If One Wants to Change Societal Norms One Must Change Society: Lessons From Michael Olivas and 'Constitutional Criteria' in Managing Higher Education Admissions Decisions,
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In this second decade of the 21st century, no reader can explore critical areas of U.S. law, and especially the ethno-sociology of U.S. law, without engaging with the work of Michael Olivas. To some large extent, Michael Olivas has been an important player in that great shift of societal structures that marked the last third of the 20th century and the beginning of this one.[2] This shift changed the societal substructures of the U.S. polity in ways that made the legal changes witnessed during that period—culminating most recently in the extension of protection of rights to marry irrespective of the sex of the couple[3]--plausible as matters of constitutional interpretation. Professor Olivas may well have sensed, in many respects well before many of his academic colleagues, that in order to change legal superstructures one must first open the possibilities of changes the sub-structures of the society whose desires shaped these superstructures and their interpretive possibilities.[4] Nowhere is this premise more acutely situated than within the structures of education in the United States. Arranged, like society, into tiers and classes reflecting social, economic and cultural standing, educational institutions, especially post secondary institutions,[5] serve as gatekeepers to position and power to speak for and to societal actors—to effectively shape societal views of the "conventional" and "acceptable" in all spheres of national activity. To transform law, one must first transform societal space; to transform societal space, one must expand the boundaries of who is included in society; to expand the boundaries of inclusion one must open access to the university. It is in this context that I consider Professor Olivas' reflections[6] of one of the most interesting cases of access to the university,

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[3] See Obergefell v. Hodges, No. 14-566 (slip Op. Decided June 26, 2015). Available http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

[4] I have considered these issues in other constexts. See, e.g., Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 University of Florida Law Review 755-802 (1993); Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain,* 6 Southern California Interdisciplinary Law Journal 611-662 (1998); Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture*, 20 Boston College Third World Law Journal 291-343 (2000).

[5] For a criticism of bifurcating approaches to access to education, see, e.g., Omari Scott Simmons, *Class Dismissed: Rethinking Socio-Economic Status And Higher Education Attainment*, 46 ARIZ. ST. L.J. 231, 242-243 /2014).

[6] Michael A. Olivas, *Constitutional Criteria: The Social Science And Common Law Of Admissions Decisions In Higher Education*, 68 U. COLO. L. REV. 1065 (1997).

Bakke,[7] and what it has to say for both the legal and societal structures of U.S. legal culture. Those reflections are worth careful study in the context of the ongoing societal and legal-constitutional conflicts that remain unresolved in this Republic.[8] I start with Professor Olivas' consideration of the structures of admission. I then draw some enduring insights from that exploration. The legal construction of admission then suggests the critical role it plays in societal transformation. It is not enough for law to represent societal norms. Where society includes some but not all elements of a polity, both law and the incentives to interpret foundational (constitutional) norms tend to reinforce the society it reflects. Opening societal structures provides the basis for transforming societal norms (including law and the framework of constitutional interpretation) to reflect the societal space thus transformed.

Professor Olivas starts with what for him frames the central problem: "how to square claims to individual merit with distributive justice theories that favor racial criteria, as envisioned in Justice Powell's modest use."[9] Professor Olivas situates the question within the structures of the academy itself.[10] To that end, Professor Olivas first "investigates the research literature on several of the more commonly employed admissions practices" and the statistical models used by admissions committees, and their re-construction by courts,[11] using this examination to challenge metaphors commonly used for admissions, proposes a "river" as a better evocation and probes the implications of Bakke.[12] That exercise points to a useful reframing of the question he poses. Indeed, that question becomes more potent because it is embedded within the societal challenge to legal instrumentalism represented by cases such as *Bakke*. The question, indeed, can be reframed in societal terms—what sorts of characteristics can constitute culturally significant positive markers [13] for selecting among individuals for positions in societally privileged organizations, especially those that sort youth among power trajectories in society.

