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DIVERSITY: THE EMERGING MODERN SEPARATE BUT EQUAL DOCTRINE

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A cult of ethnicity has arisen both among non-Anglo whites and among nonwhite minorities to denounce the idea of a melting pot, to challenge the concept of "one people," and to protect, promote, and perpetuate separate ethnic and racial communities.

The eruption of ethnicity had many good consequences. The American culture began at last to give shamefully overdue recognition to the achievements of minorities subordinated and spurned during the high noon of Anglo dominance. American education began at last to acknowledge the existence and significance of the great swirling world beyond Europe. All this was to the good. Of course history should be taught from a variety of perspectives. Let our children try to imagine the arrival of Columbus from the viewpoint of those who met him as well as from those who sent him. Living on a shrinking planet, aspiring to global leadership, Americans must learn much more about other races, other cultures, other continents. As they do, they acquire a more complex and invigorating sense of the world—and of themselves.¹

Wednesday, October 12, 1977, is a day I will always remember. I was in my third year of law school at Georgetown and oral arguments in *Regents of the University of California v. Bakke*² were scheduled for that morning.

The line started forming on Tuesday evening and I joined it after I had eaten supper. When I arrived at the front of the Supreme Court building, other students had already taken their

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1. ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 15-16 (1992).

2. 438 U.S. 265 (1978).

places at the bottom of the steps leading up to the front doors. The Supreme Court police did not allow any of us on the steps until the doors were opened the next morning. The fall season was upon us and Tuesday evening was quite chilly. Wednesday morning came ever so slowly as we waited in the cold fall evening and early morning hours. Finally, there was a stir at the front of the line which had grown by then to over three-hundred people. The front doors to the Supreme Court were opened and all of a sudden there was a rush to the steps rather than a calm procession. The police officers had to restrain the crowd pushing to get in. They were in the dubious position of making random selections on a first come first served basis without any idea of who had been there all night because by now there was no line, but only a large crowd of people all pushing forward. I managed to get the attention of one guard who allowed me to enter the courtroom. I was in and I breathed a sigh of relief. I would indeed hear the oral arguments.

This was a very important case to me because it addressed issues that touched on my very ability to be in Washington, D.C., as a law student at precisely that moment in time. The central issue was whether race could be used as a factor in graduate school admissions decisions. The question was a perplexing one for any fair-minded person. The Constitution, I had learned, should be colorblind, yet I was concerned that the Supreme Court might take the position that race was inappropriate to consider in the educational admissions process. In my own mind, I justified the use of race, or more particularly, a disadvantaged background, as a method of ensuring a diverse student population. Given my world perspective, I thought it a good idea to bring a variety of people together from different socio-economic and ethnic backgrounds and from different parts of the country and the world to study and learn together. This, I thought, was a healthy perspective and evidenced an appreciation for the different cultures of the world.³

3. The question of affirmative action, however, and the use of race as a compensatory factor perplexed me. I did not want to belittle any of my accomplishments because I happened to be black. I did not want to think that I was admitted to law school because of my minority status. I have always wanted to stand on my merits. Yet, I realized that part of the reason I was accepted was because I had met a variety of qualifications that warranted my admission. Part of the reason I was accepted to law school was because of my minority status, and part of the reason I was accepted was because I grew up in Iowa. It is very difficult to explain the internal conflict produced when you know other majority individuals look at you and think, "affirmative action product, he doesn't quite

Until recently I had been fairly comfortable with this approach. The diversity movement of the 1960s and 1970s was very different from the diversity movement of today. The word "diversity" of the *Bakke* era signified positive unifying concepts. The word "diversity" today is troubling because it sometimes means separation.⁴ Where diversity ultimately will take us is uncertain given its evolution.⁵

This article is about diversity, its evolution from the *Bakke* case, and its future in this society. Recent Supreme Court and appellate court decisions have made it possible for publicly financed separate-sex institutions to comply with the Equal Protection Clause of the United States Constitution. These same decisions have expressly opened the door for judicial remedies that may sanction the existence of racially identifiable institutions in the name of diversity. Although the courts have not necessarily encouraged the specific results of this new "diversity," they have, through judicial opinion, condoned what I call an emerging modern separate but equal doctrine. This emerging doctrine operates under the guise of diversity, but harkens back to the days of *Plessy v. Ferguson*⁶ when separate but equal was the law of the land.

In many ways, this emerging doctrine is in fact an attempt to accommodate differences. I am troubled, however, by its accentuation of those differences. I think this judicial tendency toward separate but equal is not purposeful at all, but is the result of societal evolution. Moreover, this trend results from the judiciary's acceptance of the concept of diversity without a full examination of its benefits and burdens. Thus, I caution the courts to examine more completely the advantages and disadvantages of this new diversity movement and the direction in which it

measure up." Part of this reaction is based on a false assumption that the only relevant qualifications are grade point averages and law school admission test scores. These barometers tell only part of the story but do not provide the complete picture of whether a candidate will successfully complete law school.

4. See Paul D. Carrington, *Diversity!*, 4 UTAH L. REV. 1105 (1992). Professor Carrington emphasizes this definitional metamorphosis in his article. He notes that the diversity movement afoot today is something quite different from what Justice Powell had in mind in *Bakke*. Moreover, he suggests that the compensation idea of diversity is harmful because it is fundamentally separatist. *Id.* at 1164.

5. Diversity is defined as "a point or respect in which things differ." AMERICAN HERITAGE DICTIONARY 385 (William Morris ed., 2d college ed. 1982).

6. 163 U.S. 537 (1896) (holding that an act requiring white and black persons to be furnished with separate accommodations on railway trains does not violate the 13th Amendment), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

could lead, lest we revive old skeletons that none of us would like to see again.

In recent decisions, the courts have countenanced language that encourages the development of separate institutions in the name of diversity.⁷ This modern interpretation of diversity began with the dissent of Justices Powell and Rehnquist in *Mississippi University for Women v. Hogan*,⁸ and has been building steam ever since.

Part I of this article discusses diversity as it was used in *DeFunis v. Odegaard*⁹ and *Bakke*. Part II discusses the transitional case of *Mississippi University for Women v. Hogan*. Part III discusses the more recent decisions like *United States v. Commonwealth of Virginia*¹⁰ and *United States v. Fordice*.¹¹ Part IV, the conclusion, suggests that the Supreme Court should, in the future, take care to close this door left ajar, or risk sanctioning a modern separate but equal doctrine in the name of diversity. I suggest that the Court needs to examine this issue of diversity much more carefully lest it perform its judicial function by accepting generalizations that impermissibly equate sex and race with stereotypes about thought and behavior.¹² This judicial tendency to condone racial and sex "essentialism" is ill-advised.¹³

I. DIVERSITY IN THE EARLY DAYS

The 1960s and 1970s were a period when our country was grappling with many social issues. Race relations were at the forefront of the debate. The federal government responded to some of the social turmoil by taking an active role in "ending

7. See, e.g., *United States v. Fordice*, 112 S. Ct. 2727 (1992); *United States v. Commonwealth of Va.*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

8. 458 U.S. 718 (1982).

9. 416 U.S. 312 (1974).

10. 976 F.2d 890 (4th Cir. 1992).

11. 112 S. Ct. 2727 (1992).

12. See Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of Diversity*, 1993 WIS. L. REV. 105.

13. *Id.* at 123. Professor Foster defines "essentialism" "as the notion that a person's difference determines her essential nature, governing the way a person feels, thinks, and acts." *Id.* at 139. Thus, the notion of a black experience and a female experience carries with it the incorrect assumption that blacks and females may react a certain way because of their "experiences." This assumption is ill founded and simply does not recognize the individuality of experience. True diversity recognizes that a black person from Iowa may not think and feel the same way about issues as a black person from Mississippi, or that two black people from Iowa may not think the same way about the Democratic or Republican party.

racial discrimination and segregation in housing, employment and education.”¹⁴ Additionally, federal, state, and local governments actively promoted programs “aimed at increasing opportunities for blacks, women, and other minorities in higher education and employment.”¹⁵

Affirmative action was as controversial then as it is now. Supporters claimed that affirmative action was necessary to remedy the effects of past discrimination.¹⁶ Opponents argued that such programs stigmatized blacks and disadvantaged whites.¹⁷ At issue were seats in law and medical schools, government employment opportunities at the federal, state, and local levels, and government contract awards.¹⁸

A. DeFunis v. Odegaard

The affirmative action debate became ripe for judicial intervention in a 1971 case involving Marco DeFunis, a white applicant to the University of Washington Law School.¹⁹ The law school denied DeFunis admission even though his index average was higher than thirty-six minority applicants who were admitted.²⁰ DeFunis filed suit in Washington state court contending that the law school admissions process discriminated against him because of his race in violation of the Equal Protection Clause of the Fourteenth Amendment.²¹ The trial court agreed with DeFunis and issued an injunction requiring the law school to admit him to the 1971 entering class.²²

The Washington Supreme Court reversed the trial court and held that “the Law School admissions policy did not violate the

14. DAVID M. O'BRIEN, 2 CONSTITUTIONAL LAW AND POLITICS 1340 (1991).

15. *Id.* at 1343.

16. *Id.*; see also Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986) (contending that affirmative action should generally be retained as a tool of public policy because, on balance, it is useful in overcoming entrenched racial hierarchy).

17. Kennedy, *supra* note 16, at 1329-37. For a critical assessment of compensatory affirmative action, see Carrington, *supra* note 4.

18. Carrington, *supra* note 4, at 1344.

19. *DeFunis v. Odegaard*, 416 U.S. 312 (1974). For a thoughtful discussion of benign racial preference pre-*Bakke*, see Kent Greenawalt, *Judicial Scrutiny of Benign Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975).

20. *DeFunis*, 416 U.S. at 324. The admissions process included a review of the index score of each applicant. *Id.* at 321. The index score is a product of a formula that combines the applicant's Law School Admissions Test (LSAT) score and grade point average.

21. *Id.* at 314.

22. *Id.*

Constitution."²³ DeFunis was a second year law student when he petitioned the Supreme Court for a writ of certiorari.²⁴ The judgment of the Washington Supreme Court was stayed pending the final disposition by the United States Supreme Court.²⁵ DeFunis was in his last year of law school when the Supreme Court considered this case.

The Supreme Court, in a bare 5-4 majority, held that the case was moot because the law school would allow DeFunis to complete his third year of law school regardless of "any decision this Court might reach on the merits."²⁶ Thus, the Burger Court avoided deciding one of the most controversial constitutional issues of the day.²⁷ Justice Douglas wrote a separate dissent in which he recommended abolition of the Law School Admissions Test (LSAT) in favor of a test that considers an applicant's cultural background, perception, analytical skills, and ability to succeed in law school.²⁸ Douglas, however, was not supportive of quotas.²⁹

Justice Douglas' views in this area are complex. Although he discouraged quotas per se, he also reasoned that the law school "acted properly . . . in setting minority applications apart for separate processing."³⁰ Justice Douglas justified the law school's separate consideration of minority applicants by reasoning that the cultural backgrounds of minorities are vastly different from the dominant Caucasian culture.³¹ Thus, according to Justice Douglas, the University of Washington Law School's admissions process, which compared minority candidates only to other minority candidates, was permissible.³² Stephen L. Carter, a Yale law professor, refers to this policy as an example of "the best

23. *Id.* at 315.

24. *Id.*

25. *Id.*

26. *Id.* at 319.

27. *Id.*; see HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 292 (1985) (discussing political history of appointments to the United States Supreme Court).

