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### Diversity Drift

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# DIVERSITY DRIFT

*Jonathan P. Feingold\**

## I. INTRODUCTION

Diversity may be under attack in the age of Trump, but higher education in America has its own diversity problem. If mission statements and strategic plans offer any guidance, many of America's colleges and universities actively value diversity.<sup>1</sup> Yet even as calls for diversity grow, these calls far too often lack a clear and coherent normative anchor. Institutions often seek "diversity" without first having done the work to define, precisely, why they want diversity, or to identify, concretely, what sorts of diversity will get them there.

As a result, universities have become susceptible to *diversity drift*, whereby good intentions invite unintended—and at times, perverse—consequences. Seemingly innocuous language (as simple as calls to hire and admit "diverse people"),<sup>2</sup> for instance, risks reifying whiteness as an institutional baseline against which students and faculty of color are rendered perpetual outsiders. And untethered to history, context, and power, calls for diversity can fall victim to false equivalencies that deny any principled distinction between those who would #TakeAKnee to honor Black lives and those who travel the college circuit to mock, demean, and insult.

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1. See, e.g., *Regents Policy 4400: Policy on University of California Diversity Statement*, UNIV. OF CAL., <https://regents.universityofcalifornia.edu/governance/policies/4400.html> (last visited Feb. 19, 2019); *Diversity & Inclusion*, UNIV. OF CONN., <https://diversity.uconn.edu/#> (last visited Feb. 18, 2019); *Mission Statement*, UNIV. OF OR., <https://www.uoregon.edu/our-mission> (last visited Feb. 18, 2019); *Diversity*, UNIV. OF TEX., <https://www.utexas.edu/about/diversity> (last visited Feb. 18, 2019).

2. See, e.g., Spencer Kornhaber, *A Person Can't Be 'Diverse'*, THE ATLANTIC (Jan. 26, 2016), <https://www.theatlantic.com/entertainment/archive/2016/01/ava-duvernay-oscars-so-white-diversity-academy-awards-language/429225/> (critiquing the Motion Picture Academy of America's use of the phrase "diverse members").

## II. DIVERSITY'S ORIGINS

As troubling as it may be, the rise of diversity drift should not surprise us. This contemporary phenomenon has doctrinal roots in *Regents of California v. Bakke*,<sup>3</sup> a 1978 decision that marked the Supreme Court's first major engagement with affirmative action in higher education. Allen Bakke, a white male who had been rejected from the UC Davis Medical School in consecutive years, argued that the school's race-conscious admissions program violated his rights under the Fourteenth Amendment.<sup>4</sup>

Justice Powell, who authored the controlling opinion, found for Bakke and struck down the challenged policy. In so doing, Justice Powell rejected three rationales the Medical School had mobilized to defend its admissions program.<sup>5</sup> Critically, however, he simultaneously embraced the Medical School's final justification: the pursuit of student body diversity.<sup>6</sup> Thus, even as *Bakke* proved fatal for the challenged policy, Justice Powell's embrace of diversity left open the door for affirmative action beyond. Indeed, as recently as 2016, the Supreme Court upheld affirmative action at the University of Texas and reaffirmed the diversity rationale's place within its equal protection jurisprudence.<sup>7</sup>

Even if a pragmatic victory for affirmative action, Justice Powell's vision of diversity came with baggage. Specifically, Justice Powell divorced diversity from the anti-racist projects that only decades earlier had fueled the dismantling of state-sanctioned exclusion and subordination across sectors of American life.<sup>8</sup> Instead, he advanced a market theory of diversity that neglected the Fourteenth Amendment's egalitarian instincts and instead centered the First Amendment interests of predominately White institutions and the students they had historically served.<sup>9</sup> This pivot was, by

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3. 438 U.S. 265 (1978).

4. *Id.* at 276–78. Bakke also alleged that the Medical School's admissions policy violated the California Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. *See id.*

5. *Id.* at 306.

6. *Id.*

7. *See Fisher v. Texas*, 136 S. Ct. 2198, 2208 (2016) (“*Fisher I* confirmed that ‘the decision to pursue “the educational benefits that flow from student body diversity” is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.”).

