

# The Future of *Bakke*: Will Social Science Matter?

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The papers in this Symposium combine a wide variety of legal and social science perspectives. Does this mix of law and social science illuminate the debate over affirmative action in higher education? Can the findings of social scientists inform legal principles in this contentious field? In particular, if the Supreme Court revisits its holding in *Regents of the University of California v. Bakke*,<sup>1</sup> will the Justices consider social science evidence in weighing the constitutionality of university affirmative action plans?

Four signs suggest that social science will play some role in determining the constitutionality of affirmative action in university admissions. The first of these is history. For almost a century, the Supreme Court has shown a surprising tendency to weigh social science in pivotal discrimination cases. The Court first invoked social science data in a 1908 decision, *Muller v. Oregon*.<sup>2</sup> The complainant in that case challenged an Oregon law limiting the work day for women employed in factories and laundries. He argued, in part, that the law unfairly distinguished between male and female employees.

The law's defenders, progressive reformers who hoped to alleviate oppressive working conditions for both male and female laborers, hired Louis Brandeis to defend the statute.<sup>3</sup> Brandeis submitted his now famous "Brandeis brief"

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<sup>1</sup> 438 U.S. 265 (1978).

<sup>2</sup> 208 U.S. 412 (1908). For discussion of *Muller* as the Court's first use of social science data, see, for example, JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 5-11 (3d ed. 1994).

<sup>3</sup> Many progressives perceived a conflict between the protective legislation challenged in *Muller* and the growing movement to obtain suffrage and full equality for women. At the time, however, many reformers supported the Oregon law as a way both of remedying particularly onerous working conditions for women and of laying a foundation for protective legislation that would shield all adult workers. See, e.g., MONAHAN & WALKER, *supra* note 2, at 8; Ronald K.L. Collins & Jennifer Friesen, *Looking Back on Muller v. Oregon*, 69 A.B.A. J. 294, 295 (1983) (part one).

During the decades after *Muller*, protective legislation may have hurt women more often than it helped them. See, e.g., Jennifer Friesen & Ronald K.L. Collins, *Looking Back on Muller v. Oregon*, 69 A.B.A. J. 472, 474-77 (1983) (part two) (commenting that "protective labor laws prevented women from taking work in a variety of job callings"); Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978) (listing

assembling all of the available empirical evidence documenting the negative effects of long workdays for women. Brandeis did not himself do the research for this brief. He relied instead upon a team headed by Josephine Goldmark.<sup>4</sup> Goldmark's name, unfortunately, has been lost to most legal historians. Otherwise we might talk today about "Goldmark briefs" rather than "Brandeis briefs."<sup>5</sup>

Most of Brandeis's (or Goldmark's) evidence would not pass as valid social science today. At the time of *Muller*, however, Brandeis's brief was considered both scholarly and revolutionary. More surprising, the Court paid attention to Brandeis's evidence. The Court discussed the evidence approvingly and upheld the Oregon law—even though the Court in that era struck down almost every other example of protective labor legislation to come before it. Social science thus played a key role in a very early case involving discrimination and the Equal Protection Clause.

The Supreme Court's use of social science in *Brown v. Board of Education*<sup>6</sup> is even more well-known. The Court in that case invoked all of the traditional legal tools—recent precedents invalidating segregation in higher education, the history of the Equal Protection Clause, and the text of that clause—to declare segregation unconstitutional. In addition, however, the Court cited research by Kenneth Clark, Mamie Clark, and others showing that segregation hampered the educational development of minority children.<sup>7</sup> The negative effects of segregation, the Court declared in its opinion, are "amply supported by modern authority."<sup>8</sup>

The Court's invocation of social science in *Brown* was so remarkable that it spawned a cottage industry of commentary that has continued until this day. Scholars have debated what the Court meant by its references to the cited research and, indeed, whether the Court should have included social science in its opinion.<sup>9</sup> Some scholars have maintained that the Court's references to social science

instances in which protective legislation resulted in harm to women in employment).