28. *DeFunis*, 416 U.S. at 340 (Douglas, J., dissenting). For a series of articles questioning the value of graduate school admissions tests, see Katherine Connor & Ellen J. Vargyas, *The Legal Implications of Gender Bias in Standardized Testing*, 7 BERKELEY WOMEN'S L.J. 13 (1992); Robert R. Ramsey, Jr., *Law School Admissions: Science, Art, or Hunch?*, 12 J. LEGAL EDUC. 503 (1960); Sanford J. Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 1970 U. TOL. L. REV. 321 (1970); John H. Wigmore, *Juristic Psychopometry—or, How to Find Out Whether a Boy Has the Makings of a Lawyer*, 24 U. ILL. L. REV. 454, 463 (1929-30).

29. *DeFunis*, 416 U.S. at 340 (Douglas, J., dissenting).

30. *Id.* at 334 (Douglas, J., dissenting).

31. *Id.*

32. *Id.* at 323 (Douglas, J., dissenting).

black" syndrome.³³ In Professor Carter's view, this genre of program suggests that blacks' performance does not measure up to whites' and therefore blacks should be compared only to other blacks.³⁴

Justice Douglas' dissent is perplexing, for although it recognized that the use of race in the admissions process was problematic,³⁵ it also supported the use of separate classifications for Indians, blacks, and Chicanos. The classifications were necessary, Douglas asserted, because otherwise, these groups might run the risk of being eliminated from consideration precisely because of their cultural differences.³⁶ Justice Douglas recognized this risk by agreeing that standardized tests such as the LSAT are culturally biased against minorities.³⁷ He did not suggest that the school prefer any race, only that it consider all applications in a race neutral fashion.³⁸ Therefore, any test that does not factor out cultural bias perpetuates a harm to minority cultures to the benefit of the dominant culture.

In *DeFunis*, diversity meant developing an admissions program at the University of Washington Law School that had a goal of achieving a "reasonable representation" of minority groups."³⁹ Justice Douglas stated, "[t]he purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans"⁴⁰ The goal of diversity was not to separate on the basis of race, religion, gender, or national origin, but to bring together individuals from these different groups for the benefit of the country as a whole.

Thus, whereas the majority in *DeFunis* sidestepped the constitutional issue, Justice Douglas did not view this case as moot.

33. See STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 49 (1991). Professor Carter, in his very thoughtful and provocative book, criticizes programs that compare minorities only with other minorities for practicing tokenism and stigmatization. *Id.* In Carter's view, these programs are a not so subtle statement regarding the inability of blacks to compete effectively against whites. *Id.* at 47.

34. *Id.*

35. *DeFunis*, 416 U.S. at 333 (Douglas, J., dissenting). Justice Douglas asserted that because the state school used a racial classification, the admissions process was subject to the strictest scrutiny under the Equal Protection Clause. *Id.*

36. *Id.* at 335 (Douglas, J., dissenting).

37. *Id.*

38. *Id.* at 340 (Douglas, J., dissenting).

39. *Id.* at 326 (Douglas, J., dissenting).

40. *Id.* at 342 (Douglas, J., dissenting).

Instead, he viewed the question presented as "important and crucial to the operation of our constitutional system."⁴¹ He found that the admissions program did not violate the Constitution and that the law school had not invidiously discriminated against Marco DeFunis.⁴² He also suggested that it would be a different case had the lawsuit requested a remedy that sought to displace the applicant admitted in lieu of DeFunis.⁴³ Furthermore, Justice Douglas believed that minority groups should not receive favored treatment on the basis of race.⁴⁴ He also believed, however, that the LSAT was not racially neutral in its impact on minority groups.⁴⁵ Because of this disparate impact, which in his view was not the best measure of a minority applicant's ability to succeed in law school, the admissions policy needed to treat minorities as a separate class in order to ensure that racial factors would neither harm nor help an applicant.⁴⁶

For Justice Douglas, a diverse society was one that appreciated cultural differences without penalizing minority cultures. Most importantly, he wanted all people active in the public affairs of this country to be selected based on talent and character rather than race or culture.⁴⁷ Thus, diversity at the time of *DeFunis* meant cultural diversity, or the bringing together of individuals from all walks of life.

B. Regents of the University of California v. Bakke

The Burger Court could not long avoid deciding the issue that it sidestepped in *DeFunis*. Four years after *DeFunis*, the Court

41. *Id.* at 344 (Douglas, J., dissenting).

42. *Id.*

43. *Id.* at 343 (Douglas, J., dissenting). Douglas suggested that the record would have to show that the law school considered the applicant's potential to succeed in law school. *Id.* He also suggested that as long as the law school followed proper procedures, the institutional decision should be honored. *Id.*

44. *Id.* at 337 (Douglas, J., dissenting).

45. *Id.* at 335 (Douglas, J., dissenting).

46. *Id.* at 336-37 (Douglas, J., dissenting). In this passage, Justice Douglas stated:

There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

Id.

47. *Id.* at 334 (Douglas, J., dissenting).

was embroiled once again in the affirmative action debate, this time with a case involving a medical school in California. In *Regents of the University of California v. Bakke*,⁴⁸ the Medical School of the University of California at Davis (UC-Davis) denied admission to Allan Bakke, a white male, even though it admitted minority applicants whose grade point averages, Medical College Admissions Test (MCAT) scores, and benchmark scores were significantly below Bakke's.⁴⁹

The UC-Davis medical school had adopted a special admissions program for minority group members.⁵⁰ The minority admissions committee was comprised of minority group members from the medical school. Unlike the regular admissions committee, this committee did not summarily reject applicants with grade point averages below 2.5 on a 4.0 scale. The committee rated the applicants and assigned each a benchmark score, but minority applicants were compared only to other minority applicants.⁵¹ The special minority committee then presented its top candidates to the regular admissions committee.⁵² The medical school faculty, by vote, set the number of seats available for minority candidates.⁵³ Throughout the litigation, the medical school class size was one-hundred, with sixteen of those seats allocated for special admissions.⁵⁴

The medical school rejected Bakke's application in 1973 and 1974. In both years, it admitted minority applicants with lower scores than Bakke's.⁵⁵ After his rejection in 1974, Bakke filed suit in California state court requesting mandatory, injunctive, and declaratory relief compelling his admission to medical school.⁵⁶ He argued that the special admissions program discriminated against him because of his race, in violation of the California Constitution,⁵⁷ the Equal Protection Clause of the Fourteenth

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

49. *Id.* at 277. Benchmark scores were the result of each admissions committee member rating an applicant from 1 to 100. *Id.* If there were five committee members a perfect score would be 500. *Id.* These ratings included an assessment of the candidate's overall grade point average (GPA), GPA in science courses, MCAT scores, recommendation letters, extracurricular activities, and interview. *Id.* at 274.

50. *Id.* at 274.

51. See CARTER, *supra* note 33, at 47.

52. *Bakke*, 438 U.S. at 275.

53. *Id.*

54. *Id.*

55. *Id.* at 277.

56. *Id.*

57. CAL. CONST. art. I, § 21 provides, in relevant part: "No special privileges or

Amendment, and section 601 of Title VI of the Civil Rights Act of 1964.⁵⁸

The Superior Court of California, the state trial court, found that the UC-Davis special admissions program violated the United States Constitution, the state constitution, and Title VI.⁵⁹ The court held that the program operated as a quota system because minority applicants competed against only each other for sixteen seats in the class reserved for them.⁶⁰ The state court declared that the university could not use race as a factor in admissions decisions.⁶¹ The court, however, did not order the medical school to admit Bakke because "[Bakke did not] carry his burden of proving that he would have been admitted but for the existence of the special program."⁶²

Both Bakke and the university appealed the trial court's decision. Bakke appealed because he was denied admission and the university appealed because the trial court declared that its admissions program was unlawful.⁶³ Because of the importance of the issues, the California Supreme Court transferred the case directly from the trial court.⁶⁴ The supreme court reasoned that because the case involved a racial classification, it must apply strict scrutiny.⁶⁵ Reviewing the university's justifications for the special program, the court agreed that the goal of increasing the number of minority physicians was a compelling interest, but held that there were less intrusive means available than the special admissions program.⁶⁶ This court focused on the United States Constitution and offered no opinion with respect to the

immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." See *Bakke*, 438 U.S. at 278 n.10.

58. 42 U.S.C. § 2000d (1964) provides, in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

59. *Bakke*, 438 U.S. at 279.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* There are two prongs to strict scrutiny analysis. "First, any racial classification 'must be justified by a compelling governmental interest.'... Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (citations omitted).

66. *Bakke*, 438 U.S. at 279.

state constitution or federal statute.⁶⁷ The California Supreme Court held that "the Equal Protection Clause of the Fourteenth Amendment required that 'no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race.'"⁶⁸ Thus, the state supreme court ordered UC-Davis Medical School to admit Allan Bakke.⁶⁹

The United States Supreme Court granted certiorari in order to decide whether the use of a racial preference in this benign context was constitutionally permissible.⁷⁰ The opinion in this decision raises more questions than it answers. Although all nine justices voted on the legality of the UC-Davis program, they were evenly divided on whether the special admissions program violated Title VI. Four members of the Court, Chief Justice Burger, and Justices Stewart, Rehnquist, and Stevens concluded that the special admissions program violated Title VI of the Civil Rights Act.⁷¹ These justices thought the broad language of section 601 should be given its "natural meaning," which prohibits any consideration of race.⁷² In the view of these justices, Title VI is "more than a simple paraphrasing of what the Fifth or Fourteenth Amendment would require."⁷³ Under this approach, Title VI has an independent force in addition to the Constitution.⁷⁴

Justices Brennan, White, Marshall, and Blackmun had a different view of the scope of Title VI. These justices thought Title VI went no further than the Constitution. In their view, Title VI would prohibit only those racial criteria that the Fourteenth Amendment would not allow. These justices thought that the use of racial criteria as a means of remedying past societal discrimination was consistent with the Constitution and, therefore, with Title VI.⁷⁵

The outcome in *Bakke* turned on the vote of Justice Lewis F. Powell, Jr., of Virginia, even though his analysis was not supported by a majority of the Court.⁷⁶ Powell reviewed the legis-

67. *Id.* at 279-80.

68. *Id.* at 280 (citation omitted).

69. *Id.* at 281.

70. *See id.* at 279-81.

71. *Id.* at 421 (Stevens, J., concurring in part and dissenting in part).

72. *Id.* at 418 (Stevens, J., concurring in part and dissenting in part).

73. *Id.* at 416 (Stevens, J., concurring in part and dissenting in part).

74. *Id.*

75. *Id.* at 328.

76. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 676 (4th ed. 1991).

lative history of Title VI and concluded that supporters of the bill had repeatedly declared that it had enacted constitutional principles.⁷⁷ Powell concluded that Title VI prohibited only such racial classifications that would violate the Fourteenth or Fifth Amendments.⁷⁸ He also concluded that "racial and ethnic distinctions of any sort are inherently suspect" and call for "the most exacting judicial examination."⁷⁹ Although this language strongly suggests the traditional strict scrutiny approach, the use of the imprecise words, "exacting judicial examination," raises the question of whether Justice Powell was applying the traditional strict scrutiny test for all racial classifications or something less exacting for benign racial classifications.

