The Political Significance of Legal Ambiguity: The Case of Affirmative Action

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During the past 20 years, the American politics of race has been characterized by fundamental disagreements over the legitimacy of racial preferences. I trace the development of these disagreements within the Supreme Court's jurisprudence of affirmative action. I argue that the content and endurance of the Court's ambiguous jurisprudence stems from the particular politics of constitutional adjudication. More specifically, I argue that the overarching task of the modern Court is to justify its actions against a baseline of interest-group politics. The uncertain logic of affirmative action creates a position for the Court within the group process, meeting the judicial challenge of self-justification even as it leaves the ultimate validity of racial preferences open to question.

With the exception of the early years of its existence, when no official reporter of judicial decisions existed and no requirements for filing judicial decisions were in place, the Supreme Court has always rendered its major decisions as written opinions (Currie 1981). For students of the Court, the structure and coherence of these written opinions have furnished important indicators of institutional performance. Conventional legal scholars, for example, have typically viewed poorly reasoned opinions as an institutional failure, a sign that members of the Court have not articulated and defended the neutral principles necessary to secure the rule of law (Wechsler 1959; Peretti 1999:11–35). Political scientists, on the other hand, have usually accepted inconsistencies within and between opinions as inevitable institutional outcomes, clear evidence that the Court is a political body driven by the conflicting policy preferences of its members (Segal & Spaeth 1993; Epstein & Knight 1998).

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In this article, I examine the Supreme Court's affirmative action decisions, a body of opinions shot through with unresolved tensions. I find that this tangled set of cases is not fully explained by either the standard legal or political science approaches. As a result, I argue that the effort to understand the ambiguities of affirmative action requires a different kind of inquiry, focused on the pattern of political ideas that undergird contemporary constitutional adjudication.

My argument proceeds in three sections. In the first section, I trace the central tensions in the Court's affirmative action decisions back to *University of California Regents v. Bakke* (1978). From a conventional political science perspective, the endurance of *Bakke*'s incongruities may be explained in terms of individual judicial preference: for the past 20 years, Justices with the critical votes in affirmative action decisions have been committed to compromise. In turn, from a conventional legal perspective, this judicial preference for compromise may be criticized for its lack of coherent principles: by failing to articulate an unequivocal approach to affirmative action, *Bakke* and its progeny maximize public uncertainty and foster arbitrary judicial action. I call into question both of these approaches, arguing that each evades the substance of *Bakke* itself. The argument from judicial preference provides reason to expect some kind of affirmative action muddle, but it fails to examine the specific content of the muddle the Court has produced. The appeal to legal principle compounds the problem of evasion by dismissing the conflicting claims the Court has made for the sake of unified principles the Court has failed to endorse. Contrary to these approaches, I argue that the task is to account directly for *Bakke*'s unresolved tensions, to explain their particular content and purpose.

In the second section, I consider Cass Sunstein's (1999) recent effort to provide such an explanation. Sunstein situates the Court within a particular political context, interpreting the uncertainties of *Bakke*'s logic against the persistent divisions of the affirmative action debate. According to Sunstein (1999), the Court's ambiguous jurisprudence is successful because it facilitates the democratic settlement of controversy, creating opportunities for political resolutions rather than foreclosing further debate. I argue that Sunstein's attempt is an important initial effort, a first step toward a direct assessment of *Bakke*'s significance. Unfortunately, Sunstein ultimately fails to demonstrate an actual link between *Bakke* and democratic deliberation. The connection between equivocal judicial decisions and enhanced political debate—a connection central to Sunstein's analysis—remains a matter of normative decree.

In the third section of the article, I build on Sunstein's basic insight by examining *Bakke* against a broader background of political ideas. Instead of simply stipulating a link between affirma-

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tive action and a deliberative ideal, I embed *Bakke* within the particular politics of judicial action, relating the specific terms of the decision to the contemporary Court's project of self-justification. The modern era of constitutional adjudication began with the Supreme Court's retreat from economic and social regulation, effectively leaving policymaking in those areas to the interplay of interest-group politics. In the wake of this retreat, the overarching task for the Court has been to justify its actions against a baseline of interest-group politics, finding a way to maintain judicial authority when so much of its old domain had been abandoned. I argue that the conflicting segments of *Bakke*'s rationale provide interlocking ways of meeting the challenge of interest-group politics. In doing so, *Bakke* responds to the abiding political predicament confronting the modern Court, fashioning a position for the judiciary within the ebb and flow of group process.

In sum, I argue that the ambiguities of affirmative action are bound up with the modern practice of constitutional adjudication—a practice marked by distinct understandings of politics and particular concerns about the legitimacy of judicial review. It is in the context of such institutional practice that *Bakke*'s significance becomes clear.

The Ambiguities of Affirmative Action

Over the past few years, university affirmative action programs have suffered some spectacular setbacks. They have been abolished by court order in Texas and terminated by referendum in California and Washington. Speculation about the consequences of these defeats is well under way, and as the campaign against affirmative action spreads to other states, such speculation will only increase (Glazer 1998; Rosen 1998; Sullivan 1998; Traub 1999). In spite of its growth, this debate over the results of reform is unlikely to yield a quick consensus. Universities are still developing alternative admissions programs, and it will be some time before commentators can assemble a complete picture of the new procedures. This uncertainty about future policy is compounded by a more fundamental ambiguity: there has long been disagreement about how the affirmative action status quo should be understood. The debate over affirmative action's demise is thus connected with prior disputes over what affirmative action is.[1] The consideration of where we will go involves an enduring set of disagreements over where we are.

Many of the conflicts over the meaning of affirmative action have centered around *University of California Regents v. Bakke*, the 1978 decision in which the Supreme Court articulated the basic

[1] See, for example, Sullivan 1998:1053, where a post-affirmative action evaluation is partly based on the view that current affirmative action in higher education is "modest and contained."

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rationale for using racial preferences in university admissions. The structure of the decision alone invited interpretive disagreements. At issue in *Bakke* were the racial quotas used in medical school admissions by the University of California, Davis. Four Supreme Court justices supported the quotas as a legitimate response to societal discrimination, but four others struck down the quotas on the grounds that federally supported institutions must be colorblind. Justice Lewis F. Powell, Jr., broke the deadlock between the two blocs by splitting the difference: he prohibited racial quotas, but allowed race to be taken into account as one factor in university admissions. Powell consequently announced the judgment of the Court, even though no other justice actually joined his opinion. This unusual configuration of judicial opinions has made identification of *the* Court's holding somewhat complex (Brest & Levinson 1992:726).[2]

The deeper difficulty with assessing *Bakke*, however, is less a matter of structure than a matter of justification. Powell's extraction of a single judgment from opposing camps cleared a space for affirmative action between the poles of absolute colorblindness and rigid racial quotas. It was a maneuver that was at once skeptical and optimistic about race-based policies. On one hand, Powell insisted on a very strong judicial presumption against racial classifications, arguing that all public policies featuring racial distinctions were "inherently suspect and thus call[ed] for the most exacting judicial examination" (*Bakke* at 291). On the other hand, Powell argued that it was entirely constitutional for universities to pursue student diversity by taking the race of individual applicants into account (*Bakke* at 318). In order to justify his position, Powell had to explain how his two claims were mutually consistent.