8. *See Bakke*, 438 U.S. at 311–13. *See also* Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 770–71 (1997) (“[Grounding the diversity rationale in the First Amendment] constitutionalizes the power of a privileged educational establishment to determine what learning shall be valued and who shall be taught.”); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 416 n.170, 442 (1998) (“Because academic freedom is a neutral principle favoring no particular substantive end, I do not believe it provides an adequate constitutional basis for the diversity rationale.”).

9. *See Bakke*, 438 U.S. at 313 (“Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas,’ petitioner invokes a countervailing constitutional

many accounts, politically savvy; by embracing an arguably shallow vision of diversity that valued difference for difference sake, Justice Powell offered a path to five votes on the Supreme Court and an avenue for institutions to maintain race-conscious admissions without implicating their own legacies of racial exclusion and marginalization.<sup>10</sup>

### III. RESISTING DIVERSITY DRIFT

Forty years later, the rhetoric of diversity appears entrenched within the lexicon of higher education. For those committed to building more equitable and inclusive institutions, this should be viewed as progress. But to realize such aspirations, institutions must break free from the conceptual confines of diversity bequeathed to us in *Bakke*. As a point of departure, institutions should endeavor to understand their particular diversity projects through an intersectional lens that attends to, and is informed by, related institutional commitments such as equality and inclusion.<sup>11</sup> The goal need not be a single, static, uncontested vision of diversity. To the contrary, it may be vital—if not inevitable—for institutions to reanimate un-interrogated visions of diversity by speaking to local context, conflict, and history. Ultimately, to guard against diversity drift, institutions would be wise to engage in an introspective project that anchors diversity to a normative foundation that centers those who have been, and remain, at the margins.

This is a project that could take many forms, and I offer but one in this short essay. Specifically, I invite institutions to center and celebrate the relationship between racial diversity and “equal university membership,” a concept I employ elsewhere to capture each university student’s interest in an equal opportunity to enjoy, regardless of her race, the full benefits of university membership.<sup>12</sup>

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interest, that of the First Amendment.”); Lewis H. LaRue, *The Rhetoric of Powell's Bakke*, 38 WASH. & LEE L. REV. 43, 45 (1981).

10. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1532 (2004) (“Even as he rejected a race-asymmetric or antisubordination framework for interpreting the presumption against racial classifications, Justice Powell offered the nation a master compromise in the concept of ‘diversity’ itself—a framework that would allow limited voluntary race-conscious efforts at desegregation to continue, in a social form that would preserve the Constitution as a domain of neutral principles.”).

11. Consider, for instance, UCLA’s faculty hiring guide, which explores the related concepts of equity, diversity, and inclusion. See UCLA EQUITY, DIVERSITY AND INCLUSION, SEARCHING FOR EXCELLENCE, EVIDENCE-BASED STRATEGIES FOR EQUITABLE AND INCLUSIVE FACULTY HIRING 4–6 (2018), <https://ucla.app.box.com/v/searching-for-excellence> (last visited Feb. 18, 2019).

12. See Jonathan Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, UTAH. L. REV. (forthcoming 2019) (exploring the relationship between racial diversity and each student’s interest in equal university membership).

In other words, we should care about racial diversity, in part, because it promotes personal equality in the classroom.

#### IV. RETURNING TO THE AFFIRMATIVE ACTION CANON

To appreciate the relationship between diversity and personal equality in the university, one need only return to *Bakke*. To buttress his diversity rationale, Justice Powell drew heavily on the Harvard College Admissions Plan, a document that outlined how and why Harvard considered applicant race in its admissions process. Justice Powell was so fond of the Harvard Plan that, in addition to quoting it at length, he appended the entire document to his opinion.<sup>13</sup>

Mirroring Justice Powell's first amendment framing, Harvard valued diversity, including racial diversity, because of its ability to promote the robust exchange of ideas in the classroom.<sup>14</sup> Yet in ways that often escape standard accounts of *Bakke*, Harvard's interest in diversity ran deeper. Specifically, Harvard recognized that if it failed to admit a sufficient number of students of color, the few who it did admit might encounter an institutional environment that would deprive them of an education equal to their White peers. Harvard explained:

10 or 20 black students . . . might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. . . . [T]here is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.<sup>15</sup>

This insight never penetrated Justice Powell's core embrace of diversity and its attending benefits. Nonetheless, it remains embedded in his opinion, and offers a point of departure for a more grounded and—to many—more normatively satisfying vision of diversity. For institutions interested in fortifying and localizing Harvard's instincts, there are two natural places to turn: social science and Supreme Court precedent.