Justice Powell concluded that although the medical school could consider race as a factor in admissions decisions, race could not be determinative. Moreover, Justice Powell's analysis concluded that the UC-Davis admissions program violated the Equal Protection Clause.⁸⁰

C. Justice Powell and Diversity

Although this decision left many important issues regarding racial preferences unsettled,⁸¹ Justice Powell's opinion offered an important discussion of his social theory on diversity. For the first time, the Supreme Court, albeit one justice, articulated the parameters of affirmative action in the context of graduate school admissions. California offered the following reasons for its special admissions program: (1) to reduce the underrepresentation of minorities in the medical profession;⁸² (2) to compensate for past societal discrimination;⁸³ (3) to increase minority physicians in underserved communities;⁸⁴ and (4) to obtain educational benefits

77. *Bakke*, 438 U.S. at 285 (Powell, J., plurality).

78. *Id.* at 287 (Powell, J., plurality).

79. *Id.* at 291 (Powell, J., plurality).

80. *Id.* at 320 (Powell, J., plurality).

81. See NOWAK & ROTUNDA, *supra* note 76, at 676-77. Professors Nowak and Rotunda point out that the *Bakke* decision was extremely narrow in scope. It applied only to the constitutionality of affirmative action in higher education admissions programs. The Supreme Court ruled only that the UC-Davis program violated Title VI. A majority of the Court did not conclude that the program violated the Constitution, only Justice Powell reached that conclusion. Noticeably absent was the Court's failure to adopt any clear guidance on what constitutional standard would be applied in benign race classifications. *Id.*

82. *Bakke*, 438 U.S. at 306 (Powell, J., plurality).

83. *Id.*

84. *Id.*

from an ethnically diverse student body.⁸⁵ Of the four, diversity was the only reason that Justice Powell found sufficiently compelling to justify the use of race as a factor in admissions decisions. Thus, of all the reasons the school set forth, diversity alone was constitutionally permissible.⁸⁶

What did "diversity" mean to the Court and why was it such an important part of the *Bakke* decision? In *Bakke*, the Supreme Court explored the contours of diversity in a specific racial context. The Court extolled the virtues of diversity in the educational arena.⁸⁷ Although this case represents the use of diversity in its most positive form, it also represents the failure of the Court to offer a probing inquiry regarding the benefits and burdens of diversity. Justice Powell's justifications for the values of diversity are reflected in the following passage:

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.⁸⁸

With these sweeping generalities, Justice Powell gave his judicial stamp of approval to the notion that diversity was good in the educational context because it could enhance the classroom experience.

Noticeably absent from Justice Powell's diversity lexicon was a definition of the "something" that he alleged was beneficial. Even Justice Powell fell into the trap of racial essentialism here, asserting that a black student will usually bring something to the classroom that a white person cannot offer. Powell suggests, or at least implies, that there is a black experience and a white experience. Justice Powell's reasoning is based on an assumption that two people will each bring something unique to the classroom because they are different individuals with different life experi-

85. *Id.*

86. *Id.* at 307-12 (Powell, J., plurality).

87. *Id.* at 322-24 (Powell, J., plurality).

88. *Id.* at 323 (Powell, J., plurality).

ences. No one would argue with that statement, but it does not help our understanding of the benefits of diversity, nor does it explain what is meant by diversity.

When the Supreme Court decided *Bakke*, this country was ten years removed from the violence of the late 1960s, including the assassinations of Robert F. Kennedy and Martin Luther King, Jr., and the subsequent riots across the country. Our society was in transition and was making genuine efforts to address some of the societal ills identified in the sixties. Affirmative action was an attempt to address historical racial inequality. The country was asked to view its minority populations not as problems but as resources.⁸⁹

Out of this calamity grew an approach that began to recognize that a diverse student body was essential to the quality of education.⁹⁰ President William Gordon Bowen of Princeton University said it best when he stated that a great deal of learning occurs through the interactions among students of different sexes, races, religions, and backgrounds.⁹¹ In President Bowen's view, people with different backgrounds who come from cities, rural areas, and different countries offer a variety of interests, talents, and perspectives. These qualities stimulate students to learn from their differences and to re-examine deeply held assumptions about themselves and the world around them.⁹² The contribution of diversity was thus seen as substantial,⁹³ however amorphous the *Bakke* opinion left it.

Although in *Bakke* the Court clearly held that the interest of diversity was compelling in the context of a university's admissions program, the school could not elevate ethnic diversity to become the determinative factor upon which it based its admissions decisions.⁹⁴ As Justice Powell explained:

It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The

89. See O'BRIEN, *supra* note 14, at 1340-44.

90. *Id.* at 312. For a thoughtful contemporaneous discussion on what the author calls legitimate preference for one group in the admission process, see Robert A. Sedler, *Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California*, 17 SANTA CLARA L. REV. 329, 340 (1977).

91. *Bakke*, 438 U.S. at 312 n.48 (Powell, J., plurality).

92. *Id.*

93. *Id.* at 313 (Powell, J., plurality).

94. *Id.* at 314 (Powell, J., plurality).

diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.⁹⁵

Justice Powell concluded that an admissions program that assigned a fixed number of places to a minority group would "hinder rather than further attainment of genuine diversity."⁹⁶

Justice Powell cited the Harvard College admissions plan as an example of a program that took race into account in achieving the educational diversity valued by the First Amendment.⁹⁷ The Harvard plan, however, unlike the UC-Davis policy, did not guarantee a fixed number of seats to minority applicants.⁹⁸ Moreover, the *Bakke* opinion reveals that until a short time before this case, diversity meant only geographic diversity.⁹⁹ Powell's opinion adopted Harvard College's concept of diversity, that had itself expanded to include students from disadvantaged racial and ethnic groups in addition to those from diverse geographical regions.¹⁰⁰ The goal of the Harvard plan's diversity necessarily requires that race will be a factor in some admissions decisions, but it will not be the sole factor and it will be balanced against other considerations. Quoting from the Harvard program, Justice Powell noted, "In practice, this new definition of diversity has meant that race has been a factor in some admissions decisions."¹⁰¹

In assessing the role that race has played in admissions decisions, it is important to keep in mind how the admissions process works. Under the Harvard plan, like many other admissions programs, the difficult part of the admissions process is selecting a limited number of students from a large pool of talented capable individuals. Most applicants are qualified, that is, within a competitive range.¹⁰² Only a small percentage are disqualified by

95. *Id.* at 315 (Powell, J., plurality).

96. *Id.*

97. *Id.* at 316 (Powell, J., plurality). See Justice Powell's comments on the First Amendment and the "robust exchange of ideas." *Id.* at 313 (Powell, J., plurality) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

98. *Bakke*, 438 U.S. at 316 (Powell, J., plurality).

99. *Id.*

100. *Id.*

101. *Id.*

102. I use "qualified" to mean the achievement of a score within a competitive range that indicates the applicant's ability to complete successfully a particular educational program of study. For example, suppose a test is devised to provide a music school with results that predict an applicant's success in completing a music curriculum. The highest

falling below the competitive range. The debate centers on measuring the competitive range.

With respect to minority applicants, and indeed most applicants, objective qualifications such as standardized examinations are not the best indicators of ability to succeed. Thus, admissions committees are required to draw lines based on both objective and subjective criteria. Many members of the majority become quite concerned when schools accept minority applicants with objective measurements, for example, test scores, that are not as high as majority applicants' scores.¹⁰³ These majority members, however, discount the importance of the subjective factors in this equation.

This dual standard for objective criteria fueled a major controversy at Georgetown University Law Center in the spring of 1991 regarding the different scores achieved by black law students as a group and white law students as a group.¹⁰⁴ Critics of the dual standard, such as Timothy Maguire, pointed out that the average LSAT score for majority students was 43, whereas the average for minority students was 36. Additionally, Mr. Maguire noted that "[t]here was also a significant difference

score possible is ten and the lowest score is zero. Although the test is not 100% accurate as a predictor of success, it is useful in determining those with music skills sufficient to successfully complete the course, those who may not complete the course, and those who may have difficulty completing the course. The school may view applicants scoring six and above as falling within a competitive range. Anyone scoring five or below is not as easily placed in the competitive range without some additional factors to indicate the individual's ability to succeed. Scores of one, two, or three may not be in the competitive range and the school may choose not to consider applicants with these scores because of experience that shows that people scoring in this range fail the music curriculum. Thus, when I discuss qualifications, the definition includes those people within the competitive range with all factors considered. Therefore, an applicant with a score of six or five, or possibly four, may still fall within the competitive range because of factors in the person's background that would indicate his or her ability to complete the curriculum.

One study concluded that most law schools referred to minimum GPAs and LSAT scores as "points below which schools tended to reject applicants unless other bases for admission were better than average." Patricia W. Lunnenborg & Donna Radford, *LSAT: Survey of Actual Practice*, 18 J. LEGAL EDUC. 313 (1966).

103. See TIMOTHY MAGUIRE, ADDRESSING THE UNSPEAKABLE, THE GEORGETOWN LAW ADMISSIONS CONTROVERSY AND POLITICAL CORRECTNESS IN HIGHER EDUCATION, (Young Am.'s Found. (1991)) (on file with *William & Mary Journal of Women and the Law*); Timothy Maguire, *Admissions Apartheid*, LAW WKLY., Apr. 8, 1991, at 5 [hereinafter Maguire, *Admissions Apartheid*]; see also ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975) (discussing affirmative action as a moral wrong); Randall Kennedy, *supra* note 16; Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758; Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977).

104. See Maguire, *Admissions Apartheid*, *supra* note 103.

between black and white GPAs."¹⁰⁵ Black students accepted at Georgetown averaged 3.2, and their white counterparts averaged 3.7.¹⁰⁶ Maguire concluded that:

It has become abundantly clear to me that the greatest problem law schools are facing in their quest for diversity is not lack of black role models, hostile environments, or biased journal selection procedures. The biggest problem is that in . . . every level of postsecondary education black achievements are far inferior to those of whites.¹⁰⁷

Moreover, Maguire writes, "[t]here is no sign that currently-fashionable 'diversity-enhancing' reforms will solve this problem."¹⁰⁸

This argument is repeated again and again by many people, usually majority members, who simply point to the numbers and say that some people are less qualified than others. What the argument fails to understand is that objective criteria are only one factor among many that schools use to determine whether a person can successfully complete a particular course of study. An additional weakness of the argument is its blind acceptance of the belief that numerical scores on examinations always indicate whether a person is qualified. At best, these numbers help to determine whether a person is within the competitive range. Test scores are only a starting point, and some would argue not a very good starting point at that.¹⁰⁹

As the Harvard College admissions program operates, the ethnic background of an applicant may be a plus, "yet it does

105. *Id.* at 5.

106. *Id.*

107. *Id.*

108. *Id.* Maguire notes that although people of color do not face the problems caused by an unfriendly environment at historically black colleges, black academic performance, at least as measured by LSAT scores, remains very low at these institutions. He reports that at all-black Howard University, one out of nine students who took the LSAT placed in the upper half of students taking the test (31+), and 55% scored between zero and nineteen, which is the bottom 10% of all test takers. At Morehouse College, 55% of students who took the LSAT also scored between zero and nineteen. At Hampton University, 61% fell within this range. At Jackson State College, the figure was 74%. At Grambling, the figure was 84%. *Id.*

With these statistics, Maguire concludes that black achievements are far inferior to those of whites. Of course, Mr. Maguire has made the same assumption that most other majority individuals do when arguing this point—he has accepted without batting an eye the validity of the LSAT as a magical predictor of one's intelligence, achievements, and ability to succeed in law school. This assumption is the root of the problem.