In the section entitled the "Social Science of Admissions," [14] Professor Olivas looks to standardized criteria used in the education industry to standardize selection among applicants. He

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[7] Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (allowing race to be one of several factors to be considered as criteria in college admission, but prohibiting the use of specific quotas).
[8] See, e.g., Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); and now Fisher v. University of Texas at Austin, No. 09-50822 , -- F. 3 – (cert. granted, No. No. 14-981, June 29, 2015). *Fisher* is discussed in Debra Cassens Weiss, Cert grant sends university affirmative action case back to the Supreme Court, ABA Journal (June 30, 2015), available http://www.abajournal.com/news/article/cert_grant_sends_university_affirmative_action_case_back_to_the_supreme_cou/ (""Essentially ignoring the court's admonition to hold UT to the demanding burden articulated in its equal protection clause precedent, the 5th Circuit approved UT's program under what amounts to a rational-basis analysis," the cert petition says." Id.).
[9] Olivas, Constitutional Criteria, supra, 1066-67.
[10] Id., 1067 ("New evidence on what constitutes "success" in graduate or professional schools, as well as court challenges to established admissions procedures, have made it necessary to review and refine admissions practices and criteria so that they have more powerful predictive validity, increased reliability, and heightened sensitivity to the increasingly heterogenous student body under consideration in modern applicant populations.").
[11] Id., 1068.
[12] Id., 1069. The river has been used by other educators as well, especially university presidents at elite institutions, but to different effect. See Charles R. Lawrence III, *Two Views Of The River: A Critique Of The Liberal Defense Of Affirmative Action,* 101 COLUM. L. REV. 928, 974-75 (2001).
[13] On the power of culturally significant speech in the context of race in the framing of societal relations, see, e.g., Larry Catá Backer, *Culturally Significant Speech: Law, Courts, Society and Racial Equity*, 21 UNIVERSITY OF ARKANSAS LITTLE ROCK LAW JOURNAL 845-879 (1999).
[14] Olivas, Constitutional Criteria, supra, 1069-1080.

acknowledges the utility of test scores and undergraduate grade point averages (UGPA) as an administratively convenient short hand method for sorting through applications. But he notes two usually unstated presumptions, "that previous academic achievement and performance on a standardized test are fair predictors of a candidate's academic performance in the graduate or professional program, and that the behavior and skills essential for graduate and professional schools are but extensions of the behaviors and skills necessary for successful academic achievement in college."[15] Professor Olivas then challenges those assumptions,[16] citing to studies among Latino,[17] African-American and Chicano,[18] and older students and women students.[19] It is not clear that what is measured fairly captures performance potential,[20] or that it captures the appropriate skill sets.[21] He notes the fallacy of the assumption that undergraduate performance can be an accurate predictor of graduate study as well.[22] Statistics, then, tend to have a perverse effect on admissions. It essentially abstracts the individual student and reanimates the individual as a reflection of a relational connection between a collection of data and judgments about the meaning of that data derived from data aggregation across individuals. This is a process now generic to society and a basis for developing regulatory baselines.[23] The process constructs a "population" which is itself a reflection of judgments from data. But where those judgments are grounded in "knowledge" about a particular type of relational behaviors, say among a sub-set of societal actors, the characteristics of that subset becomes the marker for assessing the data of all. In effect, the data becomes self reflexive. It reflects and amplifies the characteristics of the group from out of which the markers of performance are measured and by implication treats as outliers and marginal, characteristics that fall outside that data set. In the language of aggregated individuals, it reduces the population to the aggregation of individuals whose markers set the standard—the classic marker of systemic discrimination!

