures); see also Hoberock, *supra* note 271 (noting that Colorado voters had recently voted no); Amy Wood, *Affirmative Action Foes: Chasing the Initiative*, 21 SOUTHERN CHANGES, no. 2, 1999 at 3.

first with attention to corrective and distributive justice, and then with the understanding that affirmative action typically enhances diversity²⁷³—paying heed to what diversity installs and promotes. Adding pluralism, decentralization, and alignment with the law outside civil rights to an assessment that starts with justice increases the chances that diversity-promoting affirmative action will be justified.²⁷⁴ Should the proposal still fail—not enough justice, not enough heterogeneity, not enough heft in the heterogeneity it brings—it will have received a morally sufficient hearing.

CONCLUSION

Even though the U.S. Supreme Court has deemed diversity the most acceptable rationale for actions that take civil-rights statuses into account, and even though other decisionmakers—elected officials, business managers, heads of colleges and universities, and military leaders—have united to praise it, diversity still lacks justification as the term is used in law: “The showing or maintaining in court that one had sufficient reason for doing that which he is called to answer.”²⁷⁵ To date, no such justification has emerged. Amply warned that the task will be difficult,²⁷⁶ this Article has undertaken to say why imposing diversity, even when diversity inflicts harm, can warrant approval.

When challenged in court by individuals who say that a diversity measure hurt them, users of the rationale have responded with evasion. For good instrumental reasons, they prefer bland affirmation to specifics. The widely shared belief that diversity is good while quotas are bad, for example, supports prerogatives for managers, who become free to emphasize or retreat from diversity as they please without reckoning or explanation. Empirical claims about the benefits of diversity might be accurate, but they have also begged questions, confused correlation with causation, and rested on dubious methodologies and insufficient precision.

Implementers and the public alike find diversity more palatable than other justice-based rationales for affirmative action—including rectification, reparation, and desegregation—because talk of diversity avoids the bitterness of grievances that remain, to some degree, alive and

273. See *supra* Part III.

274. See *supra* Part IV.

275. V THE OXFORD ENGLISH DICTIONARY 643 (Clarendon Press 1933).

276. Writers use a variety of gerunds to describe what the diversity rationale demands. See, e.g., SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* (2003) (“wrestling”); SUSAN SCHRAMM-PATE & RHONDA BAYNES JEFFRIES, *GRAPPLING WITH DIVERSITY: READINGS ON CIVIL RIGHTS PEDAGOGY AND CRITICAL MULTICULTURALISM* (2008) (“grappling”); SCHUCK, *supra* note 10, at v (“managing”); Braxton, *supra* note 182 (“struggling”); Ann Coulter, *At the End of the Day, Diversity Has Jumped the Shark, Horrifically*, HUMAN EVENTS, Nov. 23, 2009, at 6 (“reckoning”).

painful. This Article has argued that sidestepping claims of injustice is both a strength and a weakness of the diversity rationale: strength because palatability gives affirmative action enough political capital to be installed, and weakness because justice dodged becomes justice at best postponed, if not denied.

Accordingly, I have argued, the task of justifying diversity proceeds on two levels. One level is reparative: Functioning as an element or at least a consequence of affirmative action, diversity becomes justified as a source of corrective and distributive justice. The other level of justification, using analogy, works with resemblances and parallels. Uncontroversial ideals of American law and politics—including pluralism, separation of powers, and markets—esteem multiplicity and variety as sources of strength.

These uncontroversial ideals give implementers guidance on how to prepare, install, and maintain a diversity plan. “Otherwise qualified,” a term borrowed from disability discrimination law, informs their task. For example, the tripartite scheme of American government recognizes the executive, legislature, and judiciary as units; a claimant that is not a unit holds no entitlement to participate in the powers of “separation of powers.” In a commercial market, sellers must have goods to sell and buyers must have money to buy. Pluralism also imposes conditions for membership. And so diversity measures, by analogy, necessarily determine which axes of variation deserve attention and which must be ignored.