109. See *supra* note 28.

not insulate the individual from comparison with all other candidates for the available seats."¹¹⁰ This kind of admissions program assesses every applicant on her own merits. Thus, seats are not filled because of skin color, even though it may be a plus for that particular applicant. The applicant losing the seat was not foreclosed from consideration, but was determined not to be as desirable a candidate based on a thorough review of her combined qualifications. Consideration of these combined qualifications includes both objective and subjective factors.¹¹¹

The concerns articulated by the dean of admissions at Harvard College are similar to the concerns that the admissions committee at the University of Mississippi Law School addresses each year. As an admissions committee member, I am not only interested in good grades and good test scores, but I also look for the "complete person." I would like our student body to be composed of talented, interesting people, people who have a wide range of life experiences: older students, students who have had experience in other disciplines, students who have military experience, married students, students with disabilities, students who are parents, students who have travelled extensively, and students from different cultural backgrounds. All of these people add a richness to the student body that benefits our educational mission. In my view, this kind of diversity contributes to a rich classroom experience. Students with diverse backgrounds and interests bring different perspectives to the classroom debate.¹¹²

110. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978). For example, the Harvard College admissions program brochure provides:

Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds, and career goals as it is by a fine faculty and our libraries, laboratories, and housing arrangements.

Id.

111. *Id.*; see *supra* note 102.

112. I recently participated in a conference that demonstrated perfectly the advantages of diversity. The National Conference of Commissioners on Uniform State Laws brought together lawyers, judges, professors, and practitioners from all over the country. Each person had a unique perspective that brought helpful insight to the legislative debate.

If the Supreme Court is to accept diversity as a compelling state interest, it should be able to articulate clearly what that term means. Justice Powell in *Bakke* introduced a new concept of diversity into the legal lexicon. Perhaps this expanded concept of diversity was ill-conceived from the start because all Americans are ethnically diverse. Furthermore, no one has examined the benefits and burdens of diversity. Although few would argue with the noble intention of diversity as it was explained in *Bakke*, it raises two problems.

First, as *Bakke* demonstrates, the definition of diversity is not static, but has an evolving meaning that depends on its social context. At Harvard College, diversity expanded from its original meaning of geographical diversity to include disadvantaged, economic, racial, and ethnic groups.¹¹³ Thus, the Supreme Court in *Bakke* and *DeFunis* discussed diversity in the context of geographical, ethnic, and socio-economic differences, among others. In contrast, in *Mississippi University for Women v. Hogan*¹¹⁴ and *United States v. Commonwealth of Virginia*,¹¹⁵ the Supreme Court and the Fourth Circuit discussed the value of diversity in the context of gender discrimination and institutional diversity.¹¹⁶ In these later cases the Court used diversity in a very different social context, but with no "mediating principles."¹¹⁷ In each of these cases, the diversity factor had a significant impact on institutional policies. In some cases, the impact of the diversity factor has been beneficial. In others, however, it has been detrimental to racial and cultural progress.¹¹⁸

The second problem with the *Bakke* formulation of diversity is that courts have recently used this concept to justify results that have questionable constitutionality under the Equal Protection Clause.¹¹⁹ In *United States v. Fordice*¹²⁰ and *United States v.*

113. *Bakke*, 438 U.S. at 322-23.

114. 458 U.S. 718 (1982).

115. 976 F.2d 890 (4th Cir. 1992).

116. See discussion *infra* parts II.A., III.A.

117. See Foster, *supra* note 12, at 130. Professor Foster argues that diversity is an empty concept because there is no principle for determining which differences should count. She is critical of the current concept of diversity because (1) it is an empty concept; (2) there is a prospective value of diversity which should include the experiences of those who were excluded in the past; and (3) current diversity concepts marginalize individuals who possess that difference such that others view them as less qualified. *Id.*

118. *Id.* at 133. Professor Foster makes the point that once an organization has "enough" of a particular minority represented, it can then justify excluding that minority on diversity grounds. *Id.*

119. See *United States v. Fordice*, 112 S. Ct. 2727 (1992); *United States v. Commonwealth of Va.*, 976 F.2d 890 (4th Cir. 1992).

120. 112 S. Ct. 2727 (1992).

Commonwealth of Virginia,¹²¹ the United States Supreme Court and the Fourth Circuit Court of Appeals kept alive the specter of publicly financed single-race and single-sex institutions. In the *Fordice* decision, the Supreme Court opened the door for the continued existence of publicly financed all-black colleges in the name of diversity.¹²² Similarly, in *Commonwealth of Virginia*, the Fourth Circuit required Virginia to remedy Virginia Military Institute's male-only admissions policy.¹²³ One option for the Commonwealth is to establish parallel institutions or programs for women, also in the name of diversity.¹²⁴

What lurks behind the door that the courts have opened through these opinions is troubling because it leads to a passage back in time when separate but equal was the law of the land. Although this modern separate but equal approach is pursued in the name of diversity and, at times, at the behest of the minority groups allegedly benefited by the 1954 *Brown*¹²⁵ decision, it remains, nevertheless, a tragic choice of direction. However well intentioned these recent decisions may be, the result is an accentuation on differences and divisiveness, an elevation of the importance of the cultural identity over the national identity, and a heightened sense of separateness rather than oneness or unity. This direction has already proven to be problematic. A return to that path further delays our age of enlightenment and growth as national citizens and members of the world community.

II. OPENING THE DOOR

A. Nurses Can Be Men

Joe Hogan was a registered nurse and worked in a Columbus, Mississippi, medical center.¹²⁶ The Mississippi University for Women (MUW) is also located in Columbus and was established by the Mississippi Legislature in 1884 "for the Education of White Girls."¹²⁷ MUW established the nursing school in 1971 as

121. 976 F.2d 890 (4th Cir. 1992).

122. See discussion *infra* part III.C.

123. See discussion *infra* part III.A.

124. *Commonwealth of Va.*, 976 F.2d at 900.

125. *Brown v. Board of Educ.*, 349 U.S. 294 (1954).

126. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720 (1982).

127. *Id.* at 720.

a two-year program, but by 1982 it offered both a four-year baccalaureate program and a graduate program.¹²⁸

Hogan applied for admission to MUW nursing school in 1979, but was denied solely because of his sex.¹²⁹ The school told Hogan he could only audit classes.¹³⁰ He was otherwise qualified and, had he been female, MUW would have admitted him and allowed him to enroll in courses for credit.¹³¹ Hogan filed suit in the United States District Court for the Northern District of Mississippi claiming that MUW's single-sex admission policy for the nursing school violated the Equal Protection Clause of the Fourteenth Amendment.¹³²

The district court entered summary judgment in favor of MUW and dismissed Hogan's claim. The court applied a rational relationship standard of review to the single-sex admissions policy and concluded that MUW's single-sex policy bore a "rational relationship to the State's legitimate interest 'in providing the greatest practical range of educational opportunities for its female student population.'"¹³³ The State convinced the district court that MUW's policy was not arbitrary because such a policy was consistent with educational theories that maintained that students derive unique benefits from single-sex institutions.¹³⁴

The Fifth Circuit Court of Appeals reversed, holding that the district court improperly used a rational relationship standard to test the constitutionality of the admissions policy.¹³⁵ Instead, the district court should have required the State to carry a heavier burden of showing that the gender-based classification was substantially related to an important governmental objective.¹³⁶ The Fifth Circuit recognized that the State had a significant interest in providing educational opportunities for all its citizens even though Mississippi had enacted a statute in support of the con-

128. *Id.*

129. *Id.* at 721.

130. *Id.*

131. *Id.* The parties stipulated that but for Hogan's gender, he was qualified for admission. *Id.*; see *Mississippi Univ. for Women v. Hogan*, 646 F.2d 1116, 1117 (5th Cir. 1981).

132. *Hogan*, 458 U.S. at 721. Hogan requested injunctive, declaratory, and compensatory relief. *Id.*

133. *Id.* (citation omitted).

134. *Id.* Recently, Virginia Military Institute articulated this theory in *United States v. Commonwealth of Va.*, 766 F. Supp. 1407, 1411 (W.D. Va. 1991), *vacated and remanded on other grounds*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993). See *infra* notes 190-237 and accompanying text.

135. *Hogan*, 646 F.2d at 1118.

136. *Id.*

tinued existence of an all-female school.¹³⁷ The Fifth Circuit concluded that "the maintenance of MUW today as the only state-supported single-sex collegiate institution in the State cannot be squared with the Constitution. Mississippi suggests no interest of male students that is served by this disparate treatment of females."¹³⁸ Thus, the Fifth Circuit remanded the case to the district court with instructions for further proceedings and vacated the summary judgment dismissing Hogan's claim for money damages.¹³⁹

At the rehearing, the State argued that Congress limited the reach of the Fourteenth Amendment by adopting section 901(a)(5), Title IX of the Education Amendments of 1972.¹⁴⁰ This statute expressly exempted institutions that, from their establishment, had traditionally and continually maintained a policy of single-sex admissions.¹⁴¹ The Fifth Circuit rejected the State's argument, holding that the congressional power under section 5 of the Fourteenth Amendment to enforce the provisions of the amendment through appropriate legislation does not allow Congress to authorize states to maintain practices that violate the Equal Protection Clause of the Fourteenth Amendment.¹⁴² The Supreme Court granted certiorari¹⁴³ and affirmed the judgment of the Fifth Circuit.¹⁴⁴

The Supreme Court held that a classification based on gender "must carry the burden of showing an 'exceedingly persuasive

137. *Id.* at 1119. To justify the continued single-sex admissions policy at MUW, the State relied on Miss. CODE ANN. § 37-117-3 (1972). This section provides in part:

The purpose and aim of the Mississippi State College for Women is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and type-writing, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework, and in such other industrial branches as experience, from time to time, shall suggest as necessary or proper to fit them for the practical affairs of life.

MISS. CODE ANN. § 37-117-3.

138. *Hogan*, 646 F.2d at 1119.

139. *Id.* at 1119-20.

140. 20 U.S.C. § 1681(a)(5) (1988).

141. *Hogan*, 458 U.S. at 722. Section 901(a) of Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

142. *Hogan*, 458 U.S. at 723.

143. *Mississippi Univ. for Women v. Hogan*, 454 U.S. 962 (1981).

144. *Hogan*, 458 U.S. 718 (1982).

justification' for the classification."¹⁴⁵ The "burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"¹⁴⁶ The first step in this analysis is a determination by the court of whether the State's objective is legitimate and important.¹⁴⁷ The second step is a determination by the court of "whether the requisite direct, substantial relationship between objective and means is present."¹⁴⁸ The Court noted that "[t]he purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."¹⁴⁹

Here, the State's justification for the single-sex admissions policy at MUW's nursing school was that it constituted educational affirmative action and helped to compensate for past discrimination against women.¹⁵⁰ The Supreme Court was not persuaded by the State's justification. The Court found that women had been the primary beneficiaries of training in the field of nursing. Women did not lack opportunities in the nursing field even before the school of nursing's first class enrolled in 1971.¹⁵¹ Ninety-four percent of nursing degrees granted in Mississippi were awarded to women and ninety-eight percent of the nursing degrees awarded nationally were awarded to women.¹⁵² Thus, the Court concluded that MUW's single-sex policy operated to perpetuate the stereotyped view of nursing as an exclusively female province.¹⁵³ The benign compensatory purpose was not validated by the statistical evidence representing an abundance of women

145. *Id.* at 724 (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) and *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

146. *Id.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)). See also *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), *rev'g J.E.B. v. State ex rel. T.B.*, 606 So. 2d 156 (Ala. Civ. App. 1992). In *J.E.B.*, the Court applied intermediate scrutiny to a gender classification regarding jury selection. This level of review is fact intensive. The Court held that sex-based peremptory challenges that exclude men or women from jury service are unconstitutional because they are not substantially related to the important state interest of assuring a fair and impartial trial. *Id.*

147. *Hogan*, 458 U.S. at 725.