But the standardization is itself potently societally reflexive. Standardization implements underlying premises about the components and characteristics of societally privileged markers, and draws a line outside of which reside societal outsiders. These outsiders may reflect a host of differences that dominant culture has selected for suppression or indifference. Where these markers of behavior, thought, expression are inherent in subcultures, the effect, when marked against race, religious, ethnic or other characteristics might serve to exclude a disproportionate number of those applicants. That exclusion is not the consequence of the race, ethnic, religious and other markers (all of which this society has already forbidden) but because the cultural characteristics that may mark their members tend to exclude them from performing in accordance to academic selection markers that are privileged in the selection process. Professor Olivas' "review has shown the cautions necessary in employing admissions criteria or practices that tend to predict performance differentially for different categories of students. Because the quantitative ("statistical") treatment of universal indices or variables is also flawed or laden with covert social

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[15] Id., 1070.
[16] Id., 1071 ("For minority students, moreover, studies by several admissions scholars reveal small or no meaningful statistical relationships between test scores and academic performance." Id.).
[17] Id., 1071-73.
[18] Id., 1074
[19] Id. 1073
[20] Id., 1075-76.
[21] Id., 1076.
[22] Id., 1076-78. See also, Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me A River: The Limits of "A Systematic Analysis of Affirmative Action in American Law Schools*, 7 AFR. AM. L. & POL'Y REP. 1, 22 (2005) (analyzing possible factors which may explain why African-American law students underperform academically when their admissions criteria predict higher levels of success)
[23] Explored in Michel Foucault, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977—1978 87-114 (Graham Burchell, trans., New York: Palgrave 2007).

values, one cannot feel any more comfortable with admissions committees' present reliance upon these criteria."[24] That caution springs from the structural assumptions[25] underlying the meaning that attaches to individual performance data.[26] But I suggest that it implies substantially more than that—it evidences the way that defining people out of society produces a complex set of self reinforcing mechanisms that, though they appear neutral. Are geared to ensuring that societal borders are respected. Law comes to this reality only lately, for it to have effect, the underlying assumptions that product "facts" must themselves be interrogated and societal borders reframed. That, of course, is the great value of flexible admissions standards—providing a basis for functionally altering societal borders in the longer term while preserving the forms of societal self reflection.

It is to the construction of self preserving techniques that Professor Olivas turns to next. Having explored the dangers of overreliance on test scores and UPGAs, Professor Olivas next reviews "another facet of the social science of admissions: the statistics that undergird predictive validity studies."[27] That examination interrogates the fairness of fair testing methodologies. Professor Olivas notes: "That societal values inhere in statistical equations often surprises observers who may have come to believe that such equations are value-free or apolitical. However, the choice of variables employed to measure statistical relationships requires value-laden assumptions and choices." [28] He offers a critique grounded in the contradictions of the precise technical assumptions of the models themselves.[29] The problem, of course, is broader—not their fairness inter se. Rather it is the effect of the construction of fairness standards that are grounded on a precisely drawn societal order that excludes some but embraces others. One does not deal here with technical problems of assessment; one deals instead with fundamental assumptions about who in society is embraced and who is tolerated, who falls within groups whose characteristics reflect societal consensus on behaviors and approaches that are to be rewarded, and those that are not. This is a political not a technical issue[30] that is all to often lost within the technical minutiae of formulae. These are not neutral numbers based techniques,[31] but the mechanics of cultural reinforcement. Law has little to say about this; absent changes in societal perceptions of itself, law provides at best a hortatory base for societal change.

But law does serve an important role—one that sometimes cuts the Gordian Knot. That role does not attack the technical fence that protects societal borders. Rather, law can create a permission, backed by such power as the state is willing to deploy, to dig under societal walls the define and constrain society self-conception, and offer the possibility of transformation.[32] This is especially the case in the context of judicial opinions interpreting law, and more specifically constitutional