Unfortunately, it was an explanation he found difficult to produce. In repeated discussions with other justices leading up to the *Bakke* decision, Powell was unable to demonstrate exactly how his strict presumption against racial classifications squared with his validation of flexible racial preferences (Schwartz 1988:88,118). Indeed, during the same period, Powell had trouble persuading his own law clerks that racial quotas failed his judicial test while racial preferences did not (Jeffries 1994:476–78).

There were clear reasons for Powell's difficulty. On the surface, the flexible preferences he approved and the racial quotas he rejected seemed quite similar; both quotas and flexible preferences allowed the admission of some applicants to hinge on race (Mishkin 1983; O'Neill 1985:261–62; Kahn 1987; Kirp & Weston 1987; Jeffries 1994:455–501; Peterson 1995; and *Bakke* at 379,

[2] This configuration remains controversial. In *Hopwood v. Texas* 1996: 944–48, the Fifth Circuit criticized Powell partly because his "lonely" opinion did not actually represent the judgment of a Court majority.

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Brennan concurring in part and dissenting in part). It is true, of course, that Powell's alternative did help shield the importance of race from public view. When university officials relied on quotas, they advertised the significance of race by explicitly reserving positions for minority applicants; in contrast, when they relied on flexible preferences, they embedded racial considerations within each individual admissions decision without revealing the extent of assistance given to minority applicants overall. Quotas made the role of race obvious, while flexible preferences rendered it opaque.

Yet it was unclear why this difference in publicity should matter under the "exacting judicial scrutiny" Powell embraced. Moreover, even if the lack of publicity did have some benefits, it remained unclear whether such benefits outweighed the long-run costs of race-conscious programs (Eastland 1996; Kahlenberg 1996). Unlike compensatory racial preferences, which would end once the injuries of discrimination were made whole, the preferences Powell supported had no apparent stopping point. Admissions officers could rely on race indefinitely, redefining the terms of their reliance over time to reflect changing ideas about student diversity. This possibility left Powell in a precarious position: the racial preferences that he initially denounced as "inherently suspect" turned out to be potentially permanent.

Powell's inability to articulate a clear rationale raised a problematic question: If *Bakke* rested on two claims, and each claim appeared to undercut the other, how was such a decision to be understood? This question has remained problematic, moreover, because the uneven path of subsequent affirmative action decisions has failed to dispel *Bakke*'s ambiguities (Mishkin 1983; Kirp & Weston 1987; Jeffries 1994:499–501; Amar & Katyal 1996; Sunstein 1998). In the decade following Powell's opinion, no majority of the Supreme Court was able to agree on the standard of judicial review required in affirmative action cases. Instead, its fractured judicial decisions left larger questions of justification to one side; the Court handled individual controversies over affirmative action by deferring to the deliberative wisdom of Congress (e.g., *Fullilove v. Klutznick* 1980) and by drawing distinctions between the relative harms of preferential hiring and preferential firing (e.g., *Wygant v. Jackson Board of Education* 1986). The net result of such decisions was to reinforce the general terms of *Bakke*'s compromise, allowing "some affirmative action, but not too much" (Jeffries 1994:500).

A bare five-member majority finally settled on a standard for reviewing affirmative action in 1989, holding that all race-based actions by state and local governments should be subject to strict judicial scrutiny (*Richmond v. J. A. Croson Co.* 1989). *Croson* placed a substantial legal burden on affirmative action advocates, demanding a high level of evidence to justify new preferential pro-

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grams as well as to defend those already in place (*Croson* at 493–507; Dellinger 1995). In part, this strong presumption against affirmative action reaffirmed *Bakke*, reiterating and reinforcing Powell's argument that all racial classifications should be subject to the most exacting judicial scrutiny (*Croson* at 493–94). Yet, for at least some members of the Court majority, *Croson*'s implications ultimately pointed beyond Powell's position. As Justice Atonin Scalia wrote, "At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens'" (*Croson* at 521, citations omitted; see also *Croson* at 518–20, Kennedy concurring). Read for all its worth, *Croson*'s reasoning promised to supplant *Bakke*, displacing Powell's compromise with a virtual prohibition of affirmative action.

Croson was not, however, pushed to its limits. In *Metro Broadcasting v. FCC*, decided one year after *Croson*, a five-member majority swung the Court in the opposite direction, producing a ruling far more favorable to affirmative action (*Metro Broadcasting, Inc. v. FCC* 1990). Writing for the Court, Justice Brennan upheld the use of racial preferences in the licensing and sale decisions of the Federal Communications Commission (FCC). Brennan anchored part of his argument in *Bakke*, analogizing the FCC's race-based pursuit of diverse "views and information on the airways" to the race-based pursuit of student diversity that Powell had endorsed (*Metro Broadcasting* at 567–68). Brennan otherwise parted ranks with Powell. Although Powell had insisted on strict scrutiny of racial classifications, Brennan adopted a significantly less stringent standard of review, arguing that federal affirmative action programs need only be "substantially related" to "important governmental objectives within the power of Congress" (*Metro Broadcasting* at 565).

In its most recent affirmative action decision, handed down five years after *Metro Broadcasting*, the Court changed direction yet again (*Adarand Constructors, Inc. v. Pena* 1995). Writing for the five-member majority, Justice Sandra Day O'Connor reversed *Metro Broadcasting*, specifically rejecting the lenient standard of review employed by Brennan. "[A]ny person," O'Connor wrote, "has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny" (*Adarand* at 224). With this conclusion, O'Connor held federal affirmative action programs to the same standard that was used in *Croson*'s scrutiny of state and local affirmative action. Even so, O'Connor's opinion was not a simple extension of *Croson*. The

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promise of rigidly enforced colorblindness, imminent in *Croson*, remained unrealized in O'Connor's opinion (*Adarand* at 239, Scalia concurring). In fact, O'Connor explicitly argued that strict judicial scrutiny of affirmative action programs was not equivalent to the prohibition of such programs. Although strict scrutiny typically results in the automatic invalidation of measures discriminating on the basis of race (Strauss 1995:6–14), O'Connor asserted that affirmative action was somehow different, and that strict scrutiny of such programs would not be "fatal in fact" (*Adarand* at 237, internal quotations omitted).