<sup>4</sup> See Collins & Friesen, *supra* note 3, at 296–97. Goldmark was a leader in the National Consumers' League, a group devoted to workplace reforms. Before compiling the research for the *Muller* brief, Goldmark published an article in the *American Journal of Sociology* detailing the difficult conditions under which women worked. See *id.* at 295.

<sup>5</sup> The combination of Goldmark's gender and her status as a non-lawyer probably kept her name off the brief Brandeis submitted to the Supreme Court in *Muller*. See *id.* at 297. In a subsequent case heard by the Illinois Supreme Court, however, Goldmark received credit as co-author of a brief submitted with Brandeis. Friesen & Collins, *supra* note 3, at 472.

<sup>6</sup> 347 U.S. 483 (1954).

<sup>7</sup> See *id.* at 494–95 n.11. For excerpts from some of the social science research, trial testimony, and appellate statements in *Brown*, see MONAHAN & WALKER, *supra* note 2, at 150–59.

<sup>8</sup> *Brown*, 347 U.S. at 494.

<sup>9</sup> For a bibliography of some of these writings, see MONAHAN & WALKER, *supra* note 2, at 267–68.

demeaned the moral principle embodied in the Fourteenth Amendment. What if the social science changed? Would segregation then pass constitutional muster?<sup>10</sup> The Court, however, tethered its *Brown* decision partly to social science, a fact that suggests social science may continue to play a role in discrimination cases.<sup>11</sup>

History alone, however, does not compel my prediction that the Supreme Court will consult social science in weighing any post-*Bakke* challenge to affirmative action in higher education. The second reason I believe that the Court will pursue such a course is simple necessity: standing alone, neither the text nor the history of the Equal Protection Clause answers the hard questions about what equality means in our society. The language of the Constitution evokes a concept of equality that is both complex and elusive. Colorblindness is an important goal of our constitutional commitment to equality, but the Constitution establishes no straightforward rule of race-blind action. Instead, the Fourteenth Amendment more eloquently and ambiguously commands that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>12</sup>

The notion of “equal protection” is an open-ended one that does not derive from constitutional text or history alone. We can only understand equality in the context of a particular society. Each of the Supreme Court Justices, like every member of our society, has a notion of what an equal society looks like. All of our notions are somewhat different, but these concrete visions inform our abstract articulation of what “equal protection” means.

I believe that the Justices who decided *Brown* looked at the society around them and knew that it was not equal. The social science evidence helped them perceive and articulate the nature of that inequality. The Justices saw that a society in which black children identified white dolls as “nice” and black dolls as “bad” could not be an equal society.<sup>13</sup> There was something wrong with that picture. It

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<sup>10</sup> Cf. Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955) (“It is one thing to use the current scientific findings . . . in order to ascertain whether the legislature has acted reasonably” but “quite another thing to have our fundamental rights rise, fall or change along with the latest fashions of psychological literature.”).

<sup>11</sup> Maureen Hallinan correctly notes that some lower courts have seemed less receptive to social science evidence in recent cases challenging affirmative action programs. See Maureen Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 735–36 (1998). I remain optimistic, however, that social science will play some role in any authoritative decision by the Supreme Court.

<sup>12</sup> U.S. CONST. amend. XIV, § 1. Although the Fourteenth Amendment restricts only state action, the Supreme Court has read the Due Process Clause of the Fifth Amendment to impose a similar constraint against the national government. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

<sup>13</sup> Cf. Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 169, 175 (Committee on the Teaching of Social Psychology of The Society for the Psychological Study of Social Issues ed., 1947) (reporting on

should not have taken much social science to see that America of the 1950s was unequal. The stories of people who lived through that era—like Gregory Williams—should have been enough.<sup>14</sup> But the social science evidence was one of many pieces enabling the Court to conclude that our society was denying equal protection to many of its members. Forty-five years later, social science may play a comparable role in showing the Court that we are still far from equality and that discretion to adopt affirmative action measures can still contribute to our common goal of achieving full equality.<sup>15</sup>

The third reason that the Supreme Court has looked to social science evidence in previous discrimination cases, and should weigh that evidence in any future challenges to affirmative action, is that social science helps the Court explain to the public its outcomes in these difficult cases. When courts decide discrimination cases, they operate at the edges of our social tolerance. All of us suffer from bias, but we rarely see that bias in ourselves. It is important to remember that many upstanding people in the 1950s firmly believed that racial segregation in elementary schools was right and proper. It is difficult for individuals to overcome their own prejudice or even to see that it exists.