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[24] Olivas Constituttional Criteria, supra, 1078.
[25] Id.
[26] See, Bryan K. Fair, *Re(Caste)ing Equality Theory: Will Grutter Survive Itself By 2028*, 7 U. PA. J. CONST. L. 721, 733 (2005).)
[27] Olivas, Constitutional Criteria, supra, 1080.
[28] Id., 1081. He notes further: "The models include: the single-group regression model, the separate-group regression model, the equal-risk model, the desirable criterion-level performance (Darlington regression) model, the constant ratio (Thorndike) model, the conditional-probability model (Cole), the expected-utility model, the equal-impact model, and the proportional (quota) model. Each of these will be examined to make more explicit their values, particularly their values for group membership, their differential predictive validity, and their technical flaws." Id., 1084.
[29] Id., 1084-1089.
[30] Id., 1089.
[31] See, e.g., id., 1088.
[32] Discussed in Larry Catá Backer, *Reifying Law: Understanding Law Beyond the State*, 26(3) PENN STATE INTERNATIONAL LAW REVIEW 521-563 (2008).

law.[33] That transformation, in turn might induce changes in the premises that make up the techniques of admissions which themselves are now problematic precisely because they define the societal normal to exclude. That was the consequence of *Bakke*.[34] It is with *Bakke* in mind that Professor Olivas considers what he terms the common law of admissions criteria.[35] He asks: "Exactly how far does Bakke reach? Is it still alive? How have judges ruled in admissions cases since Bakke? Inasmuch as Bakke endorsed the Harvard admissions program for achieving diversity, is affirmative action permissible for the right reasons?"[36] His answer, as the 20th century was closing, was hopeful. But it was an answer, based in part, on the inevitability of societal closure. "As will become evident from the following review of other postsecondary admissions cases, no other criterion delivers more racial results than does race itself. There is no good proxy, no more narrowly tailored criterion, no statistical treatment that can replace race."[37] And what of the common law wrapped around the decision in *Bakke*? As unhappy as some jurists were with *Bakke*, as relentless as the attack by societal actors seeking to seal the breach in the wall of societal self definition caused by *Bakke*, *Bakke* remains good law.[38]

> These cases, and many others I could have analyzed, show that the distribution of scarce benefits remains a contentious issue, one that divides American society along fronts of race, class, ethnicity, gender, and other dimensions. Like immigration cases that define who we are as a polity or as a people, so do admissions cases define us as a nation. Inasmuch as higher education is the great engine of upward mobility in our society, how we constitute our student bodies is an important consideration.[39]

And this insight moves Professor Olivas from technique, and law, to metaphor.[40] He rejects the "pool" and "pipeline" metaphors all to common, even almost 20 years on, that tend to be applied to admissions techniques, "both because they misconstrue the nature of the problems (as I define them) and because they misdirect attention."[41] Professor prefers the metaphor of the river. "This is the image I want to convey, rather than those conjured by pipelines or pools, neither of which has a river's power, purpose, potential, fecundity, or majesty."[42] This metaphor better characterizes the problem for Professor Olivas.[43] The problem of admissions for underrepresented groups has little to do with shortages of qualified candidates; rather it has to with the insight buried in the river metaphor, "that demography and efforts by schools to do the right thing will inevitably lead to improvement over time."[44] And that, perhaps, is what Bakke brings to the equation—it permits societal institutions to do right, in the process change the societal constraints that produced the need for *Bakke* in the first place.[45] Beyond that, time will solve the problem

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[33] Discussed in Backer, *Chroniclers in the Field of Cultural Production*, supra; Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12(1) WILLIAM & MARY BILL OF RIGHTS JOURNAL 117-178 (2003).
[34] Olivas, Constitutional Criteria, supra, 1092-96.
[35] Id., 1090-1114.
[36] Id., 1091.
[37] Id., at 1095.
[38] Id
[39] Id., at 1114.
[40] Id., 1114-1116.
[41] Id., 1115. See also Michael A. Olivas, *An Essay On Friends, Special Programs, And Pipelines*, 35 J. COLLEGE AND UNIV. L. 463 (2009).
[42] Olivas, Constitutional Criteria, supra, 1115.
[43] Developed further in later work, see, e.g., Michael A. Olivas, *Law School Admissions After Grutter: Student Bodies, Pipeline Theory, And The River,* 55 J. Legal Educ. 16 (2005).
[44] Id., 1116.
[45] He notes, "When I am asked if Bakke can survive, I answer that its longevity is proof that there is a god. Of course, I did not think so two decades ago, when the Court's order that Allan Bakke be admitted to the

presented to the courts in Bakke—demographic changes will obviate the need for race preferences[46]--or change the vectors of discrimination as societal forces redraws but does not eliminate its boundaries.