O'Connor did not outline her flexible approach to affirmative action in detail. Still, the closest analog to O'Connor's position was arguably to be found in *Bakke*'s uncertain blend of skepticism and optimism. The compromise brokered by Powell fit easily within the possibilities left open by O'Connor (*Adarand* at 257–58, Stevens dissenting; Amar & Katyal 1996:1767–71). More specifically, O'Connor quoted from Powell's opinion at length, noting that his reasoning supplied the "defense" of her own conclusions (*Adarand* at 224–25). Like Powell, O'Connor insisted that all racial classifications must be tested by the highest standard of judicial review, yet she recognized that racial classifications may be used as an entirely legitimate basis for affirmative action. And, like Powell, O'Connor failed to provide an unequivocal synthesis of her claims, leaving the final meaning and consequences of her opinion vague. Contrary to *Metro Broadcasting* and *Croson*, in which different members of the Court selectively fastened onto separate parts of Powell's position, O'Connor remained faithful to *Bakke* as a whole, reflecting the basic components of its affirmative action compromise within the architecture of her opinion.[3]

In the wake of *Adarand*, Powell's opinion has remained at the center of judicial action, as lower courts have continued to address affirmative action disputes by working through *Bakke*'s terms. In some instances, judges have applied *Bakke*'s rationale directly, weighing the effort to secure diverse student bodies in the balance of strict scrutiny (e.g., *Wessmann v. Gittens* 1998). In other instances, judges have used *Bakke* selectively, relying on part of Powell's reasoning while calling into question the rest (e.g., *Hopwood v. Texas* 1996).[4] Just as the Supreme Court has

[3] It is possible that O'Connor may ultimately arrive at a novel middle ground, different from the position occupied by Powell. Yet, even among commentators sympathetic to this view, there is acknowledgement that O'Connor's approach has thus far remained an incomplete and indefinite blend of colorblind individualism and group-based empowerment—an approach that is directly analogous to that of Powell (Maveety 1996:7, 120–21, 131). I explore the link between Powell and O'Connor further in my discussion of *Carolene Products* (see note 23).

[4] Extrapolating from Supreme Court decisions, the *Hopwood* majority altogether rejected Powell's defense of racial preferences, arguing that "the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny" (*Hopwood* at 948). The justification for this rejection was

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struggled with *Bakke*, testing its terms yet never completely breaking free of its hold, the lower courts have attempted to settle the legacy of *Bakke* with alternative renderings of its meaning. To date, there has been no final or determinate resolution. After more than 20 years of debate and judicial decisions, the ambiguities of *Bakke* remain.[5]

How should these ambiguities be understood? Among political scientists, a standard way to explain judicial outcomes is to focus on the identity and interplay of judicial attitudes (Segal & Spaeth 1993; Epstein & Knight 1998). From this perspective, the *Bakke* decision can be explained by Powell's position between two evenly split judicial blocs. Although the other justices gravitated toward opposite ends of the affirmative action spectrum, Powell's primary commitment was to a middle-way resolution, even if no such resolution was readily apparent.[6] Powell's opinion subsequently survived because judicial preferences about affirmative action remained generally stable: balanced judicial blocs retained polarized views about the legitimacy of racial classifications, while Powell remained committed to compromise (Jeffries 1994:499–500). After Powell left the bench, Justice O'Connor assumed the role of judicial accommodationist, sustaining the *Bakke* bargain by shuttling between opposing judicial blocs (Maveety 1996:7, 121).

Conventional legal scholars offer a somewhat different account of *Bakke*. Rather than linking Powell's opinion to a specific distribution of judicial preferences, legal scholars identify *Bakke* with a dangerous mode of judicial action (Mishkin 1983; Kahn 1987). According to this view, Powell defied the conventions of principled judicial decisionmaking by failing to establish unambiguous general rules that transcended the immediate controversy and promised to govern future judicial action.[7] Without providing a well-specified justification of what he had done, Pow-

drawn from Powell's own arguments in favor of strict scrutiny (*Hopwood* at 940). The Supreme Court refused to hear an appeal to *Hopwood* in 1996 (*Texas v. Hopwood* 1996). As part of this refusal, Justices Ginsburg and Souter noted that the Court's denial was not an endorsement of *Hopwood*'s rationale. For the argument that the program at issue in *Hopwood* may have been unconstitutional even under the terms for Powell's compromise, see Amar and Katyal 1996.

[5] Viewed historically, *Bakke*'s persistence is hardly surprising. When Powell left the ultimate validity of race-based policy ambiguous, his opinion fell in line with a long history of judicial decisions, as well as with the original intentions of the Fourteenth Amendment's framers. (See Kull 1992.)

[6] In the words of his biographer, "Powell had no clear idea what the Supreme Court should say about affirmative action, but he already had a firm conviction about what it should *not* say. It should neither condemn affirmative action categorically nor approve it unreservedly. Faced with two intellectually coherent, morally defensible, and diametrically opposed positions, Powell chose neither" (Jeffries 1994:469, emphasis original). Powell's entire jurisprudence is commonly identified with this kind of preference (Greenhouse 1998)—a view that is supported by the fact that Powell himself saw *Bakke* as his most important decision (Jeffries 1994:456).

[7] For the classic defense of principled judicial decisionmaking, see Wechsler 1959.

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ell made it difficult to forecast what he would do—a result that fostered arbitrary judicial power and maximized public uncertainty. In order to avoid such an outcome, legal scholars have advocated selective interpretations of *Bakke*, either assimilating Powell's presumption against racial classifications into a broader argument for strict colorblindness (Eastland & Bennett 1979: 171–96) or fashioning Powell's defense of flexible racial preferences into a rationale for proliferating affirmative action throughout society (Sullivan 1986).[8] Like members of the Court in *Croson* and *Metro Broadcasting*, legal scholars have thus attempted to supply the clarity and completeness missing in Powell's original opinion by dispensing with the compromise he presented.

To adjudicate between the political science and legal accounts of *Bakke*, one would have to sort through their contradictory views of the Court's institutional function. Political scientists readily accept muddled judicial results because they understand judicial decisionmaking to be a political aggregation of individual preferences. In contrast, legal scholars routinely decry poorly justified rulings because they understand judicial decisionmaking to be governed by general principles. These two views of the Court pull in opposite directions. For instance, the political science emphasis on preference undermines the legal advocacy of principle, converting every judicial decision into a clash of political will incompatible with the pursuit of reasoned, neutral solutions (Segal & Spaeth 1993:32–73).

For my purposes, however, the underlying conflict between the two accounts is less important than their shared limitation: neither account addresses the substance of *Bakke* itself. Although the analysis of judicial preference suggests that some kind of affirmative action compromise is likely, it fails to account for the particular content of the compromise that Powell actually brokered. The political science approach thus tells us how a case like *Bakke* may arise without explaining what *Bakke* means. The appeal to legal principle simply compounds this problem of evasion. Rather than assessing Powell's conflicting claims, legal scholars dismiss his compromise for the sake of unified principles the Court has failed to endorse. The decision that might govern the jurisprudence of affirmative action thus becomes more important than the decision that has prevailed. Taken to-

[8] Selective treatments of Powell surface even when commentators restrict preferences to higher education. (See Amar & Katyal 1996.) Amar and Katyal (1996) devote little time to examining Powell's presumption against racial classifications. Instead, they argue that preferences are clearly different from quotas *if* the students affected by them come to understand the two policies as different (1772–73). This appeal to individual transformation is, as I discuss later, part of Powell's argument. But this appeal must still be understood in the context of Powell's argument for strict scrutiny—a context Amar and Katyal ignore.