148. *Id.*

149. *Id.* at 725-26.

150. *Id.* at 727.

151. *Id.* at 729.

152. *Id.*

153. *Id.*

in the nursing field. Consequently, the Court held that the State's articulated objective was not legitimate.¹⁵⁴

Moreover, the Court concluded that the MUW admissions policy failed the second prong of the equal protection test, which requires a "show[ing] that the gender-based classification is substantially and directly related to its proposed compensatory objective."¹⁵⁵ The MUW policy allowed male students to audit classes at the school of nursing. This policy undermined the school's claim that the mere presence of men adversely affected women students.¹⁵⁶ The Court found that admitting men to the classroom had no impact on teaching style, did not affect the performance of the female nursing students, and did not lead to male domination in the classroom.¹⁵⁷

Thus, the Court found that the State of Mississippi had "fallen far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classification" and had violated the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁸ The Court was equally unpersuaded by the State's argument that section 901(a) in Title IX of the Education Amendments of 1972¹⁵⁹ permitted the institution to exist as it had in the past.¹⁶⁰ First, the Court concluded that it was not clear that Congress intended to exempt schools like MUW from any constitutional obligation. Rather, the exemption applied only to the requirements of Title IX.¹⁶¹ Second, even if Congress had envisioned a constitutional exemption through this legislation, section 5 of the Fourteenth Amendment gives Congress authority only to enforce its guarantees, not to restrict, abrogate, or dilute them.¹⁶²

154. *Id.* at 730. Several legal scholars have criticized the compensatory purpose justification for single-sex policies. See Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751 (1991).

155. *Hogan*, 458 U.S. at 730.

156. *Id.*

157. *Id.* at 731.

158. *Id.*

159. 20 U.S.C. § 1681(a) (1988).

160. *Hogan*, 458 U.S. at 732. The State argued that § 901(a)(5) granted an exemption from the general prohibition against discrimination to institutions that traditionally and continually from their establishment had a policy of admitting only students of one sex. Title IX, the State argued, was enacted pursuant to Congress' power under section 5 of the Fourteenth Amendment to enforce, by appropriate legislation, the provisions of the Amendment. Thus, Congress curtailed the application of the Fourteenth Amendment to institutions falling within the language of § 901(a)(5). *Id.*

161. *Id.*

162. *Id.*

In this 5-4 decision, Chief Justice Burger dissented to emphasize that the holding was limited to the context of a professional nursing school.¹⁶³ He was concerned that lower courts might misread this decision and apply it to a broader spectrum of cases. He also posited that the State might be justified in maintaining an all-women business school or liberal arts school.¹⁶⁴

Justice Blackmun's dissent expresses concern with what he labels as a "spillover"¹⁶⁵ effect of the Court's decision. He reasoned that although the Court was purporting to write narrowly, the existence of another state educational institution geared to a single sex was in jeopardy even though equivalent programs were offered elsewhere within the state to the opposite sex.¹⁶⁶ Blackmun stated that he "hope[s] we do not lose all values that some think are worthwhile (and are not based on differences of race or religion) and relegate ourselves to needless conformity."¹⁶⁷

Justice Powell, joined by Justice Rehnquist, also dissented. In their view, the majority was "bow[ing] to conformity [and holding] unconstitutional . . . an element of diversity that has characterized much of American education and enriched much of American life."¹⁶⁸ These justices criticized the Court for holding that states may not constitutionally permit the operation of institutions of higher learning open only to women.¹⁶⁹

Additionally, these justices expressed displeasure that the Court made such a pronouncement in a case involving the personal convenience of one man.¹⁷⁰ Justices Powell and Rehnquist argued that this was not a case in which the Petitioner had no other alternatives and would be prevented from pursuing his chosen profession.¹⁷¹ Mississippi had two other schools offering coeducational programs in nursing that Hogan could have attended.¹⁷² These justices argued that it was legal error to apply a heightened scrutiny analysis to a case such as this that involved a

163. *Id.* at 733 (Burger, C.J., dissenting).

164. *Id.*

165. *Id.* at 734 (Blackmun, J., dissenting).

166. *Id.*

167. *Id.* at 734-35 (Blackmun, J., dissenting).

168. *Id.* at 735 (Powell, J., dissenting).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* The dissent characterized Hogan's harm as one of inconvenience because he would have had to drive 147 miles to the University of Mississippi in Jackson or 178 miles to the University of Southern Mississippi in Hattiesburg. Because he lived in Columbus, it made sense for Hogan to attend MUW.

"narrowly utilized state classification that provides an additional choice for women."¹⁷³ Rather, they stated, such heightened scrutiny is reserved for cases of "genuine sexual stereotyping."¹⁷⁴ Although Justices Powell and Rehnquist offered no examples of "genuine sexual stereotyping" to distinguish it from the kind of stereotyping MUW was practicing, they implied that Hogan, because he was a male, was not a victim of genuine sex stereotyping. They concluded that the Court should have applied a lower level of scrutiny in reviewing the MUW admissions policy. This reasoning suggests that Justices Powell and Rehnquist would like to have their cake and eat it, too. Apparently, in their view, gender stereotyping is genuine only when it adversely affects women.

Additionally, these dissenting justices offered examples of historically single-sex institutions, all of which are private schools.¹⁷⁵ Justices Powell and Rehnquist also cited studies that indicate the benefits of both all-male and all-female institutions.¹⁷⁶ But the issue is not whether single-sex institutions serve some beneficial purpose, but rather, whether it is constitutional for the State to support such institutions. These dissenters thought that it was appropriate "within the context of a public system that offers a diverse range of campuses, curricula, and educational alternatives"¹⁷⁷ to accommodate those people who sought the benefits of attending a single-sex institution.¹⁷⁸

Justices Powell and Rehnquist argued that the Court had improperly applied the equal protection standard generally applicable to sex discrimination because in this context the State was attempting to expand women's choices.¹⁷⁹ Thus, these justices would sustain Mississippi's single-sex admissions policy under a rational basis analysis.¹⁸⁰ But Powell and Rehnquist further ar-

173. *Id.* at 736 (Powell, J., dissenting).

174. *Id.*

175. *Id.* at 736-37 (Powell, J., dissenting). Listed in the dissent are examples of institutions that were historically single sex, such as Yale, Princeton, Mount Holyoke, Vassar, Wellesley, Radcliffe, Smith, Bryn Mawr, and Barnard. Significantly, all of these institutions are privately funded.

176. *Id.* at 738 (Powell, J., dissenting).

177. *Id.* at 739-40 (Powell, J., dissenting).

178. *Id.* at 740 (Powell, J., dissenting).

179. *Id.* For an explanation of the equal protection standard courts generally employ to analyze gender-based classifications, see *infra* notes 197-99 and accompanying text.

180. *Id.* at 742 (Powell, J., dissenting). The rational basis test requires that state action be rationally related to the accomplishment of a legitimate governmental purpose. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 303 (1982) (Powell, J., dissenting).

gued that the admissions policy would also survive heightened scrutiny analysis, as the State's purpose was "legitimate and substantial."¹⁸¹ In support, the justices offered that "[g]enerations of our finest minds, both among educators and students, have believed that single-sex, college-level institutions afford distinctive benefits."¹⁸² Although they conceded that there are those who hold different views, Powell and Rehnquist set forth only that a debate existed with respect to the benefits of single-sex institutions. The existence of such a debate, however, is not a basis for describing the State's policy as legitimate and substantial.

The dissent by Justices Powell and Rehnquist, stripped to its bare essentials, was founded on tradition. It concluded that, "In sum, the practice of voluntarily chosen single-sex education is an honored tradition in our country, even if it now rarely exists in state colleges and universities."¹⁸³ The State cannot, however, persuasively articulate a legitimate and substantial interest based on this argument of tradition.

Justices Powell and Rehnquist were not finished, however. In their conclusion, they asserted that *Hogan* was not a simple sex discrimination case but that the whole notion of diversity was at stake. Accordingly, they argued:

A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system. At stake in this case as I see it is the preservation of a small aspect of this diversity. But that aspect is by no means insignificant, given our heritage of available choice between single-sex and coeducational institutions of higher learning.¹⁸⁴

In contrast, the *DeFunis* and *Bakke* cases did not speak of diversity in the context of an educational system. Diversity in *DeFunis* and *Bakke* centered on the geographical and ethnic backgrounds of the individual. In *Hogan*, though, Justices Powell and Rehnquist introduced a structural concept of diversity that since has expanded to include the admissions practices of educational institutions. Although they may be right that America

181. *Hogan*, 458 U.S. at 743 (Powell, J., dissenting).

182. *Id.*

183. *Id.* at 744 (Powell, J., dissenting).

184. *Id.* at 745 (Powell, J., dissenting).

has respected diversity, Powell and Rehnquist have conveniently and perhaps improperly expanded its meaning to include a justification for publicly supported single-sex institutions of higher education. What else can be justified in the name of diversity? Single-race institutions of higher education? Single-religion institutions of higher education? Should all of these institutions be publicly financed? This perspective is what one scholar refers to as the "dark side of diversity,"¹⁸⁵ the side that provides a reason to exclude or isolate.¹⁸⁶

B. *The Turning Point*

The dissent of Justices Powell and Rehnquist is critical because it condones a judicial trek toward the days of separate but equal without a careful examination of this concept of diversity. I would not be so concerned if this judicial tendency started and stopped with the MUW case and the dissent in that opinion, but that is not what happened. Rather, what happened is that a federal district court judge followed this new view of diversity in the Virginia Military Institute (VMI) case.¹⁸⁷ It also became a part of the Fourth Circuit's decision in the VMI case for which certiorari was subsequently denied.¹⁸⁸ The Fourth Circuit's decision kept the door open to the possibility of publicly financed single-sex institutions.

The Supreme Court also carried the banner for this new diversity movement in *United States v. Fordice*,¹⁸⁹ an opinion that paved the way for the possibility of maintaining publicly financed single-race institutions. The Supreme Court has left the door to the past ajar, and some of the old ghosts are creeping into our modern jurisprudence. The tendency is a dangerous one because it provides the building blocks for divisiveness. It also evidences the Court's uncertainty regarding the proper direction for cases involving publicly financed single-race or single-sex institutions. The Court is understandably reluctant to say there is no place in our educational system for publicly financed single-sex or

185. Mary M. Cheh, *An Essay on VMI and Military Service: Yes, We Do Have to Be Equal Together*, 50 WASH. & LEE L. REV. 49, 58-61 (1993).

186. *Id.* at 60.

187. *United States v. Commonwealth of Va.*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated and remanded on other grounds*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

188. 113 S. Ct. 2431 (1993).

189. 112 S. Ct. 2727 (1992).

single-race or single-something-else institutions, but if it is unwilling to close the door to these kinds of institutions, it has by default opened the door to revisit separate but equal in the context of diversity.

Although I believe there is a value to single-interest institutions, I am not sure it is constitutionally permissible for the government to publicly support such institutions, nor am I sure that there is a substantial governmental interest involved. Though recent federal court decisions suggest that publicly financed separate-sex institutions of higher education may be constitutionally permissible, none of these courts has carefully examined the alleged benefits of this new use of diversity in the context of the Court's two-pronged intermediate standard of review. Rather, the courts have summarily concluded that the government's interest is legitimate and is substantially related to its compensatory objective.