#### V. THE SOCIAL SCIENCE

There is good reason to take Harvard's instincts seriously.<sup>16</sup> In the years since *Bakke*, now well-established research on stereotype

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13. See *Bakke*, 438 U.S. at 321–24.

14. See *id.*

15. *Id.* at 323.

16. Beyond the social science I discuss here, student testimony offers additional insight into the identity-contingent burdens that attend to severe underrepresentation in the university context. See Brief of UCLA School of Law Students of Color as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 554405 (law students of color across four at University of California law schools detailed their experiences

threat and social identity threat reveal a clear link between institutional environments and a student's university experience.<sup>17</sup> These two related, yet distinct phenomena broadly refer to the psychological threat that an individual experiences when she fears that she will be devalued or negatively stereotyped because of an identity she holds.<sup>18</sup>

Three key insights from the social science deserve mention here. First, these threats are environmentally contingent.<sup>19</sup> In other words, they arise not from some individual vulnerability inherent to a person, but rather because that person finds herself in an environment that signals that her success might be negatively implicated because of an identity she holds.<sup>20</sup>

Second, numbers matter. Or more precisely, institutional demographics—particularly along socially salient categories such as race and gender—comprise one powerful cue that can either exacerbate or ameliorate the likelihood of threat.<sup>21</sup> When individuals

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following the passage of Proposition 209, which effectively ended affirmative action in California); *see also* Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199 (2010) (observing that “[u]nderrepresented minority students in states that permit affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states.”).

17. Nilanjana Dasgupta, *Ingroup Experts and Peers as Social Vaccines Who Inoculate the Self-Concept: The Stereotype Inoculation Model*, 22 PSYCHOL. INQUIRY 231, 232 (2011) (“Stereotype threat and social identity threat are known to undermine performance in domains where one’s group is negatively stereotyped and one’s belonging uncertain; over time, weak performance reduces self-confidence in one’s ability (or self-efficacy) and leads individuals to withdraw from the domain.”).

18. *See, e.g., id.*; David S. Yeager et al., *Teaching a Lay Theory Before College Narrows Achievement Gaps at Scale*, 113 (24) PROC. NAT’L ACAD. SCI. E3341, E3347 (2016); Mary C. Murphy et al., *Signaling Threat: How Situational Cues Affect Women in Math, Science, and Engineering Settings*, 18 PSYCHOL. SCI. 879, 879 (2007); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995).

19. *See, e.g.,* Murphy, *supra* note 18, at 879–80 (“[W]e contend that a person’s vulnerability to identity threat need not be inherent to him or her. Instead, situational cues may contribute to experiences of social identity threat among groups potentially stereotyped in a setting—even when targets are interested, confident, proven achievers in the relevant domain.”).

20. *See id.*

21. *See, e.g.,* Valerie Purdie-Vaughns et al., *Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*, 94 J. PERSONALITY & SOC. PSYCHOL. 615, 615–18 (2008) (describing how visible underrepresentation can produce identity contingencies and compromise institutional trust); Michael Inzlicht & Talia Ben-Zeev, *A Threatening Intellectual Environment: Why Females Are Susceptible to Experiencing Problem-Solving Deficits in the Presence of Males*, 11 PSYCHOL. SCI. 365, 370 (2000) (“The data from the current study support the conclusion that the presence of males constitutes a threatening intellectual environment for females performing a math task, and specifically that women experience a greater deficit in their math performance the more males there are in the environment.”).