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gether, the standard political science and legal accounts do not explain *Bakke* so much as they explain it away.

Powell's effort to find a balance between extremes makes his opinion difficult to evaluate, but this is no reason to avoid the content of his claims. The persistence of *Bakke*'s ambiguities calls for a more direct and searching inquiry, one that examines the significance of unresolved tensions and assesses the reasoning on which these tensions rest. Cass Sunstein (1999) has recently offered such an examination of *Bakke*, based on a novel account of judicial institutions. I consider his argument in the following section.

Bakke and Judicial Minimalism

Affirmative action was not originally the product of popular demand or legislative action. Instead, the cluster of racially targeted policies now known as affirmative action emerged during the late 1960s as the consequence of administrative, judicial, and private sector decisions (Skrentny 1996). Once developed, affirmative action entered the public view, and by the mid-1970s it had become an object of open controversy. Public opinion has followed a fairly consistent pattern ever since (Lipset & Schneider 1978; Bobo 1998; Hochschild 1998; Verhovek 1997). First, beliefs about affirmative action have generally differed by race, with black Americans typically being more supportive than their white counterparts. Second, the overall trend of black support and white opposition has been punctuated by general points of convergence. The use of clear-cut racial quotas to equalize outcomes has proven highly unpopular among blacks as well as whites; alternatively, programs that grant minorities some special consideration, without specifying quotas or numerical requirements, have received substantial black and white approval. Third, beyond these general trends and points of convergence, people have remained uncertain about the concrete applications of affirmative action. Although programs that make some special effort to help racial minorities garner far greater support than quotas designed to equalize results, beliefs about exactly what that "special effort" should be have remained confused.[9]

Bakke broadly mirrors the contours of public opinion (Kirp & Weston 1987:246–47; Peterson 1995:7–8). Like much of the citizenry itself, Powell rejects overt racial quotas, accepts a policy specifically designed to assist racial minorities, and has difficulty explaining his position completely. The result is intellectually unsatisfying ("as constitutional argument," Robert Bork observed,

[9] As Lipset & Schneider (1978:44) put it: "[T]he distinction between 'opportunity' and 'results' is a slippery one, and most situations are inherently ambiguous. . . . Needless to say, admission to college or professional schools is *both* an opportunity for future success and a result of past achievement" (emphasis original).

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"[*Bakke*] leaves you hungry an hour later"), but Powell manages to capture the equivocal views about affirmative action that the public held in 1978 and, to a great extent, still holds today (Jeffries 1994:497).[10]

It is the congruence between Powell and the public that anchors Cass Sunstein's (1999) recent account of *Bakke*'s significance. According to Sunstein, the dynamics of political controversy fundamentally shape judicial action (Sunstein 1996, 1999).[11] When political disagreements over a given issue are substantial and the direction of debate is unclear, a collegial body like the Supreme Court will often have difficulty reaching agreement on a comprehensive rule. Even if judicial agreement can be achieved, Sunstein argues, sweeping judicial decisions carry a risk. Rather than putting to rest controversial questions, broad judicial rulings may prematurely foreclose options, leaving the citizenry unable to pursue issues effectively through political channels. Under such circumstances, the best judicial decisions are often "minimalist" ones designed to help citizens work through contested issues rather than to compel a legal resolution.[12]

Sunstein views *Bakke* as a "minimalist" response to the politics of affirmative action (Sunstein 1998, 1999:117–36). Confronted by conflicting judicial blocs, public division, and some political uncertainty, Powell authored an opinion without completely endorsing a single point of view. In doing so, he made it possible for the Court to render a decision in an area of public debate while leaving the ultimate outcome of the controversy open. Affirmative action thus remained subject to the political process, with multiple opportunities to reconfigure the policy through subsequent legislation, administrative rulings, and judicial decisions. When Powell left general questions unanswered and broad justifications undeveloped, he produced an opinion well-suited to the complexities of the issue at hand.

In an important respect, Sunstein's argument advances beyond standard political science and legal approaches. Rather than leaving the significance of *Bakke*'s substance unexamined, Sunstein attempts to assess the decision by situating it in a political context. In Sunstein's hands, Powell's compromise is neither a mere artifact of judicial preference nor an unfortunate result of missing legal principle, but a positive political act designed to

[10] From the left, Ronald Dworkin offered an assessment similar to that of Bork (Jeffries 1994:497). As my discussion of post-*Bakke* decisions suggests, the same kind of assessment could be made of O'Connor's approach (Maveety 1996:121).

[11] The view Sunstein develops was originally outlined in Levi 1949.

[12] As Sunstein (1999:50) writes, "By bracketing the largest disputes, a minimalist court attempts to achieve the great goal of a [free] society: making agreement possible when agreement is necessary, and making agreement unnecessary when agreement is impossible."

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facilitate the democratic settlement of a controversial issue. This is a step in the right direction.

It is a limited step, however, for Sunstein's explanation ultimately fails to establish the link between judicial minimalism and enhanced democratic deliberation. Sunstein does not identify a connection between ambiguity and deliberation within the arguments of *Bakke* itself. Indeed, Sunstein makes no real effort to demonstrate that ambiguous decisions generally stimulate political action more than clear decisions.[13] It is true that the Court's affirmative action jurisprudence is ambiguous and that this ambiguity mirrors public opinion. Yet, on its own, the resemblance between *Bakke* and public opinion indicates only that Powell's position is politically acceptable (Peterson 1995); it does not demonstrate that *Bakke* was designed to encourage democratic decisionmaking.

The coincidence between the Court and public opinion may have other sources. Some scholars, for example, have argued that members of the Court adjust to public opinion so that they may assert control over the policy process, anticipating possible public objections in order to ensure that judicially preferred positions are not overturned (Flemming & Wood 1997). Sunstein does not evaluate such alternatives and, thus, leaves his own position open to doubt. Like the political science assessment of judicial preference, the argument from public opinion suggests that the Court will ultimately arrive at some kind of affirmative action muddle but indicates little about the content or purpose of the specific muddle the Court has produced.

The difficulty with Sunstein's argument is not that judicial support for democratic deliberation is unprecedented or simply impossible. Sunstein and others have documented particular instances in which judicial decisions have been designed to foster deliberative practices (Sunstein 1984, 1993; Bybee 1998:82–91, 103–6, 145–72).[14] On the contrary, the difficulty is that in using deliberative democracy as the single normative standard to evaluate all judicial decisions, Sunstein short-circuits the assessment of ideas actually at work in any given case. The claim that the judiciary ought to maximize deliberation does not mean that all judges are in fact attempting to do so or that deliberative ideas actually provide the best explanation of arguments judges have deployed.

[13] Some research does support the deliberation-enhancing properties of ambiguous decisions. There is, for example, some evidence that ambiguous judicial decisions lead to greater legal mobilization (McCann 1994). Of course, the stimulation of legal mobilization is not the same as the stimulation of democratic deliberation as a whole. The point is not that McCann completely substantiates Sunstein's argument, but that Sunstein does little to substantiate his own argument by drawing upon empirical research such as McCann's.