III. GHOSTS FROM THE PAST

A. *Women Can Be Soldiers Too*

United States v. Commonwealth of Virginia (the VMI case) directly raises the question of whether the Equal Protection Clause of the Fourteenth Amendment permits the public maintenance of a single-sex institution.¹⁹⁰ In the VMI case, the United States Department of Justice brought suit against Virginia Military Institute in the United States District Court for the Western District of Virginia on behalf of a female high-school student who sought consideration for admission to all-male VMI.¹⁹¹ Judge Kiser held that VMI could continue to maintain its single-sex admissions policy because its unique adversative educational method contributed to diversity in Virginia's higher educational system.¹⁹² Although the Fourth Circuit Court of Appeals later vacated and remanded the district court's decision,¹⁹³ both the district court and court of appeals decisions promote an expanded

190. *United States v. Commonwealth of Va.*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

191. *Id.* at 894.

192. *See United States v. Commonwealth of Va.*, 766 F. Supp. 1407, 1413 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

193. *Commonwealth of Va.*, 976 F.2d at 900.

view of diversity which includes the possibility of publicly supported single-sex institutions.

Moreover, both decisions justified this expanded view of diversity and the benefits of single-sex institutions on the basis of students' alleged achievement of undifferentiated intangibles such as better self-esteem, aspirations for higher degrees, more academic involvement, and the increased likelihood of carrying out career plans.¹⁹⁴ The courts based some of these determinations on the conclusions of a book published in 1977.¹⁹⁵ Some of the findings may be outdated. It is difficult to attach much weight to such information without a full engagement on the issue of single-sex education.¹⁹⁶

Equal protection jurisprudence requires heightened scrutiny in the area of gender classifications.¹⁹⁷ Courts apply an intermediate level test to determine whether they can uphold the discriminatory classification under the Constitution. That test requires the State to provide an "exceedingly persuasive justification" for the classification.¹⁹⁸ The test has two components. First, the classifi-

194. *Commonwealth of Va.*, 976 F.2d at 897-98; *Commonwealth of Va.*, 766 F. Supp. 1409-10. Historically, single-sex primary and secondary schools have been a rarity in American public education. See Comment, *Single-Sex Public Schools: The Last Bastion of Separate But Equal?*, 1977 DUKE L.J. 259; Jack G. Steigelfest, Comment, *The End of an Era for Single-Sex Schools: Mississippi University for Women v. Hogan*, 15 CONN. L. REV. 353 (1983) (discussing the Court's willingness to investigate the objectives underlying the maintenance of single-sex schools).

195. *Commonwealth of Va.*, 976 F.2d at 897-98; *Commonwealth of Va.*, 766 F. Supp. 1409-10 (citing ALEXANDER ASTIN, *FOUR CRITICAL YEARS* (1977)). Mr. Astin is a professor of higher education at the University of California, Los Angeles, and president of the Higher Education Research Institute. Mr. Astin's book was the culmination of 17 years of research and its focus was the impact of college on students overall. The author did not undertake the book to compare and contrast single-sex institutions with coeducational institutions. *Id.*

196. Cheh, *supra* note 185, at 58. Professor Cheh, in addressing the same criticism of the diversity justification, stated:

Nevertheless it remains unclear what weight to give these conclusions [regarding single-sex institutions] in the absence of a full engagement on the issue. The Supreme Court has yet to meet the matter head on, and because VMI offered a unique educational experience not available to men and women, VMI was not the vehicle for that debate. If the issue is met squarely, it may be that the findings on single-sex schools are now outdated, indeterminate, or evolving. It may be that women are the only true beneficiaries of single-gender experiences precisely because they may need—as men presumably do not—a "safe haven" from the dampening influence of society's gender stereotypes. Single-sex education can never be justified except in the context of an actual educational system where the advantages and disadvantages of maintaining a gender-segregated system are fully explored.

Id. (footnote omitted).

197. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982).

198. *Id.* at 731.

cation must serve an important governmental objective, and second, the discriminatory means employed must be substantially related to the achievement of the governmental objective.¹⁹⁹

Judge Kiser, in his district court opinion, distinguished the VMI case from *Hogan* on two grounds. The first distinction was factual. Although the Court found in *Hogan* that no harm resulted from allowing men to attend nursing classes, Judge Kiser reasoned that harm would result from allowing women to attend VMI.²⁰⁰ Judge Kiser explained, "key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests."²⁰¹ The second distinction was based on the State's asserted important objective. In *Hogan*, the reason Mississippi offered to justify discrimination was affirmative action, but in the VMI case Virginia's reason was that the "male-only admissions policy at VMI promotes diversity within its statewide system of higher education."²⁰²

Judge Kiser concluded that

[T]he Court found that Mississippi's proffered explanation failed both prongs of the intermediate scrutiny test, i.e., that it was not an important governmental objective and that the means of advancing the objective were not substantially related to the achievement of that objective. In contrast, diversity in education has been recognized both judicially and by education experts as being a legitimate objective. The sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution.²⁰³

To grant legitimacy to the expansive redefinition of diversity, Judge Kiser concluded that courts and educational experts have recognized single-sex diversity. His support for this contention

199. *Id.* at 730; see also *Craig v. Boren*, 429 U.S. 190, 197 (1976) (setting forth that intermediate level scrutiny analysis requires that classifications based on sex must serve important governmental objectives and must be substantially related to the achievement of those objectives).

200. *United States v. Commonwealth of Va.*, 766 F. Supp. 1407, 1411 (W.D. Va. 1991), vacated, 976 F.2d 890 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993).

201. *Id.*

202. *Id.*

203. *Id.*

is *Williams v. McNair*,²⁰⁴ a case decided in 1970 and filed by a group of males to enjoin enforcement of a South Carolina statute that required by implication, not by express language, that Winthrop College admit only girls.²⁰⁵ In *Williams*, however, the court applied a mode of Equal Protection Clause analysis for gender classifications that has since become outdated. Because *Williams* was a 1970 decision, the court applied a rational basis approach rather than the intermediate level review as first required by *Craig v. Boren* in 1976.²⁰⁶ Judge Kiser's reliance on *Williams*, therefore, was misplaced.

Judge Kiser also cited *Ayers v. Allain*,²⁰⁷ a case that involved eight Mississippi schools, as an example of a decision that extended the meaning of diversity to include the "freedom to create different missions at different state universities, in order to promote diverse educational opportunities within the state."²⁰⁸ The Supreme Court subsequently vacated and remanded that Fifth Circuit decision relied upon by Judge Kiser.²⁰⁹ Additionally, *Ayers* was inapposite, as none of the publicly funded institutions of higher education in Mississippi had single-sex or single-race admissions policies. It is true that each of Mississippi's eight publicly supported universities had different mission statements and such mission variety does contribute to educational diversity. However, none of those missions, at the time of the Fifth Circuit's

204. *Id.* at 1409 (citing *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970)). Judge Kiser also cited *Vorchheimer v. School Dist.*, 532 F.2d 880 (3d Cir. 1976), *aff'd per curiam*, 430 U.S. 703 (1977). *Commonwealth of Va.*, 766 F. Supp. at 1413. In *Vorchheimer*, the city of Philadelphia maintained four high schools with different admissions requirements. *Vorchheimer*, 532 F.2d at 881. This school system included two single-sex high schools, Central High for boys and Girls High School for girls. Both schools offered college preparatory courses and both schools were comparable in quality. *Id.* The plaintiff, a female, would have been able to qualify academically for attendance at Central, but for her gender. *Id.* The Third Circuit held that the plaintiff's interest was outweighed by the harm caused by requiring her admission to an all-male school. *See id.* at 888.

Rostker v. Goldberg, 453 U.S. 57 (1981), is also viewed as a case that provides a good example of relevant distinctions between the two genders. But the basis for this decision, the military conscription requirement, has been significantly undermined by amendment to the law and changes in policy regarding women serving in combat positions. *See* 10 U.S.C. § 113 (1991); PRESIDENTIAL COMM'N ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT (Nov. 15, 1992).

205. *Williams*, 316 F. Supp. at 135 & n.2.

206. 429 U.S. 190 (1976). For an explanation of intermediate level scrutiny, see *supra* notes 197-99 and accompanying text.

207. *Commonwealth of Va.*, 766 F. Supp. at 1409 (citing *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (en banc), *vacated and remanded*, 112 S. Ct. 2727 (1992)).

208. *Commonwealth of Va.*, 766 F. Supp. at 1409.

209. *United States v. Fordice*, 112 S. Ct. 2727 (1992).

decision, included single-sex or single-race policies.²¹⁰ Thus, Judge Kiser's reliance on *Ayers* is also misplaced.

Additionally, to refer to VMI as an example of educational diversity is to employ a post hoc rationalization. Diversity had nothing to do with the establishment of VMI and it was certainly not the overriding state policy in 1839. Indeed, at the appellate level of the VMI case, Judge Niemeyer noted that, if anything, Virginia's public colleges and universities had experienced a move away from gender diversity.²¹¹

Judge Kiser next legitimized his expansive reading of diversity through a reference to educational experts. The only conclusive point he made, however, was that a healthy pedagogical debate existed regarding the "wisdom of maintaining 'single-sex' institutions of higher education."²¹² Judge Kiser recognized the debate in the *Williams* case, which he nevertheless used to support his expansive definition of diversity.²¹³ In the VMI decision, Judge Kiser relied on expert testimony and one empirical study to prove his point that VMI would be irreparably harmed if it opened its doors to women.²¹⁴ The testimony and study, however, agree only that "some students, both male and female, benefit from attending a single-sex college."²¹⁵

Though Judge Kiser's district court opinion is now of no precedential value, the harm done was that it legitimized an expansive reading of diversity without careful inquiry. In *Bakke*, diversity was limited to geographic and ethnic considerations within a single graduate program.²¹⁶ Conceding for a moment that diversity has broader applications than originally defined in

210. See Robert N. Davis, *The Quest for Equal Education in Mississippi: The Implications of United States v. Fordice*, 62 U. Miss. L.J. 405, 415 (1993).

211. *Commonwealth of Va.*, 976 F.2d at 899.

212. *Commonwealth of Va.*, 766 F. Supp. at 1410 (citing *Williams v. McNair*, 316 F. Supp. 134, 137 (1970)).

213. See *id.* at 1411-13.

214. *Commonwealth of Va.*, 766 F. Supp. at 1412-13.

215. *Id.* at 1411-12.

216. See discussion *supra* part I.C.; see also Cheh, *supra* note 185, at 60. Professor Cheh writes:

Diversity was first used as a compelling justification to include minority racial groups in schools where their numbers were scant or nonexistent. . . . [T]he overall objective was diversity of the student body as a whole, as a means of enriching the educational experience for everyone.

....

... In contrast, diversity in the VMI context is a reason to exclude, or to isolate and separate constituent groups.

Id. (footnote omitted).

Bakke, the real struggle is in the constitutional implementation of a government policy that describes classifications that discriminate as legitimate. If the government interest is legitimate, as it may be with diversity, then implementation of such policies necessarily leads one down the road of separate facilities, or at least separate educational opportunities, in the name of diversity. Justices Powell and Rehnquist raised the banner of educational diversity in the dissent in *Hogan* and now Judge Kiser has carried that banner held high through his district court and has passed it along to the Fourth Circuit Court of Appeals.