And thus Professor reinforces the notion of constitution as constraint. "Few legislatures are likely to confess racial prejudice or to recognize it in their state agencies. Thus, affirmative action must be theoretically and operationally grounded in the First Amendment, in academic freedom, and in the four tenets of autonomy, which include the freedom to choose students."[47] This requires the interlinking of the legal (1st Amendment constraints), the political (academic freedom), and the societal (institutional autonomy of the university), which Professor Olivas might suggest, may all march to the tune of demographic imperatives.

The nearly 20 years that separate us from Professor Oliva's thoughts, expressed in *Constitutional Constraints,* have not dimmed the power of its insights as the focus on the interlinked relations among legal, political and societal constraints have sharpened. The legal academy remains respectful of testing as a means of social sorting according to merit, though they continue to nod in the direction of the fundamental problem of standardizing techniques for harvesting data that might predict merit and thus open the door to access to elite institutions, though grounded on Professor Olivas' insights about their distorting effects.[48] Professor Olivas notes that "Like immigration cases that define who we are as a polity or as a people, so too do admissions cases define us as a nation."[49] But that definition extends, at least within the legal academy and the societal structures which it serves, ought also to bear in mind the extent to which it is enmeshed in broader societal structure's, that in the case of law that would include the judiciary as well as the bar. [50]

And yet discretion, is something of a two edged sword. On the one hand it serves as the foundation for arguments about the value of admissions decisions—the creation of a constitutional law of discretion can be understood as a structural basis for affirmative action undertaken through admissions decisions. But that sort of discretion appears positive only when deployed to particular effect, that is to the objective of dismantling the societal structures to preserve its hierarchies in its current form, and substitute a new societal ordering, with new structures of hierarchy and subordination that favor a now transformed self-knowledge of the societal self. It is in this context that one can understand both Professor Olivas' embrace of status

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UC-D Medical School led me to believe he had won. He did win, but the carefully nuanced Powell opinion has proven surprisingly resilient and supple over the two decades since." Id., 1121.

[46] Id., at 1121 ("As demographic changes occur and historical discriminatory practices are changed, the argument that race preferences in admissions are necessary to combat the vestiges of racial discrimination will lose its force." Id.).

[47] Id., with reference to Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom*," 45 STAN. L. REV. 1835 (1993).

[48] See, e.g., Aaron N. Taylor, *Reimagining Merit As Achievement*, 44 N.M. L. REV. 1, 33-34 (2014); Pamela Edwards, *The Shell Game: Who Is Responsible For The Overuse Of The LSAT In Law School Admissions?*, 80 ST. JOHN'S L. REV. 153 (2006) ("The original LSAT was heavily based on aptitude tests that "had their own foundation in racist and anti-immigrant sentiment."" Id., 164-165, citing, Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1487 (1997)).

[49] Michael L. Olivas, *Governing Badly: Theory And Practice Of Bad Ideas In College Decision Making,* 87 IND. L.J. 951, 959 (2012).