[14] In general, the opportunities to catalyze deliberation may be few, for the issues left to the judiciary are often the issues that political actors do not want to debate (Graber 1993).

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The political context that lends specific judicial arguments meaning—the enduring pattern of ideas out of which particular judicial claims arise—may or may not depend on theories of democratic deliberation. It is not an issue that can be determined in advance by normative decree, but one that requires careful investigation (Smith 1988).

Bakke and the Politics of Interest-Group Pluralism

Sunstein fails to persuade because he fails to establish a connection between Powell's compromise and the encouragement of democratic deliberation. Yet, even though Sunstein's argument is flawed, his point of analytic departure remains suggestive: Is there a pattern of political ideas that provides the context for *Bakke* and gives its ambiguities meaning? In my view, such a pattern is to be found in the contemporary Supreme Court's project of self-justification.

Since the inception of the modern constitutional period, the Supreme Court has faced a broadly consistent set of political challenges extending beyond any one issue area. The modern constitutional era began in 1937 with the Supreme Court's dramatic retreat from social and economic regulation (McCloskey 1960; Ackerman 1991). In the decades prior to 1937, the Court had routinely reviewed minimum wage, maximum hour, and other social welfare legislation in order to determine whether they were either reasonable efforts to meet public needs or unreasonable policies designed to suit a particular class (Gillman 1993). This regime of judicial review came under sharp attack during the early 1930s, as the Court deployed its formalisms to invalidate central pieces of New Deal legislation. In this environment, judicial action increasingly came to be seen as an undemocratic displacement of legislative decisions by an unelected (and, hence, unaccountable) body (Leuchtenburg 1995:82–112, 213–36).[15] The Court ultimately responded to such criticism by abandoning substantive due process, leaving social and economic policy almost entirely to the discretion of political majorities.

After 1937 the Court thus found itself presented with the task of reformulating its authority in a new political order (Griffin 1996; Gillman 1997). For my purposes here, the most noteworthy feature of the new political order was the centrality of interests (Purcell 1973; Rogers 1987; Baumgartner & Leech 1998:44–63). Throughout the nineteenth century, "interests" had been used as a term of opprobrium to designate groups and organizations antithetical to the common good. By the end of the 1930s, however, the terms of political discourse had fundamentally shifted such

[15] For the classic counter-majoritarian critique, see Bickel 1962.

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that politics was understood to consist of *nothing but* interests. The notion of an informed, independent citizenry deliberating in the name of the public interest was dismissed in social science scholarship and popular commentary as a political myth. Instead, the concrete realities of democratic practice, like the concrete realities of economic markets, were taken to be a matter of interest-based competition, bargaining, and pressure.[16]

The doctrines of substantive due process were out of place in the new politics of interests. In its attempts to distinguish reasonable, public-regarding regulations from the legislation of special interests, the Court had grounded judicial review on a distinction that the new political realism expressly denied. This suggests that the crisis of 1937 was not precipitated simply because the Court frustrated the political process, but more precisely because the Court frustrated the process of interest-group interplay. The challenge to justify judicial action anew was, in effect, a challenge to justify judicial action against a baseline of interest-group politics.[17]

A. The Argument for Strict Scrutiny

Although the challenge posed by interest-group politics has not figured in the interpretive debate over *Bakke*, it is actually central to the decision. Powell's first major claim in *Bakke* is that all race-based state policies must be subject to the most exacting judicial scrutiny. In a section typically neglected by commentators, Powell derives this claim from a reading of "our Nation's constitutional and demographic history" (*Bakke* at 291). According to Powell, nineteenth-century jurists originally understood the Fourteenth Amendment's overriding purpose to be "the freedom of the slave race," but they soon discarded this view as the Amendment was used to protect private property and liberty of contract (291).

The judicial concern for economic rights persisted through 1937, the year in which "the era of substantive due process came to a close" and "the Equal Protection Clause began to gain a genuine measure of vitality" (*Bakke* 291–92). Yet the judicial turn away from economic rights after 1937 did not mean a turn back to nineteenth-century politics. "During the dormancy of the Equal Protection Clause," Powell argues, "the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various mi-

[16] This development was reflected in the history of Madison's *Federalist #10*, which rose from nineteenth-century obscurity to a central place in the pantheon of twentieth-century interest-group literature. (See Adair 1951 and Bourke 1975.)

[17] For a related effort to examine the link between the politics of interests and judicial action, see Gillman 1999.

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nority groups" (292). It is this exclusionary struggle of all against all that defines modern American politics. In contrast to the period following the Civil War, there are now no fixed majorities and minorities, but only fleeting "majorities" and "minorities," changing in composition as political fortunes rise and fall (295).

In Powell's view, the new political terrain demands a new judicial response. Awash in the ocean of shifting racial and ethnic coalitions, the Court simply has "no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not" (*Bakke* at 296). Discrimination is no longer located along any single axis; instead, it is exercised along a variety of different axes, dictated by the ebb and flow of political rivalry. The Court might grant preferential treatment to any given group, but as "these new preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary" (297). The Court's attempts to remain current with the subsequent cascade of variable preferences threaten to exceed its capacity. To the extent that the Court might rise to the task, the effort would link constitutional interpretation to the fluctuating fate of particular groups. This move would be politically disastrous. As Powell puts it, "the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation" (299). In the context of modern American politics, the Court cannot treat any one group as a special ward of the state without eroding the basis of constitutional government. Powell thus dismisses the old nineteenth-century view that focused the Fourteenth Amendment on the plight of African Americans.

To secure constitutional government, then, Powell insists that all racial classifications receive an identical level of judicial scrutiny. Moreover, to protect the rights of individuals, he insists that the uniform level of judicial scrutiny be strict. Whatever social balance may be achieved as different groups take turns discriminating against one another, there is an immediate cost imposed on individuals each time racial classifications are used. Preferential programs may harm beneficiaries as well as non-beneficiaries by stigmatizing some individuals "in order to enhance the societal standing of their [own] group," and by forcing other "innocent persons . . . to bear the burdens of redressing grievances not of their own making" (*Bakke* at 298). These individual harms cannot be directly eliminated because the group dynamics responsible for generating racial classifications are part and parcel of the basic group dynamics that characterize modern American politics. Like all political decisions, political judgments about racial classifications "are the product of rough compromise struck by contending groups within the democratic process" (299). Still, if

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the Court cannot transform group politics, it can shelter individuals from some of its consequences. "When [political judgments] touch upon an individual's race or ethnic background," Powell concludes, "he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background" (299).