Social science is one of the tools we have for overcoming bias, for showing people that the world is not the way they think it is. When the Supreme Court cited social scientists in *Brown*, it forced readers to confront their own biases. The Court's social science references played only a minor role in the *Brown* opinion, yet those references linger in our cultural memory. It was important, I think, for the 1954 Supreme Court to tell the public that social science had demonstrated the harmful effects of segregation. That evidence opened the public's eyes to their own bias, helped jar the complacency that perpetuated segregation, and strengthened acceptance of the Court's own opinion.

In the same way, today's social science evidence illuminates the prejudice and disadvantage that still plague our society.<sup>16</sup> The evidence challenges our own

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the use of and results from a "Dolls Test" to investigate the development of racial identification and preferences in black children).

<sup>14</sup> See Gregory H. Williams, *Experiencing Life on Both Sides of the Color Line: The Need for Affirmative Action in Higher Education*, 59 OHIO ST. L.J. 663 (1998).

<sup>15</sup> Cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 273-74 (1995) (Ginsburg, J., dissenting) (citing studies of ongoing racial bias as evidence that "Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the 'equal protection of the laws' the Fourteenth Amendment has promised since 1868"). A majority of the Court in *Adarand* adopted strict scrutiny as the test to measure the constitutionality of affirmative action programs. That test, however, would not preclude the Court from concluding—in part based on social science evidence—that eradicating ongoing discrimination is a compelling interest justifying affirmative action. *But see infra* note 46 and accompanying text (discussing Court's unwillingness to recognize societal discrimination as a justification for affirmative action).

<sup>16</sup> See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM*

complacent belief that turn-of-the-century America is a raceblind society in which all opportunities are equal. If the Supreme Court considers social science evidence in any future challenge to affirmative action, it might use that evidence to demonstrate the persistent gap between our constitutional ideals and our social reality.

Finally, social science should play a role in weighing constitutional challenges to affirmative action because affirmative action is only a remedy. Affirmative action is not a constitutional principle—it is just a means to achieving a constitutional end. With remedies we must be pragmatic, we must ask what works. We must ask about the costs of any remedies we choose—and about whether we could design the remedy better.

Jim Chen's paper makes this point dramatically.<sup>17</sup> As he urges, we must

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CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 144-48 (1998) (finding that even after controlling for socioeconomic background, SAT score, college grades, college selectivity, college major, advanced degrees, and employment sector, white men earned \$8,500 more per year, on average, than did black men); HARRY CROSS ET AL., EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS 42 (1990) (reporting, among other findings, that white applicants received 52% more job offers than Hispanic applicants with equivalent credentials); MARGERY AUSTIN TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING at xi (1991) (stating that on average, white applicants advanced further in job application process, and received more final offers, than did black applicants with matched credentials); MARGERY AUSTIN TURNER ET AL., U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING DISCRIMINATION STUDY: SYNTHESIS at i-vii (1991) (describing a study of housing searches in twenty-five metropolitan areas where more than half of African-American or Hispanic testers seeking to rent or buy housing experienced unfavorable treatment compared to matched white testers); Peter J. Leahy, *Are Racial Factors Important for the Allocation of Mortgage Money?*, 44 AM. J. ECON. & SOC. 185 (1985) (stating that mortgage lending outcomes appear racially biased even after controlling for socioeconomic factors and other neighborhood characteristics); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818-819 (1991) (noting that black and white consumers pursuing identical negotiation strategies and presenting identical credit histories obtained dramatically different prices for new cars; the final price for black male testers was twice as high as that for white male testers, while final offers for black female testers were three times higher than those made to white males). See generally BARBARA F. RESKIN, THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT 19-43 (1998) (summarizing these and other studies); GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT §§ 4.1-4.3 (1995) (summarizing the results of paired testing in which blacks and Latinos were "treated significantly worse than equally qualified whites," as well as other evidence of ongoing discrimination).