Though the Fourth Circuit vacated and remanded the district court opinion,²¹⁷ it accepted the district court's factual conclusion that "if VMI became coeducational, it would offer 'neither males nor females the VMI education that now exists.'"²¹⁸ The Fourth Circuit held that the lower court's conclusions were supported in three respects: "physical training, the absence of privacy, and the adversative approach."²¹⁹ The court held:

The district court's conclusions that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology are adequately supported. And the district court was not clearly erroneous in concluding that if a court were to require the admission of women to VMI to give them access to this unique methodology, the decision would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation. The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.²²⁰

The Fourth Circuit thus accepted Virginia's diversity argument as a persuasive and legitimate goal.²²¹ However, the court remanded the case to the lower court in order to address the issue of "why the Commonwealth of Virginia offers the opportunity

217. *United States v. Commonwealth of Va.*, 976 F.2d 890, 900 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

218. *Id.* at 896 (quoting *Commonwealth of Va.*, 766 F. Supp. at 1407).

219. *Id.* at 896-97.

220. *Id.* at 897 (citation omitted).

221. *See id.* at 898.

only to men."²²² The unanswered question remains why the State offers VMI's unique education and training to men and not women.²²³ The circuit court held:

If VMI's male-only admissions policy is in furtherance of a state policy of "diversity," the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender.²²⁴

Thus, the Fourth Circuit concluded that the State had adequately defended VMI's program to produce citizen soldiers, but Virginia needed to explain how it was advancing the governmental objective of educational diversity by maintaining one single-sex institution.²²⁵

The Fourth Circuit thereby embraced the expanded definition of diversity and, in the name of diversity, pushed open the door to the passage toward separate but equal. The Fourth Circuit emphasized that it had indeed chosen to travel down this path toward separate but equal when it recommended that "the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution."²²⁶

The Fourth Circuit made it clear that the governmental goal of educational diversity was not met through the VMI example standing alone. In addition to suggesting that VMI could admit women, the court offered another option—a parallel institution for women. It is precisely this kind of open door to the past of separate but equal that is cause for concern. Diversity has been a laudable goal, but it could lead to a path of duplicated programs, duplicated facilities, and fiscal drain on public expenditures. The Fourth Circuit glossed over the diversity issue and instead accepted unexamined conclusions regarding its legitimacy in this context as a state interest. Perhaps diversity is a legitimate state

222. *Id.*

223. *Id.*

224. *Id.* at 899

225. *Id.*

226. *Id.* at 900.

interest, but the court should have demonstrated that through a close examination of the issues.

Did VMI offer its unique brand of single-sex education in the interest of diversity? I don't think so—the real reason was tradition. Yet the Fourth Circuit in its phrasing of the central issues focused on the lack of an all-female military school rather than the larger question of whether Virginia afforded women equal educational opportunities.²²⁷ Thus, I think the focus of the Fourth Circuit's inquiry was misplaced.

In April 1994, Judge Kiser issued his memorandum opinion in the VMI case on remand from the Fourth Circuit and concluded that the Virginia Women's Institute for Leadership (VWIL) program at Mary Baldwin College met the requirements of the Equal Protection Clause.²²⁸ The overarching question was what did the "Fourth Circuit's opinion require of a proposed plan in order to pass constitutional muster?"²²⁹ The United States argued that to comply with the Fourth Circuit's opinion the Commonwealth was required to provide a VMI type of education.²³⁰ The Commonwealth argued that compliance with the Fourth Circuit's mandate could be achieved through developing an all-female college program comparable to VMI but not necessarily identical.²³¹

Judge Kiser was persuaded by the Commonwealth's arguments. He saw the VWIL plan as one that would take into account "the differences and the needs of college-age men and women."²³² The adversative method was replaced with a cooperative method "which reinforces self-esteem rather than the leveling process used by VMI."²³³ Judge Kiser noted that:

VWIL will be a highly structured program but without the extreme adversative VMI components, such as the rat line and breakout. In the opinion of one of the leading experts on the educating of women, Dr. Elizabeth Fox-Genovese, an adversative method of teaching in an all-female school would be not

227. Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function*, 50 WASH. & LEE L. REV. 35, 45 (1993). Professor Ides similarly argues that "in the context of the VMI case, the question is not whether the state provides an all-female version of VMI, but whether the Commonwealth provides equivalent opportunities in higher education for women." *Id.*

228. See *United States v. Commonwealth of Va.*, 852 F. Supp. 471 (W.D. Va. 1994).

229. *Id.* at 474.

230. *Id.* at 475.

231. *Id.* at 472.

232. *Id.* at 476.

233. *Id.*

only inappropriate for most women, but counter-productive.²³⁴

Judge Kiser's opinion also detailed some of the differences between the VWIL and VMI educational models in areas of academic offerings, residence life, military component, overall benefits and outcomes, and pedagogical justifications. He noted that "[t]he very concept of diversity precludes the Commonwealth from offering an identical curriculum at each of its colleges."²³⁵ He concluded that:

[T]he differences between VWIL and VMI are justified pedagogically and are not based on stereotyping. This is not to say that some women cannot succeed within a VMI type methodology. The evidence at trial indicated that the VMI methodology could be used to educate women and, in fact, some women—such as the allegorical Jackie Jones—may prefer the VMI methodology to the VWIL methodology. As discussed above, however, the controlling legal principles in this case do not require the Commonwealth to provide a mirror image VMI for women. Rather, it is sufficient that the Commonwealth provide an all-female program that will achieve substantially similar outcomes in an all-female environment and that there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends. VWIL satisfies the Fourth Circuit's requirement that the Commonwealth adopt a parallel program for women which takes into account the differences and needs of each sex.²³⁶

Judge Kiser's memorandum opinion has been appealed to the Fourth Circuit for a determination on whether the instructions of the court of appeals were followed. Ultimate resolution of this issue may well rest with the Supreme Court, but whether or not Judge Kiser properly interpreted the Fourth Circuit's instructions, the harm has already been done. The court of appeals, in the name of diversity, has suggested that a parallel single-sex institution might satisfy the Equal Protection Clause. The Fourth Circuit, in the name of diversity, has taken another step down the road toward a modern separate but equal doctrine.²³⁷

234. *Id.*

235. *Id.* at 477.

236. *Id.* at 481. This decision is currently on appeal to the Fourth Circuit Court of Appeals.

237. See Grace W. Tsuang, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659 (1989). For a thorough discussion of how this expanded view of unexamined diversity can lead to other forms of mischief, such as separate but equal racial or ethnic schools, see generally Cheh, *supra* note 185.

B. Faulkner v. Jones

The Fourth Circuit added little clarity to its diversity analysis in *Faulker v. Jones*.²³⁸ In *Faulkner*, The Citadel, a public all-male college in South Carolina, admitted Shannon R. Faulkner, but withdrew her admission when the school discovered that Shannon was female.²³⁹ The district court granted a preliminary injunction to Ms. Faulkner and required The Citadel to allow her to attend day classes pending resolution of her equal protection claim on the merits. In a case factually almost identical to the VMI case, the Fourth Circuit held:

In this case, ordering Faulkner to day classes will probably shake The Citadel's stability temporarily. However, the preliminary injunction will not change or destroy any material aspect of The Citadel's program. Moreover, no temporary adverse impact would be irreversible for The Citadel. Denying Faulkner's access, on the other hand, might likely become permanent for her, due to the extended time necessary to complete the litigation. The most telling aspect of this case, and that which distinguishes this case from VMI, is the presence of this time pressure, combined with an absence of present opportunity for Faulkner.

South Carolina is not prepared to provide an alternative remedy to Faulkner at this time, and it has not suggested one. Any alternative would have to await the results of the state committee's study, a court review of the committee's report, and implementation. In the meantime, current state policy denies Faulkner any relief to which she probably would be entitled in the long run, whether by attendance at The Citadel or at some other institution. Under these circumstances, we conclude that the district court did not abuse its discretion in entering the preliminary injunction for the limited, but temporary relief.²⁴⁰

The Fourth Circuit justified its decision in *Faulkner* by concluding that Ms. Faulkner would suffer irreparable harm if not allowed to enroll in day classes, but The Citadel would not suffer comparable harm.²⁴¹

238. 10 F.3d 226 (4th Cir. 1993), *motion to stay denied*, 14 F.3d 3 (4th Cir. 1994).

239. *Faulkner*, 10 F.3d at 228.

240. *Id.* at 233.

241. *Id.* at 233. In his dissent, Judge Hamilton disagreed that Ms. Faulkner would suffer irreparable harm and further argued that The Citadel would suffer such harm by her admission. *Id.* at 234 (Hamilton, J., dissenting).

In the VMI case, the Fourth Circuit accepted the lower court's findings "which recognized physical and psychological differences between men and women."²⁴² The Fourth Circuit reasoned that admitting women to VMI would require the school to develop a dual tracking program for training men and women.²⁴³ Thus, in the VMI case the court concluded that admitting women would fundamentally change VMI's military program and effectively end its uniqueness.²⁴⁴ This, the court said, distinguishes The Citadel case from the VMI case. Such a distinction is quite elusive. It appears that the Fourth Circuit now may be on the right constitutional track in *Faulkner*, but it is unwilling to admit that its analysis was incomplete in the VMI case.

C. Single-Race Institutions in the Name of Diversity

In 1992, the Supreme Court held open the separate but equal door in *United States v. Fordice*.²⁴⁵ In *Fordice*, black students in Mississippi filed a lawsuit alleging that the state maintained a dual system of higher education because most black students attended historically black colleges and most white students attended historically white colleges.²⁴⁶ The plaintiffs argued that Mississippi's higher education system violated both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.²⁴⁷ The State responded that it had achieved full compliance with the Fourteenth Amendment and Title VI by adopting race-neutral policies, and that the choices students made were individual choices.²⁴⁸

The Supreme Court held:

If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether

242. *Id.* at 231 (citing *United States v. Commonwealth of Va.*, 976 F.2d 890, 896 (4th Cir. 1992), *cert denied*, 113 S. Ct. 2431 (1993)).

243. *Id.* (citing to *Commonwealth of Va.*, 976 F.2d at 896).

244. *Id.* (citing to *Commonwealth of Va.*, 976 F.2d at 897).

245. 112 S. Ct. 2727 (1992). In another context, the Supreme Court engaged in diversity policy making with a prospective focus. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (addressing challenges to two Federal Communications Commission (FCC) policies, one involving enhancement for minority ownership in granting new licenses and the other challenging the minority distress sale program). The Court held that "[t]he Commission's minority ownership policies bear the imprimatur of long standing congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity." *Id.* at 600.

246. *Fordice*, 112 S. Ct. at 2733.

247. Davis, *supra* note 210, at 414 (citing *Fordice*, 112 S. Ct. at 2733).

248. *Id.* (citing to Petitioner's Brief at 1, *Fordice*, 112 S. Ct. 2727 (No. 90-6588)).

by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.²⁴⁹

The Court concluded that had the lower courts applied this standard, their analyses would have revealed several surviving aspects of Mississippi's prior dual system that were constitutionally suspect.²⁵⁰ That is, even though such policies may be race-neutral on their face, they substantially restrict a person's choice of institution and they contribute to the racial identifiability of the eight public universities.²⁵¹

The Court identified four current policies traceable to a prior *de jure* system: admission standards, program duplication, institutional mission assignments, and the continued operation of all eight public universities.²⁵² The fourth policy is relevant to the diversity debate. Although the Supreme Court strongly encouraged the district court to review the viability of maintaining eight publicly supported universities, it left open the possibility that the state could justify the continued existence of eight schools if it eliminated program duplication.²⁵³

The Court recognized that a larger rather than a smaller number of schools offered students more choices among institutions and that if the state closed one or more institutions, this would decrease the discriminatory effects of the past system. Even based on the circumstances surrounding this case, however, the Court was not willing to order closure or merger.²⁵⁴ Based on the record, the Court could not determine whether the Con-

249. *Fordice*, 112 S. Ct. at 2737.