As the above review suggests, an account of group politics is at the center of Powell's argument for strict scrutiny. This account is not of his own invention. Powell takes his view of group politics from Robert Dahl and Richard Posner, two students of interest-group pluralism (*Bakke* at 299, n.38).[18] Speaking broadly, interest-group pluralists reject the notion of fixed majorities and minorities, insisting instead that the democratic process is a matter of competition among a wide range of groups. In the typical run of events, democratic power is not a matter of majority rule, but rather a matter of "minorities rule" (Dahl 1956:132). Democratic legislation is not passed for the sake of the public interest, but as a consequence of whatever bargains interest groups have been able to broker in the political marketplace. According to interest-group pluralists, then, it makes little sense to speak of discrimination in particular because it is everywhere in general: most political action simply is "discrimination in the sense of an effort to redistribute wealth (in one form or another) from one group in the community to another, founded on the superior ability of one group to manipulate the political process rather than on any principle of justice or efficiency" (Posner 1974a:27–28).[19]

It is Powell's reliance on interest-group pluralism that firmly connects his argument to the basic political challenge facing the modern Court. Interest-group pluralism was originally developed by political scientists as part of the shift toward interest-based politics that served as the backdrop for the judicial crisis of 1937 (Ross 1991:303–46; Purcell 1973:95–114, 179–217, 235–66). Indeed, interest-group pluralism not only played a part in the shift

[18] The works cited are Dahl 1956 and Posner 1974a. Dahl's work is a founding text of interest-group pluralism. Posner criticized the political school of interest-group pluralism, of which Dahl is a part, for failing to have a rigorous, comprehensive, and testable theory of interest-group formation and behavior (1974b). Nonetheless, Posner also accepted many of the basic tenets of interest-group pluralism. In the particular section of Posner's work that Powell cites (Posner 1974a:27), Posner reviewed the pluralist literature that Dahl's work helped spawn.

[19] Others have traced Powell's claims to Nathan Glazer. (See Lawrence & Matsuda 1997:48; and Glazer 1975.) The connection between Glazer and Powell is difficult to document directly. Powell himself never cited Glazer. A few *amicus* briefs cited Glazer (Lawrence & Matsuda, 1997:48); yet, as the leading study of *Bakke*'s *amicus* activity has argued, the case attracted such a tremendous number of briefs that novel *amicus* arguments were most likely lost in the fray before gaining judicial notice (O'Neill 1985:89, 172). On the other hand, Powell *did* cite Dahl and Posner as sources for his political view—a citation that is supported by the clear resemblance between the arguments of all three.

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toward interest-based thinking but also dominated political science views of interest-based politics for much of this century (Baumgartner & Leech 1998).

Interest-group pluralism has not been simply a theory of interest-group politics; for the mainstream of social science, it has been *the* theory. Thus, when Powell draws on interest-group pluralism, he appeals to a common understanding of the political environment that rendered the pre-1937 regime of judicial review obsolete. Moreover, when he derives a rule for judicial action from interest-group pluralism, Powell carves out a judicial role in the context of post-1937 politics, converting the Court into a guarantor of the interest-group process.[20] The subjection of all racial classifications to strict scrutiny permits the Court to preserve the framework in which the "majority" and "minority" are repeatedly re-formed. Groups may complain that the discrimination they have suffered during political competition is excessive and deserves a race-based remedy. Following Powell's prescriptions, the Court keeps such complaints in check by insisting that discrimination of any kind is to be understood relative to an enormously diverse array of rival discriminations. Egregious histories of discrimination do exist, but from the perspective of the judiciary, these histories must always be acknowledged within the fluctuating context of contending groups. The aim is not to disavow claims of discrimination, but to emphasize the impossibility of responding to all such claims judicially without courting constitutional chaos. The constant scrutiny of a vigilant judiciary thus saves interest-group politics from its own excesses. Even though the new politics of interests has swallowed the old judicial questions whole, the need for judicial action remains.[21]

Powell's justification of contemporary judicial authority is hardly the only one available. Since 1937, many jurists have argued that the very possibility of a fair interest-group politics requires some form of judicial intervention. The main doctrinal locus for such arguments has been footnote four of *United States v. Carolene Products, Co.* (1938:152–53). Authored by Justice Stone, the central portions of footnote four direct the Court to maintain "those political processes which can ordinarily be expected

[20] In this sense, the question is not whether social science will matter in the adjudication of affirmative action, for it already has (cf. Merritt 1998).

[21] Whenever politics is shown *not* to consist of fluid group competition for control, however, Powell gives the Court a different role. For example, the absence of group politics makes gender-based classifications less suspect: "With respect to gender there are only two possible classifications . . . There are no rival groups which can claim that they, too, are entitled to preferential treatment" (*Bakke* at 303). Beyond the issue of gender, Powell also upholds color-conscious responses to school desegregation because they have always come on the heels of judicial, legislative, or administrative determinations of clear constitutional violations (300–301). The requirement of prior findings limits race-based policies to instances in which the fluid interplay among the multiplicity of minorities has not been achieved. In such instances, racial classifications do not threaten constitutional government so much as they restore a status quo of fluid group competition (*Bakke* at 310).

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to bring about the repeal of undesirable legislation" and to pay particular attention to statutes directed at "discrete and insular minorities." Thus, footnote four asks the Court (1) to keep the political process open, free of the machinations that incumbents might use to entrench their power and frustrate majority rule; and (2) to provide special protection for racial and religious minorities—two groups that historically have been excluded from majority coalitions cemented on the basis of prejudice (Ely 1980).

In one sense, Powell's position in *Bakke* is clearly contrary to *Carolene Products.* Whereas footnote four selects specific groups for judicial solicitude, Powell relies on the claims of interest-group pluralism to argue that such a selection is constitutionally disastrous. This basic difference in the treatment of groups translates into different views of affirmative action. Footnote four places racial minorities in a unique legal position, granting them special judicial attention because of the powerlessness and exclusion they have historically endured. As a result, footnote four readily sustains racial preferences because it weighs the remedial claims of racial minorities more heavily than the anti-affirmative action objections of non-minorities (*Bakke* at 357, Brennan concurring in part and dissenting in part; Ely 1980:170–2). In contrast, Powell places members of all racial groups on the same legal footing, considering each individual to be the potential target of shifting discriminatory schemes. Powell thus demands extensive justification before he is willing to support affirmative action over complaints of unequal treatment.

The clear contrast between Powell and *Carolene Products* should not, however, be allowed to obscure a similarity in purpose. Both rationales are designed to situate the Court within the context of group competition, providing a justification for judicial action within the arena of modern American politics. Footnote four speaks "in the language of governmental dynamics, delineating the scope of judicial review in terms of the Court's appropriate place in the scheme of government" (Lusky 1982:1096; Cover 1982:1289–97). Although some jurists have understood footnote four as the single authoritative rendering of the Court's political position (Ely 1980), it was in fact offered as a "starting point for debate," a first attempt at assessing post-1937 politics and the judiciary's relationship to it (Lusky 1982:1098–99). In this vein, footnote four has engendered an ongoing debate over the structure of the political process and how the Court might help to make this process more fair (Cover 1982; Ackerman 1985; Farber & Frickey 1991). Powell's approach is a contribution to this long-standing debate, outlining a program of judicial action suited to the particular account of politi-

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cal dynamics given by interest-group pluralism.[22] His argument for the strict scrutiny of all racial classifications is not simply a response to the specific problem of affirmative action. Like *Carolene Products,* Powell's opinion outlines a blueprint for judicial review within a modern political framework.[23]

B. The Argument for Flexible Racial Preferences

Powell's argument for strict scrutiny is only one-half of *Bakke.* After he explains his strong presumption against affirmative action, Powell rules that it is entirely constitutional for universities to use race as a factor in the admissions process. On its face, the juxtaposition of the two positions is striking: the racial classifications that Powell resists in one breath, he grants in the next. To note that these two arguments pull in opposite directions, however, is not to say that they are unrelated.