<sup>17</sup> See Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 898-902, 906-908 (1998) (arguing that educational diversity based on *Bakke* may inflict irrevocable harm on the very idea of the American University and that educational affirmative action has not only led to a misallocation of scarce resources but has also obscured other worthy causes by diverting political energy and material

continue to ask about the costs of affirmative action and whether the benefits justify those costs. Even when we conclude that the benefits outweigh the costs, we must still ask if there are ways to make affirmative action better. The Supreme Court's current commitment to strict scrutiny, with its requirement of "narrowly tailored" means,<sup>18</sup> insures that approach. At the same time, we should not allow the costs of affirmative action programs to blind us to the benefits of those programs; substantial costs are bearable if they produce even more significant benefits. Weighing costs and benefits is an essential step in designing any remedy. Social science data can show us both the pluses and minuses of any affirmative action program.

If the Supreme Court does look to social science when judging the constitutionality of affirmative action in higher education, what evidence should the Court consider? Ideally, the Court would consider projections like those offered by Thomas Kane, John Gruhl, Susan Welch, and Edgar Epps. On the one hand, these researchers have shown that the impact of affirmative action on higher education is modest. Affirmative action affects student admissions at elite institutions, but not at the overwhelming majority of universities nationwide.<sup>19</sup> Even at elite schools, the number of students admitted through affirmative action programs remains small,<sup>20</sup> while trends in minority enrollments depend as much on economic conditions as on affirmative action initiatives.<sup>21</sup> Affirmative action programs neither deny white students an education nor exclude them from the most prestigious schools. Indeed, because of overall growth in higher education, the number of white students at professional schools and selective colleges has increased substantially during the last thirty years—despite the implementation of affirmative action programs during those same decades.<sup>22</sup>

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resources).

<sup>18</sup> See *Adarand*, 515 U.S. at 235.

<sup>19</sup> See Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *THE BLACK-WHITE TEST SCORE GAP* 431, 438 (Christopher Jencks & Meredith Phillips eds., 1998), reprinted in 59 OHIO ST. L.J. 971, 978 (1998).

<sup>20</sup> Cf. *id.* at 453, reprinted in 59 OHIO ST. L.J. 971, 993 (noting that only 15% of Harvard College students are African American or Hispanic, and that some of these would have been admitted absent affirmative action); Edgar Epps, *Affirmative Action and Minority Access to Faculty Positions*, 59 OHIO ST. L.J. 755, 762 (1998) (reporting that in fall 1995, only 6.8% of graduate students nationwide were African American, 3.9% were Hispanic, 4.4% were Asian/Pacific Islander, and 0.5% were Native American).

<sup>21</sup> See Susan Welch & John Gruhl, *Does Bakke Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools*, 59 OHIO ST. L.J. 697, 710 (1998) (reporting that in the early to mid-1990s an economic boom made it possible for more minority students to attend college).

<sup>22</sup> The enrollment of J.D. students nationwide, for example, rose from 46,666 in 1963–1964 to 113,080 in 1977–1978; 117,997 in 1987–1988; and 128,623 in 1996–1997. See AMERICAN

While affirmative action programs thus impose few costs on white applicants,<sup>23</sup> they dramatically affect the number of minority students enrolled at

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BAR ASSOCIATION, APPROVED LAW SCHOOLS: 1998 EDITION, at 451 (1997). Total enrollment of minority students (including African Americans, Native Americans, Asian Americans, and all categories of Hispanic Americans) was 9,580 in 1977–1978, the first year such statistics are available; 13,250 in 1987–1988; and 25,279 in 1996–1997. See AMERICAN BAR ASSOCIATION, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES: FALL 1992, at 70 (1993) (reporting 1977–1978 figures); APPROVED LAW SCHOOLS, *supra*, at 453 (reporting 1987–1988 and 1996–1997 figures). The number of white students pursuing a legal education, therefore, ballooned from about 46,000 in 1963–1964 (when minority enrollments were low, but precise figures are unavailable) to 103,500 in 1977–1978, after the establishment of affirmative action programs. White enrollments remained at the latter high level throughout the next two decades, despite an increasing number of minority students (at least some of whom would have been admitted without any affirmative action programs). Based on the above data, there were 104,747 white J.D. students in 1987–1988 and 103,344 in 1996–1997.