are visibly underrepresented in a particular domain, that underrepresentation can itself signal that a person is not part of the ingroup and may be judged through lenses warped by stereotypes.<sup>22</sup>

Third, these psychological threats do not merely reside within a person's head. Hundreds of laboratory and real world studies have shown that they exact concrete and quantifiable consequences.<sup>23</sup> When present, social identity threat and stereotype threat can compromise an individual's ability to learn, decrease rates of academic and social engagement, and undermine academic performance—even when a person is otherwise highly motivated and prepared.<sup>24</sup> In summary, and consistent with Harvard's diagnosis, there is a discernable link between “numbers and providing a reasonable environment for those students admitted.”<sup>25</sup>

## VI. BEYOND THE AFFIRMATIVE ACTION CANON

The social science offers a robust empirical foundation for Harvard's observations concerning the relationship between racial diversity and equal university membership. But to fully appreciate the normative and doctrinal appeal of diversity as a driver of equality, it is helpful to return to the case law. I refer specifically to the Supreme Court's pre-*Brown v. Board of Education* desegregation jurisprudence—an area of case law that too infrequently enters contemporary conversations about diversity, affirmative action, and equal protection.

On the same day in 1950, the Supreme Court struck down segregatory regimes in higher education in Oklahoma and Texas.<sup>26</sup> The Oklahoma decision featured George McLaurin, an African American man who, following years of litigation, had won his right to attend the University of Oklahoma Graduate School of Education. Yet even after admission, McLaurin remained subject to race-based conditions. As described by the Court:

[McLaurin was] assigned to a seat in the classroom in a row specified for colored students; . . . assigned to a table in the library on the main floor; and . . . permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.<sup>27</sup>

McLaurin argued that these conditions violated his right to equal protection under the Fourteenth Amendment. The university, in

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22. *See id.*

23. *See* Murphy, *supra* note 18, at 879; Yeager et al., *supra* note 18, at E3342 fig.1.

24. *See id.*

25. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978).

26. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950). For a more extended discussion of *McLaurin* and *Sweatt*, see Feingold, *supra* note 12.

27. *McLaurin*, 339 U.S. at 640. The restrictions evolved over the course of the litigation. *See id.*

response, defended the conditions on the basis that they imposed, at most, a nominal burden on McLaurin.<sup>28</sup>

The Supreme Court agreed that, in certain respects, the restrictions were limited.<sup>29</sup> Nonetheless, in a unanimous decision authored by Justice Vinson, the Supreme Court determined that the conditions rendered McLaurin's education "unequal to that of his classmates" and thereby violated his "personal and present right to the equal protection of the laws."<sup>30</sup> Justice Vinson explained that the restrictions "impair[ed] and inhibit[ed] his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."<sup>31</sup> They also "signif[ied] that the State, in administering the facilities it affords for professional and graduate study, set[] McLaurin apart from the other students."<sup>32</sup> In short, the conditions proved constitutionally infirm because they deprived McLaurin an education equal to his white peers.<sup>33</sup>

Translated to the contemporary context, *McLaurin* reinforces the appeal of a diversity rationale that centers the personal equality interests of students of color.<sup>34</sup> At its core, this decision reminds us that basic equality concerns arise when institutional conditions deprive certain students, because of their race, the full benefits of university membership.<sup>35</sup> Racial diversity, in turn, counters such conditions by inscribing into the environmental landscape the implicit message that all students belong, are valued, and will succeed. Understood in this sense, racial diversity is integral to higher education because it comprises one piece of a broader institutional prerogative to ensure that all students, regardless of their race, have an equal opportunity to enjoy the full benefits of university membership.

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28. *Id.*

29. *Id.* at 640–41.

30. *Id.* at 642.

31. *McLaurin*, 339 U.S. at 641.

32. *Id.*

33. *Id.*

34. It is true that *McLaurin* offers an imperfect analogy; formal policies that segregate students by race are unlikely to arise in 2019. Nonetheless, *McLaurin* offers a valuable precedential anchor to contemporary debates about diversity and the merits of affirmative action.

35. *Id.* at 641–42.