Civil rights categories are a plausible starting point for any diversity plan. Statutes declare that a short list of characteristics calls for attention from positive law. By omission legislatures have also determined that other characteristics warrant less concern. Implementers of a diversity plan who follow this design would ignore diversity of, say, eye color or height or hobbies on the ground that the variety in question would be trivial. At the other end of the importance spectrum, diversity of race and sex and ability (as an antonym of disability) warrant consideration, at least at the outset. Implementers would cite other possible categories in the middle, eligible for debate about whether diversity on the axis would rectify injustice, per the antistatutory justification, or, consistent with the variety-analogy justification, foster significant pluralism.

“Plurality, dialogue, and redundancy,” the three central virtues of what Robert Schapiro calls “polyphonic federalism,”²⁷⁷ emerge from social-setting diversity at least as well as from federalism in American government, which can engage as few as two participants: state power and federal power. When present in settings like schools and workplaces,

277. ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 98 (2009).

diversity will exist on more than one axis. Polyphonic federalism describes a national system containing several dozen states, of course, and so what Schapiro has extolled in government will offer robust examples of all three values. Of them, this Article has spent the most time on plurality.²⁷⁸ As practiced by diverse participants in any ecosystem, the “dialogue” value notes mutual influence and the sharing of information.²⁷⁹ Redundancy, the third virtue, offers protection should a constituent of the mix happen to fail.

Settings where courts have condoned the diversity rationale—sometimes as a compelling governmental interest, sometimes an option acceptable under statutory law—illustrate plurality, dialogue, and redundancy as policy. When the Supreme Court approved the diversity rationale in *Bakke* and *Grutter*, it did so with reference to multiplicity and variety rather than the rectification of injustice. The problem of injustice persists, however, and not only because claims of historical wrongs call for repair. Whenever scarcity exists, any policy of favoring someone is necessarily also a policy of disfavoring someone else; though vaunted for its optimism and good cheer, diversity can hurt. Decisionmakers, especially when they are state actors, must apply the rationale with care.

For these implementers of the diversity rationale, challenges will persist. Values extolled in American law and government—including “uniformity, finality, and hierarchical accountability”²⁸⁰—stand in contrast to diversity’s plurality, dialogue, and redundancy. As Peter Schuck has warned, “[t]he law systematically favors homogeneity over diversity.”²⁸¹ Moreover, Schuck notes, “government and law are natural enemies of diversity, especially when they are most eager to create it.”²⁸² Unfamiliarity or divergence in a human population brings discomfort to individuals as well.²⁸³ The virtue of this dissonance as experienced by institutions, individuals, and state actors is that it alerts participants to gains—not only the enhancements of plurality and dialogue and redundancy—but also the repair of wrongs.

278. See *supra* Part IV.A.

279. SCHAPIRO, *supra* note 277, at 99–100.

280. *Id.* at 101–02.

281. SCHUCK, *supra* note 10, at 311.

282. *Id.* at 323.

283. See *supra* note 258 and accompanying text; see also David Brooks, *People Like Us*, ATLANTIC MONTHLY, Sept. 2003, at 32 (“Look around at your daily life. Are you really in touch with the broad diversity of American life? Do you care?”). Summarizing his large study on civic engagement, political scientist Robert Putnam has reported that “virtually all measures of civic health are lower in more diverse settings.” Michael Jonas, *The Downside of Diversity*, BOSTON GLOBE, Aug. 5, 2007, at D1. The more diversity is present, “the fewer people vote and the less they volunteer, the less they give to charity and work on community projects.” *Id.* Moreover, “[i]n the most diverse communities, neighbors trust one another about half as much as they do in the most homogenous settings.” *Id.*

Proponents and opponents of diversity alike have been proceeding as if the diversity rationale were thin: at best an excuse, rather than a justification, for imposing detriment on human beings.²⁸⁴ Yet diversity may be justified. Although it imposes undeniable costs and although its application can be erroneous in particular contexts, diversity remains the only rationale for discrimination that can work toward rectification of historical injustice while honoring the “fundamental American principle”²⁸⁵ of *e pluribus unum*. It posits—and has demonstrated—that variety and difference generate strength.

284. See *supra* notes 34–37 and accompanying text.

285. Orentlicher, *supra* note 189.