[50] See, e.g., Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 29 (2004); Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101 (2004).

based admissions criteria beyond the techniques of testing and UGPA, and his criticism of those traditional mechanics of discretion in legacy or alumni preference admissions, linking state college appropriations to test scores, program discontinuance, what Professor Olivas calls playing immigration cop.[51] Yet one wonders whether the results might be equally problematic[52]—to preserve the techniques of hierarchy, including discretionary waivers through objectives based discretion is likely to doom society to endless repetitions of contests for its redefinition through instrumental interventions in its law, politics and societal structures as new sub communities challenge the power of earlier communities that have become well embedded in the frameworks of societal control.[53] I have suggested that "even critical scholarship can at times adopt the language and vision of the normative substructure which is criticized as fundamentally "bad." Critical scholars sometimes use the language of polyculturalism to mask another—that of substitution."[54]

Indeed, such tinkering with the instruments of access to elite control sometimes fails to engage with the larger problems of defining the sort of social capital necessary for positive sorting into elite structures and for building such capital in societal sub communities whose access to such capital may be proportionally lower than others.[55] But this last is redolent with cultural, and socio-economic contestations.[56] Despite some well expressed doubt,[57] egalitarianism implicates the entirety of societal self conception and operation, absent a strong and two way robust effort at cultural, social and political assimilation of the kind that appears no longer tolerable, if only in the West,[58] but not exclusively.[59] And yet, the assimilative potential of reconstituting the societal base from which affirmative action may be legitimated is not altogether absent,[60] especially from the perspective of a pragmatic utility analysis.[61] And assimilation continues to be a one-way

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[51] Id., 955-974.
[52] For one approach see Angela Onwuachi-Willig, *The Admission Of Legacy Blacks*, 60 VAND. L. REV. 1141 (2007). But see Carlton F.W. Larson, *Titles Of Nobility, Hereditary Privilege, And The Unconstitutionality Of Legacy Preferences In Public School Admissions,* 84 WASH. U. L. REV. 1375 (2006).
[53] See, e.g., Leonard Baynes, Who Is Black Enough for You: An Analysis of Northwestern University Law School's Struggle over Minority Faculty Hiring, 2 Mich. J. Race & L. 205 (1997) (examining the questioning of a minority faculty candidate's racial authenticity); Jim Chen, *Embryonic Thoughts On Racial Identity As New Property*, 68 U. COLO. L. REV. 1123 (1997).
[54] Larry Catá Backer, *By Hook Or By Crook: Conformity, Assimilation And Liberal And Conservative Poor Relief Theory* 7 HASTINGS WOMEN'S L.J. 391, 435 (1996).
[55] See, e.g., Omari Scott Simmons, *Lost In Transition: The Implications Of Social Capital For Higher Education Access*, 87 NOTRE DAME L. REV. 205 (2011).
[56] See, e.g., Deirdre M. Bowen, *Meeting Across The River: Why Affirmative Action Needs Race & Class Diversity*, 88 DENV. U. L. REV. 751 (2011)("The story of being poor and the story of being Hispanic and/or black may have a cumulative effect, but they also have independent effects." Id., 767)
[57] See, e.g., Victor C. Romero, *Immigrant Education And The Promise Of Integrative Egalitarianism,* 2011 Mich. St. L. Rev. 275.
[58] See, e.g., Benjamin Forest, *Representation of Minority Communities in the Canadian and American Political Systems*, 8 J. PARLIAMENTARY & POL. L. 453 (2014); Wojciech Kornacki, *When Minority Groups Become "People" Under International Law,* 25 N.Y. INT'L L. REV. 59 (2012).
[59] See, Ratna Kapur *The "Ayodhya" Case: Hindu Majoritarianism And The Right To Religious Liberty* 29 MD. J. INT'L L. 305 (2014).
[60] See, e.g., Darren Lenard Hutchinson, *Preventing Balkanization Or Facilitating Racial Domination: A Critique Of The New Equal Protection,* 22 VA. J. SOC. POL'Y & L. 1 (2015).
[61] David Orentlichter, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777, 781 (2005) ("Diversity not only promotes good outcomes, it also discourages bad outcomes. Indeed, the benefits of diversity are well known to Wall Street professionals. According to a cardinal principle of investment