See also UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 194 (1997) (number of medical degrees conferred nationwide rose from 7,032 in 1960 to 12,447 in 1975; 15,075 in 1990; and 15,368 in 1994); Regents of the University of Cal. v. Bakke, 438 U.S. 265, 272, 275 (1978) (when the University of California at Davis's medical school adopted a special program to admit 16 minority students annually, it also doubled class size from 50 to 100 students; thus, more white students enrolled at the medical school after adoption of the affirmative action program than before).

Enrollment information limited to selective colleges is more difficult to obtain. White enrollment at all undergraduate institutions certainly has risen substantially during recent decades, both in absolute numbers and as a percentage of white high school graduates. See UNITED STATES DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 215 (1997) (number of non-Hispanic white undergraduates rose from 7,740,500 in 1976 to 8,480,700 in 1980; and 8,805,600 in 1995); CHARLES J. ANDERSON, FACT BOOK ON HIGHER EDUCATION: 1997 EDITION, at 19 (1998) (percentage of white high school graduates attending college rose from 45.8% in 1960 to 52.0% in 1970, 59.4% in 1985, and 62.6% in 1995). At least one study, moreover, points to modest recent increases in enrollments at the most selective colleges. See BOWEN & BOK, *supra* note 16, at 293 (entering class size for undergraduates at thirteen of the most selective private universities grew from 15,849 in 1976 to 17,494 in 1989).

<sup>23</sup> William Bowen and Derek Bok have calculated that eliminating affirmative action preferences for African-American applicants at the nation's most selective colleges would raise each white applicant's chance of admission by no more than one and one half percent. See BOWEN & BOK, *supra* note 16, at 36. This apparent paradox, that affirmative action programs greatly increase the enrollment of minority students while having little impact on each white applicant's chance of admission, derives from the fact that white applicants greatly outnumber both minority applicants and the number places awarded through affirmative action considerations. Thomas Kane likens the effect to the impact of reserved parking spaces for handicapped drivers: Every driver in a crowded parking lot will look covetously at an open handicapped space, thinking that he or she could park if only the space was not reserved. Eliminating handicapped spaces, however, would have a minor impact on nondisabled drivers because the latter drivers vastly outnumber disabled ones. See Kane, *supra* note 19, at 453,

selective schools. Kane, Gruhl, and Welch offer compelling evidence that a halt in affirmative action programs would virtually exclude African-American and Hispanic students from some elite institutions. Welch and Gruhl report precipitous declines in the number of minority students admitted to the flagship law schools at the University of California and the University of Texas following the termination of affirmative action programs in those states.<sup>24</sup> Kane, meanwhile, shows that substituting consideration of economic class for race would do little to maintain the percentage of minority students currently attending the most elite institutions.<sup>25</sup> These findings eloquently pose the question whether the perceived benefits of opening every seat in higher education to colorblind competition outweighs the costs of resegregation in the most elite schools.<sup>26</sup>

A court weighing the constitutionality of affirmative action in university admissions would also consider evidence of the educational benefits stemming from those programs. Maureen Hallinan has carefully summarized research documenting those positive effects. A large number of studies show that minority students achieve higher test scores when they attend integrated elementary and secondary schools with a white majority.<sup>27</sup> These gains come at no cost to the white students attending those schools.<sup>28</sup> Fewer studies exist of college and university achievement, but they point in the same direction. In particular, one recent study of undergraduate and graduate students finds that ethnically diverse problem-solving groups produce more feasible and effective solutions than do groups composed exclusively of white students.<sup>29</sup> Additionally, a significant number of studies have found that racially diverse campuses increase student tolerance of different racial groups, reduce prejudice, and enhance cordial

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reprinted in 59 OHIO ST. L.J. 971, 992 (1998).