It is the challenge of justifying judicial action against the backdrop of interest-group politics that links Powell's two arguments. Having used interest-group pluralism to support the strict scrutiny of racial classifications, Powell might appear to have met the modern challenge of justification. Yet Powell's relationship with interest-group pluralism is not an easy one. His strict scrutiny argument casts the Court in a protectionist role, ensuring the smooth operation of group competition and bargaining. Interest-group pluralists themselves, however, deny the judiciary such a role.[24] They typically consider the judiciary, like other political institutions, to be part and parcel of the group process. The judiciary, consequently, lacks the independence necessary to rise above interest-group politics and rescue it from its own excesses.[25] By nevertheless insisting that the judiciary check the de-

[22] For Powell's own gloss on *Carolene Products,* see Powell 1982. Powell is not the only judge that has turned to interest-group pluralism for guidance through the thicket of American politics (Shapiro 1988; Kahn 1994:171, 179–85). For general criticism of the judicial reliance on interest-group conceptions of politics, see Elhauge 1991.

[23] Powell's efforts in this vein underscore his affinity with Justice O'Connor. In her own affirmative action opinions, O'Connor has articulated a conception of interest-group politics strikingly similar Powell's (*Croson* at 505–506). Moreover, in her treatment of race-conscious redistricting, O'Connor has argued for the strict scrutiny of racial preferences on the grounds that such preferences threaten to freeze the otherwise fluid interplay of group politics (Bybee 1998:127–34). These similarities suggest that O'Connor's failure to overturn *Bakke* is based on more than a strategy of judicial accommodation. O'Connor's own justification of judicial review hews to the same conceptual lines articulated by Powell.

[24] See Dahl 1956:107–12, and 1957. The earliest interest-group pluralists shared a similar view of the Court. See Bentley 1967:382–95, originally published 1908.

[25] This is not to say that interest-group pluralists understand the group process to be self-sustaining. They identify various mechanisms (e.g., social consensus on the rules of the game and overlapping group membership) that help keep the process on track; yet, unlike the judiciary, these mechanisms are located outside the political process, in the domain of civil society. For an overview of these mechanisms, see Dahl 1956:90–151.

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structive consequences of interest-group politics, Powell places himself at odds with the political theory on which he relies.[26]

The tension between Powell and interest-group pluralism runs deeper still. Interest-group pluralism places great weight on the virtues of political competition: it is the endless movement of different groups in and out of the majority coalition that permits policy to reflect the range of interests over time. Powell's support for this core principle of pluralism is somewhat mixed, as a careful reading of his argument suggests. He continually underscores the extent and fluidity of group competition, repeatedly placing the terms "majority" and "minority" in quotes to suggest the provisional nature of such coalitions. Even so, for all his efforts to demonstrate that the supposedly monolithic majority and minority really contain a dizzying variety of competing groups, he does not hesitate to ascribe color to majority and minority formations. The heterogeneity of groups requires the "majority" to be seen as a mere association of minorities, but it is still a "*white* 'majority'" (*Bakke* at 293–95, emphasis added). Sheer group competition and diversity disaggregates the "majority" while leaving the idea of whiteness undisturbed.

In color-coding the majority, Powell gestures toward a deep cleavage otherwise obscured by his account of interest-group pluralism. The groups constituting the "majority" may indeed alter, but *all* such groups are united in their whiteness, pitted against those groups that are denied the option of "becoming" white over time (see, generally, Fields 1982; Davis 1991; Haney-Lopez 1996; Ignatiev 1995). The exclusionary development of whiteness presents a more serious problem than egregious discrimination against one group. Even though claims of extreme discrimination can be assimilated into a broader context of countervailing discriminations, the selective ascription of whiteness suggests that the broader context of countervailing discriminations is not in equilibrium. The endless variety of American discrimination is only apparent: rather than yielding a complex pattern of crosscutting exclusions, the numerous discriminations among groups all support a single line of hierarchical distinction, separating white from black.[27] Over time, whole constellations of political

[26] The tension between interest-group pluralism and the use jurists wish to make of it is an old one. More than 60 years ago, Karl Llewellyn used Bentley's *The Process of Government* (1967, originally published 1908) to develop a blueprint for independent judicial action, even though Bentley denied that such judicial action was possible (Llewellyn 1934). Posner's work harbors a similar tension. In an article that Powell did not cite, Posner argues that the judiciary was expressly established to protect public-interest considerations from interest-group politics (1974b:349–51).

[27] Justice Marshall criticized Powell along similar lines (see *Bakke* at 400). My identification of an implicit racial division in Powell's argument resonates with the broader claim that interest-group pluralism inevitably produces biased outcomes. This broader claim was well-developed in political science by the time *Bakke* reached the Court. (See, for example, Olson 1965; Connolly 1969; Lowi 1979; and Baumgartner & Leech 1998: 50–64.) This is not to say that these critics saw the selective ascription of race as a facet of

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possibility drop out of the interest-group calculus, as the give-and-take of the political marketplace reproduces and reinforces divisions between racial insiders and outsiders.

The racial divide implicit in his argument places Powell in a difficult position. His advocacy of strict scrutiny rests on the notion that interest-group politics requires judicial correction. Yet the scope of this judicial correction is in its own way limited: the exacting review of racial classifications shelters citizens from certain political consequences, but it fails to alter the basic dynamics of the group process. The persistence of racial hierarchy calls Powell's approach into question, suggesting that the political process does not serve the interests of all, no matter how open and fluid group competition appears to be. Powell recognizes the imperfections of interest-group politics, but he also defers to it, fearing that constitutional chaos will result should the Court involve itself in politics too much. The racial division in Powell's argument discredits such deference. If the ordinary operation of interest-group politics is itself biased, how can the Court fairly ignore the fundamental inequities of group bargaining and coalition formation?

It is in the context of this concern that Powell's defense of flexible racial preferences should be understood. His defense rests on two central claims. First, he argues that the pursuit of a diverse student body is constitutionally permissible, not as an end in itself, but as a means to providing a particular kind of education and producing a certain kind of student. According to Powell, student diversity contributes to the "robust exchange of ideas," promoting an "atmosphere of speculation, experiment and creation" within the university (*Bakke* at 313).[28] In turn, the atmosphere generated by diversity exposes students to viewpoints outside their own circle of experience, forcing them to confront and assess a "multitude of tongues" (312).[29] Enriched by such encounters, university graduates gain a certain breadth of view that benefits the polity as a whole. "[I]t is not too much to say," Powell writes, "that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples" (313).