street, irrespective of the rivers feedings elite institutions of post secondary education.[62] And this result despite efforts to broaden the range of curricular offerings exposing students to societal changes that might precipitate transformations in law, politics and culture.[63] Scholars have asked, "If all a law school does is admit a racially diverse class, without ensuring that any cross-racial dialogue is taking place inside the classroom, will that be sufficient to prevail against the next challenge?"[64] For some that first step is inherently transformative.[65] "However, such an approach has not taken hold in legal education, generally, where we law professors continue, overall, to admit, educate, evaluate, and mentor our students pursuant to very traditional notions of what it means to be bright."[66] The solution, on the societal level, is the same as that proposed in the legal and political level—to determine techniques through which society will be unable to protect its old structural characteristics, its old presumptions of qualifications for merit and place in its hierarchy, and the extent to which otherwise excluded individuals can now be embedded within a newly reconstituted or transformed societal apparatus.[67] In this context, fairness and objectivity become political terms, and the techniques of sorting for those status protective traits become the touchstone for neutrality.[68] The diversity defense[69] at the heart of *Bakke*, and its defense grounded, in the notion of pluralism within the stable structures of a societal framework that required a breech in its protective sorting devices to accommodate societal outliers, itself can be understood either as a tool of or reward for assimilation[70] or of the control of stress to societal stability.[71]

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strategy, people can maintain their expected profits and decrease their risk of loss by purchasing a diversified portfolio of stocks rather than putting all of their money in one stock.").

[62] See, e.g., Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education--A Curricular Study with LatCritical Commentary*, 13 LA RAZA L.J. 119, 137 (2002)

[63] See, e.g., Kim Forde-Mazrui, *Learning Law Through The Lens of Race*, 21 J.L. & POL. 1, 2 (2005).

[64] Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 4 (2006).

[65] Carla D. Pratt, Commentary, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 HOUS. L. REV. 55, 75 (2006) ("Cultural pluralism will enhance the power sharing goal of democracy by extending power. . . . Enhanced power sharing with people from subordinated groups helps to ensure that the power of the majority does not operate even unintentionally to effectuate tyranny upon those in a subordinate group").

[66] Kirsten A. Dauphinais, *Valuing And Nurturing Multiple Intelligences In Legal Education: A Paradigm Shift,* 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 1, 2 (2005).

[67] Id., 3-15 (application of theory of multiple intelligences). Cf. Richard Delgado, *1998 Hugo L. Black Lecture: Ten Arguments Against Affirmative Action— How Valid?,* 50 Ala. L. Rev. 135, 136-37 (1998).

[68] See, Jason S. Marks, *Legally Blind? Reevaluating Law School Admissions At The Dawn Of A New Century*, 29 J.C. & U.L. 111 (2002) ("If we scripted the recent attack on race-sensitive admissions as a Hollywood film, we might title it Legally Blind. In this film, disaffected white applicants who did not get accepted to prestigious law schools join with conservative political groups on a crusade to restore "fairness" and "objectivity" to the admissions process by eliminating race as a legitimate factor that may be considered when evaluating an applicant. These new civil rights activists seek a "color blind" society." Id., 120); see also William C. Kidder, *Does The Lsat Mirror Or Magnify Racial And Ethnic Differences In Educational Attainment?: A Study Of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (2001).

[69] See, e.g., WILLIAM G. GOWEN AND DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

[70] Cf. Deborah C. Malamud, *Affirmative Action, Diversity, And The Black Middle Class*, 68 U. Colo. L. Rev. 939 (1997).

[71] See, e.g., Charles R. Lawrence III, *Two Views Of The River: A Critique Of The Liberal Defense Of Affirmative Action,* 101 COLUM. L. REV. 928 (2001) ("The argument for racial diversity cannot in the end rest only upon a university's choice to expose its students to a more colorful, more culturally diverse universe, or on a cost-benefit analysis of the need for an integrated elite in a soon-to-be majority non-white nation, or, as the Bakke Court argued, on the faculty's First Amendment right to academic freedom." Id., 964).