<sup>24</sup> See Welch & Gruhl, *supra* note 21. The number of minority students attending those institutions dropped even more dramatically. Only four African Americans and twenty-six Mexican Americans entered the University of Texas's law school in 1997, while just one African American (who had deferred admission from a previous year) started Berkeley's law program in 1997. See Janet Elliott, *Hopwood Appeal Focuses on Future Without Racial Preferences*, TEX. LAW., May 25, 1998, at 8; John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, AM. LAW., Nov. 1997, at 4.

<sup>25</sup> See Kane, *supra* note 19, at 448, reprinted in 59 OHIO ST. L.J. 971, 988 (1998).

<sup>26</sup> Faced with this bleak prospect, a few long-time foes of affirmative action have altered their stance. See, e.g., Nathan Glazer, *In Defense of Preference*, NEW REPUBLIC, Apr. 6, 1998, at 18; Glenn Loury, *An American Tragedy: The Legacy of Slavery Lingers in Our Cities' Ghettos*, BROOKINGS REV., Mar. 1998, at 38.

<sup>27</sup> See Hallinan, *supra* note 11, at 742.

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

<sup>29</sup> See Poppy Laretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RESEARCH 248 (1996).



relationships among students of different races.<sup>30</sup>

The Court might also consider the evidence offered by Jennifer Hochschild and Thomas Kane that affirmative action in university admissions has harmed neither the universities nor the intended beneficiaries of those programs. Although elite universities engage in the most extensive affirmative action programs, both tuition and application rates have risen disproportionately at those schools.<sup>31</sup> Market response suggests that these universities have gained, rather than lost, prestige during the era of affirmative action. Contrary to some predictions, minority students who attend those elite institutions reap the same benefits as their white classmates. For both minority and white students, attending a more selective college is associated with higher graduation rates and greater earning power.<sup>32</sup> Indeed, African-American students who attend selective colleges through affirmative action programs are more likely to graduate from college, obtain advanced degrees, and secure high earnings than are African Americans with similar SAT scores who attend less selective institutions.<sup>33</sup> Thus, minority students capitalize on the opportunities affirmative action programs offer them.

The same minority students use their training to benefit the community. A longitudinal study found that African-American graduates of selective colleges were more likely than their white classmates to engage in civic activities after graduation, participate in politics, and assume leadership roles in both of these spheres.<sup>34</sup> Affirmative action thus furthers the traditional role of elite educational institutions in producing community servants and public leaders.

If the Court revisits the balance struck in *Bakke*, finally, it might ponder Hochschild's evidence that most Americans eschew the extreme positions advocated by the most vocal opponents and supporters of affirmative action.<sup>35</sup> In this context, the political process is likely to produce intermediate, compromise answers to the affirmative action debate. Only the Court itself might impede this process by endorsing an extreme position outlawing all forms of race-conscious affirmative action.<sup>36</sup>

If the Court heeds all of this research, I think it will adhere to the principles of Justice Powell's opinion in *Bakke*. As Samuel Issacharoff and Kathleen Sullivan point out, Powell's opinion was a compromise.<sup>37</sup> It was, however, a pragmatic

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<sup>30</sup> See Hallinan, *supra* note 11, at 745; see also BOWEN & BOK, *supra* note 16, at 218-55.

<sup>31</sup> See Jennifer Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1003 (1998).

<sup>32</sup> See Kane, *supra* note 19, at 445, reprinted in 59 OHIO ST. L.J. 971, 985 (1998).

<sup>33</sup> See BOWEN & BOK, *supra* note 16, at 258-65.

<sup>34</sup> See *id.* at 155-74.

<sup>35</sup> See Hochschild, *supra* note 31, at 1000.

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

<sup>37</sup> See Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669

compromise, one that produced a society better fitting our picture of an equal society than does a world with no race-conscious decisionmaking in university admissions. As Issacharoff warns, abandoning the *Bakke* compromise would curtail the ability of public universities to meet their twin functions of advancing academic excellence and securing public access.<sup>38</sup> And as Sullivan cogently argues, ending race-conscious admissions policies most likely would produce less efficient subterfuges for those policies.<sup>39</sup> The *Bakke* compromise remains essential to public university education at this time. Confronting the social science evidence in this symposium and elsewhere should lead the Court to sustain that compromise.