250. *Id.* at 2738.

251. *Id.*

252. *Id.* For a careful and detailed discussion of *Fordice*, see Davis, *supra* note 210 (urging Mississippi to develop a single university system that will provide quality education to all Mississippi residents); see also Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1 (1994) (exploring reasons why sound educational policy allows for the continued operation of historically black colleges); Alex M. Johnson, Jr., *Bid Whist, Tonk and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993) (arguing that the ideal integrated society can be achieved only through a transitional stage in which racial differences are truly respected, a stage that requires the public maintenance of and support for predominantly black colleges).

253. For an excellent discussion regarding educational justifications for historically black colleges, see Brown-Scott, *supra* note 252.

254. *Fordice*, 112 S. Ct. at 2742-43.

stitution required closure of one or more schools.²⁵⁵ The Court speculated that the State could possibly cure the constitutional violation by eliminating program duplication and changing mission and admission requirements.²⁵⁶ The Court held:

[O]n remand this issue should be carefully explored by inquiring and determining whether retention of all eight institutions itself affects student choice and perpetuates the segregated higher education system, whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can be practicably closed or merged with other existing institutions.²⁵⁷

Thus, the Court left the door open for the state to provide educational justifications for maintaining these eight institutions.²⁵⁸

Justice Thomas, in a concurring opinion, became one of the Court's advocates for allowing states to offer sound educational justification for maintaining their historically black schools.²⁵⁹ He noted that the Court did "not foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges *as such*."²⁶⁰ Justice Thomas next set forth an argument based on diversity:

Obviously, a State cannot maintain such traditions by closing particular institutions, historically white or historically black, to particular racial groups. Nonetheless, it hardly follows that a State cannot operate a diverse assortment of institutions—including historically black institutions—open to all on a race neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another. No one, I imagine, would argue that such institutional *diversity* is without "sound educational justification . . .".²⁶¹

Justice Thomas applied the now expanded diversity argument and concluded that although a state is not constitutionally required to maintain historically black schools, he did "not under-

255. *Id.* at 2743.

256. *Id.*

257. *Id.*

258. For a discussion regarding the education of African Americans at historically black colleges, see Brown-Scott, *supra* note 252.

259. *Fordice*, 112 S. Ct. at 2746 (Thomas, J., concurring and dissenting).

260. *Id.*

261. *Id.*

stand our opinion to hold that a State is *forbidden* from doing so. It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."²⁶² Although the Court did not promote the maintenance of such parallel institutions, it has not closed the door to this option, and it has flagged diversity as a noble goal without careful examination.

The Court did address the plaintiffs' arguments regarding additional funding for historically black institutions (HBIs). The Court held:

If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley *solely* so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State provides these facilities for *all* its citizens and it has not met its burden under *Brown* to take affirmative steps to dismantle its prior de jure system when it perpetuates a separate, but "more equal" one²⁶³

In light of the Court's earlier pronouncement regarding an educational justification for maintaining eight universities,²⁶⁴ this passage is perplexing. These views can be reconciled by understanding the Court to say that it will not condone exclusive admission policies for black students at HBIs. Justice Thomas added that these institutions could constitutionally maintain their identity through private choice.²⁶⁵ The Court's premise was that these institutions are single race today largely because of a prior structure that has influenced choice.²⁶⁶ If these institutions maintain this racial identifiability through private choice rather than restrictive admissions policies, then, according to Justice Thomas, the Court may allow a state to justify public financial assistance.²⁶⁷

But suppose the State removes all of the vestiges of the prior de jure system and still chooses to maintain historically black colleges as just that—historically black—now by private choice.²⁶⁸

²⁶² *Id.*

²⁶³ *Id.* at 2743.

²⁶⁴ *Id.* at 2737, 2743.

²⁶⁵ *See id.* at 2746 (Thomas, J., concurring and dissenting).

²⁶⁶ *Id.* at 2743.

²⁶⁷ *See id.* at 2746 (Thomas, J., concurring and dissenting).

²⁶⁸ Indeed, this seems to be the direction in which the Court was going in recent

Could the State justify these educational institutions also in the name of diversity?

In *Fordice* the Court implies that it is disinclined to legitimize the constitutional viability of single-race publicly financed institutions, but nevertheless leaves the door open for them. Although classifications based on race and sex do not receive the same constitutional scrutiny,²⁶⁹ to allow or indeed promote single-sex institutions in the name of diversity seems antithetical to the Court's "reluctance" to allow single-race institutions.²⁷⁰ Although in *Fordice* the existence of single-race institutions had historical origins, the modern justifications for single-race schools are identical to those that states have offered for single-sex institutions. States allege that HBIs provide a nurturing environment for black students, black students do not feel intimidated or overlooked in the classroom, and they are able to participate more in class and develop better self-confidence than at historically white institutions.²⁷¹ Additionally, proponents of HBIs contend

decisions like *Board of Educ. v. Dowell*, 498 U.S. 237 (1991) (holding that where existing residential segregation results from demographic changes, private decision making, and economics, and the school board can demonstrate that it complies with a prior desegregation decree in good faith, the district court may dissolve an injunctive decree); see also *Freeman v. Pitts*, 112 S. Ct. 1430 (1992) (holding that where demographic changes continue to create racial imbalance and the school district has a history of good faith compliance with a desegregation order, a district court may relinquish supervision and control of a school district in incremental stages before full compliance has been achieved in every area of school operations); *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (holding that although redistricting may be race-neutral on its face, if district lines are drawn such that the legislation cannot be understood as anything other than an attempt to separate votes along racial lines, a claim is made under the Equal Protection Clause of the Fourteenth Amendment).

269. See *supra* notes 65, 197-99 and accompanying text.

270. Consider, however, the arguments made by some proponents of inner city single-race and single-sex schools. Many of these educators justify single-sex schools because of the endangered position of black males in society. These educators maintain that African American boys have unique problems and the single-sex schools are designed specifically to address those problems. Among the problems listed are discipline, lack of role models, violence, and social pressure. For a discussion of the constitutionality of single-race and single-sex schools see Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813 (1993); Richard Cummings, *All-Male Black Schools: Equal Protection, the New Separatism and Brown v. Board of Education*, 20 HASTINGS CONST. L.Q. 725 (1993); Michael John Weber, *Immersed in Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099 (1993); Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741 (1992). But see Helaine Greenfield, *Some Constitutional Problems with the Resegregation of Public Schools*, 80 GEO. L.J. 363 (1991) (discussing constitutional problems with single-race schools).

271. See generally Pamela J. Smith, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2004 (1992) (discussing benefits of all-male black schools).

that the present condition of African Americans both in educational institutions and in society at large may provide the compelling interest necessary to pass constitutional requirements.²⁷²

Moreover, if the present undifferentiated notion that diversity justifies separateness continues, it is possible that the parties in the ongoing litigation of *Fordice* will justify racially identifiable institutions in the name of diversity. Very simply stated, the courts have failed to analyze critically the claims of diversity and, as a result, diversity is now an empty concept. It can be used both to include and to exclude.

IV. CONCLUSION

I have used the cases cited for two points. First, diversity has evolved from its original meaning in *DeFunis*²⁷³ and *Bakke*²⁷⁴ of individual ethnic and geographic diversity. As evidenced by the VMI case,²⁷⁵ *Faulkner*,²⁷⁶ and *Fordice*,²⁷⁷ courts have expanded the meaning of diversity to include educational institutions with different missions, programs, and admission requirements. Second, what troubles me most about the evolution of diversity is not so much that its meaning has changed as society has evolved, but that this evolution occurred in an unprincipled fashion without explanation as to whether the articulated benefits allegedly derived were consistent with diversity as we had come to understand it. None would argue the importance of diversity to our society, but the change in the use of diversity was not a change accompanied by any explanation or justification. It was ushered in with a dissent in *Hogan*²⁷⁸ and courts have subsequently used it to justify the existence of VMI, a single-sex institution in Lexington, Virginia.²⁷⁹

Moreover, by using diversity in such an unprincipled fashion, the courts have arguably encouraged—but at a minimum condoned—the justification of publicly supported schools that are single sex, single race, single religion, single age, or some other

272. *Brown*, *supra* note 270, at 874-76.

273. 416 U.S. 312 (1974).

274. 438 U.S. 265 (1978).

275. *United States v. Commonwealth of Va.*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

276. *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993), *motion to stay denied*, 14 F.3d 3 (4th Cir. 1994).

277. *United States v. Fordice*, 112 S. Ct. 2727 (1992).

278. 458 U.S. 718 (1992).

279. *Commonwealth of Va.*, 766 F. Supp. at 1409.

restrictive classification in the name of diversity. Maybe the Court will ultimately find certain justifications for such institutions substantial enough to pass the constitutional heightened scrutiny requirements. But the justifications offered in the opinions on which I have focused describe only a pedagogical debate and supportive studies suggesting that there may be benefits associated with all-boys and all-girls schools. Is it on this kind of evidence that we will rest judicial decisions that encourage the creation of publicly supported parallel institutions like that of VWIL at Mary Baldwin College in Staunton, Virginia?²⁸⁰

My objection at this point is not so much that single-interest institutions should not be publicly supported—though I do believe that our public institutions should be broadly available to everyone—but that the judiciary has in one fell swoop changed the meaning of diversity and legitimated its expanded application with neither a fair discussion of educational policy nor consideration of whether promoting parallel institutions passes constitutional muster. On this note, I submit that the Court should be more circumspect regarding the direction in which such cavalier decision making leads.

As Arthur Schlesinger stated:

[P]ressed too far, the cult of ethnicity has had bad consequences too. The new ethnic gospel rejects the unifying vision of individuals from all nations melted into a new race. Its underlying philosophy is that America is not a nation of individuals at all but a nation of groups, that ethnicity is the defining experience for most Americans, that ethnic ties are permanent and indelible, and that division into ethnic communities establishes the basic structure of American society and the basic meaning of American history.

Implicit in this philosophy is the classification of all Americans according to ethnic and racial criteria. But while the ethnic interpretation of American history, like the economic interpretation, is valid and illuminating up to a point, it is fatally misleading and wrong when presented as the whole picture. The ethnic interpretation, moreover, reverses the historic theory of America as one people—the theory that has thus far managed to keep American society whole.

Instead of a transformative nation with an identity all its own, America in this new light is seen as preservative of diverse alien identities. Instead of a nation composed of indi-

280. *United States v. Commonwealth of Va.*, 852 F. Supp. 471, 481 (W. D. Va. 1994).

viduals making their own unhampered choices, America increasingly sees itself as composed of groups more or less ineradicable in their ethnic character. The multiethnic dogma abandons historic purposes, replacing assimilation by fragmentation, integration by separatism.

It belittles *unum* and glorifies *pluribus*.²⁸¹

In his book, *Belonging to America*,²⁸² Kenneth Karst has captured the problems I have discussed. Professor Karst makes the point that in America, the dominant group has used the law as an instrument to assert its dominance.²⁸³ The conclusion I draw from this is that identification with separate groups to the exclusion of recognizing a national commonality is not desirable in the long-run. This so-called separatist movement, be it racial, ethnic, gender, or religious, is the reaction of some groups to not being accepted equally as part of the dominant mainstream culture. These groups have been viewed as the "other" rather than the "us." The group identification movement, which may be taking us down a separate but equal path, should be countered by the use of law as an instrument for inclusion rather than exclusion.

281. SCHLESINGER, *supra* note 1 at 16-17.

282. KENNETH L. KARST, *BELONGING TO AMERICA* (1989).

283. *Id.* at 24.