Cultural diversity may be advanced as a utilitarian exercise,[72] but it must be deployed in the service of a societal framework otherwise undisturbed. Against this framework the United States has cultivated at least a century old culture of the great individual—the lawyers working for social change through law.[73] And that societal framework also may be grounded in formal individualism,[74] disciplined indirectly by the consensus some have called testocracy.[75] The resulting set of contradictory binaries continues to bedevil U.S. law and politics, as individuals seek to manipulate the levers of each, instrumentally, to bring about societal change, and by changing societal structures and operations, to change the sovereign community itself.

Professor Olivas, then, contributes in significant ways to the great cultural dialogue in which U,S, elites are currently engaged. That dialogue implicates not merely its ostensible object—the scope of discretionary authority in university admissions sensitive to affirmative action. Rather, it touches on core societal issues—who speaks for society and its subgroups?[76] Who "owns" the issue and can speak authoritatively to the societally protective apparatus of government, especially its administration and courts.[77] These provide the undertones to Professor Olivas' excellent analysis. But it also suggests that little has changed in the intervening decades. The battle lines, so needlessly sharply drawn in the last third of the last century remain as sharp and cutting today as they did then. The irony, of course, is that the greatest proponents of the sharpest division tend to share very similar world views and normative frameworks, just geared to the needs of the societal sub groups whose interests they believe they advance.

> What remains is a kind of dialogue based on mutual non-recognition. This is a dialogue which breeds subordination as groups apply the normative principles of conformity and assimilation to as large a group of people as possible. Social cohesion, the discipline of the group in the face of mutual incompatibility, requires choice. From the perspective of the dominant group, subordination means reducing contrary cultural norms to a silence in the public (though not the private) space. Polyculturalism can exist in theory—in reality it describes a transitional period between the dominance of one set of socio-cultural norms and another.[78]

In a sense, the generation-long discussion of admissions policy in the face of the re-negotiation of societal space for once excluded or marginalized segments of society, suggest the constraints of mutual chauvinism in the face of transformative uncertainty.[79] What is clear, though, is as simple as it is difficult to attain—to change social norms one must first change society. But to change

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[72] Consider, Steven A. Ramirez, *The New Cultural Diversity And Title VII*, 6 MICH. J. RACE & L. 127 (2000).
[73] See, e.g., Kevin R. Johnson, *Lawyering For Social Change: What's A Lawyer To Do?*, 5 MICH. J. RACE & L. 201 (1999).
[74] Martin D. Carcieri, *The Wages Of Taking Bakke Seriously: The Untenable Denial Of The Primacy Of The Individual*, 67 TENN. L. REV. 949 (2000). But see, e.g., Hazel Rose Markus, Claude M. Steele & Dorothy M. Steele, *Colorblindness as a Barrier to Inclusion: Assimilation and Nonimmigrant Minorities*, 129 DAEDALUS 233, 248 (2000)
[75] See William C. Kidder, *The Rise Of The Testocracy: An Essay On The LSAT, Conventional Wisdom, And The Dismantling Of Diversity*, 9 TEX. J. WOMEN & L. 167 (2000).
[76] See generally, Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF.L.REV. 61 (1996)
[77] Joseph W. Schneider, *Social Problems Theory: The Constructionist View*, 11 ANN. REV. SOC. 209, 214-19 (1985) (on the ways in which elites compete for ownership of issues, and how those issues are shaped as a result).
[78] Backer, *By Hook Or By Crook, supra*., 439.
[79] John H. Langbein, *Cultural Chauvinism in Comparative Law*, 5 CARDOZO J. INT'L & COMP. L 41, 48-49 (1997).

society, one must be prepared to accept the consequences, the transformed society will itself draw borders that will only renew and not end, the challenges of inclusion and fairness in plural societies.