If the Court really listens to the social science evidence, however, it should take a step beyond *Bakke*. As Issacharoff, Gruhl, and Welch argue, the diversity rationale embraced by Justice Powell in *Bakke* does not fit the realities of university admissions very well.<sup>40</sup> Certainly there is virtue in diversity—in the face-to-face interaction of people from different backgrounds that Rachel Moran eloquently describes and in the educational gains Maureen Hallinan has detailed<sup>41</sup>—but the diversity rationale does not fully account for the way we conduct affirmative action in university admissions.

In addition to promoting diversity as a means of enhancing education, affirmative action in university admissions addresses the societal discrimination poignantly recounted by Gregory Williams.<sup>42</sup> A wide body of social science research painfully documents that discrimination, as do the stories of individual minority Americans.<sup>43</sup> As Vincene Verdun recounts, blackness is a difference that African Americans carry with them every day.<sup>44</sup> Other nonwhites suffer similar burdens. The minority groups targeted by affirmative action programs, moreover, possess substantially lower socioeconomic capital than do other ethnic groups. As Deborah Malamud explains, this legacy of historical discrimination significantly disadvantages blacks and some other minority groups.<sup>45</sup> The sum of this societal discrimination, both historical and contemporary, precludes the possibility of a level playing field for minority citizens. Affirmative action in university admissions is not the only answer to this societal discrimination, but it is an essential one.

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(1998); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1039–40 (1998).

<sup>38</sup> See Issacharoff, *supra* note 37, at 684.

<sup>39</sup> See Sullivan, *supra* note 37.

<sup>40</sup> See Issacharoff, *supra* note 37, at 676; Welch & Gruhl, *supra* note 21.

<sup>41</sup> See Rachel F. Moran, *Diversity, Distance, and the Delivery of Higher Education*, 59 OHIO ST. L.J. 775 (1998); Hallinan, *supra* note 11.

<sup>42</sup> See Williams, *supra* note 14.

<sup>43</sup> See *supra* note 16.

<sup>44</sup> See Vincene Verdun, *The Only Lonely Remedy*, 59 OHIO ST. L.J. 793 (1998).

<sup>45</sup> See Deborah C. Malamud, *The Jew Taboo: Jewish Difference and the Affirmative Action Debate*, 59 OHIO ST. L.J. 915 (1998).

These programs both compensate minority applicants for the bias that has reduced their educational opportunities and create a middle class of minority citizens that will help overcome future discrimination.

Yet remedying societal discrimination is the one justification for affirmative action that the Supreme Court has been reluctant to accept. State and local governments, the Court has said, cannot remedy societal discrimination.<sup>46</sup> Like most contributors to this volume, I find this position puzzling. If the government cannot remedy societal discrimination, then who can?

We have always used our government to remedy social problems, at least when the problems were those of the white majority. To take just one example, during the 1930s white Americans faced a profound crisis in their opportunities. The Depression left untold numbers of white citizens unemployed. Our government responded with a program of public handouts that has never been matched, training programs to enhance the future of unemployed citizens, and legislation to strengthen the power of ordinary workers. The Supreme Court upheld those programs even though it had to overrule entrenched constitutional rules to do so. Indeed, the New Deal provoked a constitutional crisis so grave that one scholar has characterized it as a "fundamental reworking of constitutional identity."<sup>47</sup> Yet the Court upheld this governmental effort to remedy a grave social problem.

When we talk about the New Deal, we often forget that New Deal programs disproportionately benefited white Americans. During its early years, the Works Progress Administration paid white workers higher wages than it paid black workers for the same jobs.<sup>48</sup> The National Recovery Act operated in the same

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<sup>46</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496–97 (1989) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 309–10 (1978) (opinion of Powell, J., announcing the judgment of the Court). The Court has left open the possibility that Congress may possess greater power than the states to remedy societal discrimination, partly because Section 5 of the Fourteenth Amendment explicitly authorizes Congress to "enforce, by appropriate legislation" the equal protection guarantee. U.S. CONST. amend. XIV, § 5. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230–31 (1995); *J.A. Croson*, 488 U.S. at 488–90.