Second, Powell argues that the diversity pursued by universities must be "genuine" (*Bakke* at 315). Universities do not have "an interest in simple ethnic diversity, in which a specific percentage of the student body is guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students" (315). Genuine diversity "encom-

pluralist bias. To my knowledge, they did not. Still, at a general level, the thrust of the two critiques is the same. Both see the production of substantive inequality emerging out of a formally equal process.

28 I have slightly re-ordered the quotes.

29 Here Powell is quoting *Keyishian v. Board of Regents* 1967:603.

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passes a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single but important element" (315). In effect, universities should reproduce the heterogeneity of society at large, creating a student body literally as diverse as the country itself.[30] To this end, the use of racial preferences must be part of an admissions process "flexible enough to consider all pertinent elements of diversity," altering the weight ascribed to any given element "depending on the 'mix' both of the student body and the applicants for the incoming class" (317–18).

Powell's optimistic account of racial preferences clearly clashes with the skeptical discussion of racial classifications that precedes it. Yet, beneath the obvious tension, there is also a relationship of interdependence, as the anticipated benefits of student diversity counteract the deeper problems of pluralist bias. Powell presents affirmative action as a mechanism for replicating the great diversity of the American polity within the university, but this diversity does not turn the college campus into a political microcosm. In politics, Powell sees competition, bargaining, and shifting coalition formation as groups pursue their own goals; in education, Powell envisions individual transformation as the consequence of interaction and debate.

While political diversity allows for compromise among interests as they are, educational diversity takes interests as they are and uses them as a means of generating new kinds of self-understanding. In one setting, the result is an ongoing cycle of mutual discrimination; in the other, the result is mutual understanding. Moreover, since the ultimate aim of student diversity is to train political leaders, affirmative action injects a new element of shared interests into the political domain. Left to its own devices, interest-group pluralism relies on arrangements of political convenience, with no substantive common interests available to push policy past the needs of the winning coalition. Leaders educated by diversity operate on an entirely different basis, with a comprehension of interests from across the group spectrum. The divisions produced by interest-group competition are thus challenged by a class of political actors able to see beyond the confines of any single group.

Unlike the strict scrutiny of racial classifications, then, the use of flexible racial preferences alters the very core of political action.[31] The mechanics of this alteration are paradoxical. The

[30] The equation between student diversity and national diversity is explicitly made in a passage I quoted in the previous paragraph.

[31] Powell thus differs from commentators that rely on judicial review to force legislators to look beyond narrow group interests (e.g., Sunstein 1993). Powell too is concerned with common interests, but he takes them to be the direct products of education rather than of judicially supervised political deliberation. See also *San Antonio Independent School District v. Rodriguez* 1973:29–39, wherein Powell insists that it is up to political actors (rather than the Court) to invigorate the linkage between education and democratic

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pursuit of genuine student diversity begins with the materials of interest-group politics, attempting to mirror the diversity of groups competing in society at large. Yet student diversity produces political actors imbued with common interests, a result that is foreign to the politics of group bargaining and pressure. Moreover, this novel result compensates for a critical deficit of interest-group politics, providing a means to address racial divisions untouched by the ebb and flow of group competition. Thus, affirmative action is *in* interest-group politics, but not quite *of* it.[32] Powell's endorsement of such programs enabled him to secure a similarly ambivalent position for the Court, allowing the judiciary to work both with and against the dominant currents of modern American politics.

Conclusion

On the day after it was decided, *Bakke* was hailed as the "decision that everybody won" (*Wall Street Journal* headline quoted in Eastland & Bennett 1979:171). Commentators have debated the nature of the *Bakke* compromise ever since. Some have seen the decision as a product of judicial preference, a consequence of Justice Powell's unique commitment to middle-of-the-road solutions on an otherwise polarized Court. Others have decried the decision as an abdication of legal principle and a threat to the rule of law. Most recently, *Bakke* has been presented as a catalyst for democratic deliberation, an equivocal ruling that encourages an uncertain citizenry to address problems of racial inequality.

I have argued for a different approach. In my view, by accepting the use of flexible racial preferences while simultaneously insisting on a strong presumption against all racial classifications, *Bakke* produces an ambivalent judicial settlement adapted to the dynamics of interest-group politics. On one hand, the strict scrutiny of race-based policy carves out a space for judicial review at the margins of interest-group politics, positioning the Court to police the consequences of group competition. On the other hand, the validation of racial preferences casts the Court in a more politically intrusive role, placing the judicial imprimatur on a process that supplies political goods absent from the interest-group game. The two approaches diverge, yet they remain linked by a common political baseline: the interest-group politics that makes racial classifications inherently suspect establishes the conditions that make affirmative action desirable.

practice. On the American efforts to use education to promote democracy, see Westbrook 1996.

[32] Affirmative action in higher education thus functions as a "corrective" in the specific sense that Michael Walzer develops the term (see Walzer 1990). For other paradoxical elements of affirmative action, see Skerry 1998.

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The acceptance of my approach to *Bakke* does not entail the complete rejection of alternative approaches. Elements of the latter do highlight factors that have generally sustained Powell's opinion. The distribution of judicial preferences and the divisions of public opinion, for example, help explain why the Court has produced and perpetuated an ambiguous jurisprudence of affirmative action. Should the disposition of judicial preferences or public opinion shift decisively, the continued survival of some kind of affirmative action compromise would certainly be in doubt. My point is that whatever explanatory power such factors have, they do not account for *Bakke*'s specific content and purpose.

Locating *Bakke* within the modern Court's project of self-justification, I identify a distinct political rationale for the particular arguments that Powell actually endorsed. In doing so, I expose new values in *Bakke*, suggesting new reasons for the maintenance of Powell's split-the-difference strategy. Thus, even though an inflexible presumption against race-based policy would make affirmative action decisions more coherent, my analysis suggests that the judiciary should pause before embracing such a rule. Taken on its own, the strict scrutiny of racial classifications will shape judicial action to the contours of interest-group pluralism, but it will not address the basic biases of the pluralist system. Of course, one might question whether affirmative action actually produces political leaders capable of crossing the divisions left in pluralism's wake.[33] Still, it is one thing to examine the efficacy of flexible racial preferences and altogether another to deny judicial concern for the production of common interests. As long as interest-group pluralism informs the Court's political understanding, concerns about the fundamental fairness of pluralist process will persist, pushing the judiciary to consider forms of political connection that group bargaining and competition do not provide.

Bakke remains a decision without a clear, overarching justification. Shot through with unresolved tensions, the decision raises questions about how affirmative action should be understood, questions that remain with us even as the campaign to end affirmative action moves forward. Yet *Bakke*'s incompleteness is not incidental; on the contrary, it helps calibrate judicial action to the abiding political demands facing the Court. As the battle over affirmative action grows more pitched, the political value of such legal ambiguity is worth keeping in mind.

[33] For the most comprehensive empirical examination to date, see Bowen & Bok 1998.

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