Curiously, the Court has not been as reluctant to consider societal discrimination when reviewing affirmative action remedies for women. In *Califano v. Webster*, 430 U.S. 313 (1977), decided only a year before *Bakke*, the Court approved preferential treatment for women workers in calculating social security benefits. In reaching this result, the Court referred repeatedly to the need "to remedy discrimination against women in the job market" and to "compensate for particular economic disabilities suffered by women." *Id.* at 319–20. See also Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue* 59 REC. B. ASS'N CITY N.Y. (forthcoming 1999) (Cardozo Lecture).

<sup>47</sup> BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 8 (1998).

<sup>48</sup> See DORIS KEARNS GOODWIN, NO ORDINARY TIME 162–63 (1994).

manner,<sup>49</sup> while the Agricultural Adjustment Act eliminated the crops of black farmers before those of whites.<sup>50</sup> Nobody was coy about this in the 1930s—the discrimination was quite overt. In 1935, Roosevelt signed an executive order barring discrimination in WPA projects, and the situation for black Americans improved somewhat.<sup>51</sup> But black Americans never benefited from the New Deal in the way that white Americans did.

More fundamentally, the New Deal shows us that when white Americans face a crisis in their economic opportunities, the government will respond. Our government will act affirmatively and the courts, despite a major constitutional crisis, will uphold that action. The same is still true today. If white Americans faced the type of educational and employment handicaps that minorities have faced throughout our history, I am confident that our government would act.<sup>52</sup>

The Supreme Court's reluctance to countenance affirmative action as a means of redressing societal discrimination suggests that a majority of Justices do not fully grasp the extent of that discrimination. If the Court truly understood the extent of racial discrimination that still infects our society, I do not think that it could continue to reject affirmative action as a remedy for that bias. Doing so would suggest that we can deny social responsibility for our collective flaws and shift responsibility for bias to the victims of that discrimination. Surely the Court does not intend that result.

The ongoing task for lawyers and social scientists, therefore, is to document the extent of societal discrimination that persists in the United States today, to show how affirmative action programs can help overcome that bias, and to detail any

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<sup>49</sup> See *id.* at 162; ARTHUR M. SCHLESINGER, JR., 3 *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* 431 (1960).

<sup>50</sup> See GOODWIN, *supra* note 48, at 162; SCHLESINGER, *supra* note 49, at 431. See generally HARVARD SITKOFF, 1 *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE* 52-54 (1978).

<sup>51</sup> See GOODWIN, *supra* note 48, at 163; SITKOFF, *supra* note 50, at 69-74. Roosevelt also issued an order, covering both government agencies and defense contractors, that was a precursor of modern affirmative action programs in government contracting. See James E. Jones, Jr., *Twenty-One Years of Affirmative Action: The Maturation of the Administration Enforcement Process Under the Executive Order 11,246 as Amended*, 59 *CHI.-KENT L. REV.* 67, 70-71 (1982).

<sup>52</sup> The United Nations has calculated that white Americans, when considered as a separate nation, rank first in the world in well-being (a measure that combines life expectancy, educational achievement, and income). See UNITED NATIONS, *HUMAN DEVELOPMENT REPORT 1995*, at 22 (1995). African Americans rank a depressing twenty-seventh worldwide, while Hispanic Americans rank even lower at thirty-second. See *id.* Surely if the well-being of white Americans sank from first to twenty-seventh worldwide, the government would contemplate drastic remedial steps. See also *supra* note 46 (noting the Supreme Court's willingness to accept societal discrimination as a justification for affirmative action programs benefiting women).

costs of those programs. Armed with this information, government agencies—including public universities—can tailor programs that will open doors to those who suffer from discrimination without unduly disadvantaging the more privileged members of society. This Symposium begins that essential task.

