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## Moving Forward? Diversity as a Paradox? A Critical Race View

Harry G. Hutchison

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# MOVING FORWARD? DIVERSITY AS A PARADOX? A CRITICAL RACE VIEW

Harry G. Hutchison<sup>+</sup>

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## I. INTRODUCTION

Understanding Justice Sandra Day O'Connor's contribution to the Nation's jurisprudence on race, education, and the Constitution requires an inspection of a number of cases and a number of issues. Among the key issues is the proper standard of review for Equal Protection Clause purposes.<sup>1</sup> In *Wygant v. Jackson Board of Education*, a case decided more than twenty years ago, the school board introduced a layoff system designed to maintain a racially integrated faculty.<sup>2</sup> The layoff plan displaced white teachers before displacing black teachers.<sup>3</sup> The Supreme Court invalidated the plan without supplying a majority opinion, but specific Justices offered a range of positions regarding

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<sup>+</sup> Professor of Law, George Mason University School of Law. Elizabeth McKay, Robert Sedler, and Ilya Somin provided helpful comments on earlier drafts. I am indebted to Derrick Bell for his comments about the theme for this essay. The usual caveat applies. Research support was provided by the Law & Economics Center, George Mason University School of Law.

1. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 801 (7th ed. 2004) ("The Court in *Wygant*, as in *Bakke*, did not resolve the issue of what standard should be applied to determine whether a state or local government program designed to aid members of a minority race violated the equal protection clause."). See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290–91 (1978).

2. See *Wygant*, 476 U.S. at 270; see also NOWAK & ROTUNDA, *supra* note 1, at 801 (identifying purpose of layoff system).

3. *Wygant*, 476 U.S. at 272.

the appropriate standard of review.<sup>4</sup> Justice O'Connor wrote an intriguing concurrence signifying that a majority of Justices might uphold a race-conscious hiring program that was aimed at creating a racially diverse faculty.<sup>5</sup> This concurrence foreshadowed her opinion in *Grutter v. Bollinger*.<sup>6</sup> In *Grutter*, Justice O'Connor, consistent with the teaching of *Richmond v. J.A. Croson Co.*, deployed strict scrutiny analysis to assess the permissibility of the University of Michigan Law School's admissions plan.<sup>7</sup> Whatever standard of review is chosen, race-conscious decision-making in the United States takes place within a turbulent arena that is exacerbated by the probability that the racial achievement gap in public schools and institutions of higher education signals "a problem of national scope" that represents "the greatest civil rights issue of our time."<sup>8</sup> Justice O'Connor's opinions have been praised since her retirement in 2005,<sup>9</sup> while the Court has faced a series of attacks.

One of the Court's sharpest critics, Ronald Dworkin, insists that the Court's failure to follow Justice O'Connor's leadership on a number of equal protection questions contributes to an alarming insurrection.<sup>10</sup> This rebellion "is proceeding with breathtaking impatience, and it is a revolution [that is inflated by] its disdain for tradition and precedent."<sup>11</sup> Evidently, the Supreme Court's consolidated decision in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>12</sup> decided in 2007, has prompted Dworkin's

4. See *id.* at 279–80 (opinion of Powell, J.); *id.* at 285–87 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 294–95 (White, J., concurring in the judgment); *id.* at 301–03 (Marshall, J., dissenting); *id.* at 315–16 (Stevens, J., dissenting); see also NOWAK & ROTUNDA, *supra* note 1, at 816–18 (for discussion of the various standards of review articulated in the five opinions).

5. *Wygant*, 476 U.S. at 287 (O'Connor, J., concurring).

6. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

7. *Id.* at 326 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

8. Katherine Kersten, *Teach Character to Cut Racial Gap in School Results*, STARTRIBUNE (Minneapolis, Minn.), Feb. 22, 2007, at B1. See also ABIGAIL THERNSTROM AND STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 12 (2003) ("The [National Assessment of Educational Progress] results show a frightening gap between the basic academic skills of the average African-American or Latino student and those of the typical white or Asian American.").

9. See, e.g., Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. BOOKS, Sept. 27, 2007, at 92, 95 (describing Justice O'Connor's opinions as "increasingly sophisticated and thoughtful"). Admiration of Justice O'Connor may be tied to her early embrace of diversity. See, e.g., *Wygant*, 476 U.S. at 286–87 (O'Connor, J., concurring in part and concurring in the judgment) (signaling her willingness to uphold a school board program that considered race in hiring of teachers so as to create a racially diverse faculty in schools). But see E-mail from Derrick A. Bell, Jr., Visiting Professor of Law, N.Y. Univ. Sch. of Law, to Harry G. Hutchison, Professor of Law, George Mason Univ. Sch. of Law (Dec. 19, 2007) (on file with author) (stating that there is little reason to celebrate "Justice O'Connor's contribution to the nation's discussion on race").

10. Dworkin, *supra* note 9, at 92.

11. *Id.*

12. 127 S. Ct. 2738 (2007).

contempt. He maintains that the Court's consolidated decision striking down race-based student assignment plans constitutes the Court's most important opinion illustrating "the revolutionary character and poor legal quality of many of the Court's . . . decisions."<sup>13</sup> In *Parents Involved*, neither official discrimination nor diversity rationales were adequate to justify the race-based "tiebreakers" used by the public school systems in Seattle, Washington, and Louisville, Kentucky.<sup>14</sup>

Whatever one's view of the outcome of the *Parents Involved* case may be, given society's conflicting interpretations of the guarantee of equal protection, it is far from clear that Dworkin's allegations are beyond doubt. Philosopher Alasdair MacIntyre supplies a more balanced perspective, which suggests that a perpetually unsettled character pertains to America's contemporary moral and philosophical debates.<sup>15</sup> Such disputes, fastened as they are to alternative and incompatible notions of justice,<sup>16</sup> are unlikely to be resolved short of authoritarianism or oblivion despite society's frequent invocation of the language of pluralism, democracy, and equality. This vocabulary generates a dense fog, which masks the depth and extent of disagreement among Americans and confirms Karl Marx's observation that "conflict and not consensus [is] at the heart of modern social structure."<sup>17</sup>

It has been noted that "[i]n any sphere of inquiry the highway of methodology is paved with epistemological commitments."<sup>18</sup> It is the same in law, "as in all the disciplines, [that] method is controlled by assumptions about the aims of inquiry, the possibility of knowledge, the conditions for its attainment," and the probability of indeterminacy.<sup>19</sup> "The advent of language expands reality, for words represent not merely the immediate world of presence, but also 'what is absent, not only what is near but also what is far, not only the past but also the future.'"<sup>20</sup> Analysis of adjudication must

13. Dworkin, *supra* note 9, at 92.

14. Samuel Estreicher, *The Non-Preferment Principle and the "Racial Tiebreaker" Cases*, 2006-2007 CATO SUP. CT. REV. 239, 239-40 (2007), available at <http://www.cato.org/pubs/scr/2007/>.

15. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 235 (Am. ed. 1981) [hereinafter MACINTYRE, AFTER VIRTUE]. See also Harry G. Hutchison, *Shaming Kindergarteners? Channeling Dred Scott? Freedom of Expression Rights in Public Schools*, 56 CATH. U. L. REV. 361, 361-68 (2007) (noting the "cultural separation" and tension between opposing efforts to either restore religion to or remove religion from public life).

16. MACINTYRE, AFTER VIRTUE, *supra* note 15, at 235.

17. *Id.* ("None the less Marx was fundamentally right in seeing conflict and not consensus at the heart of modern social structure.").

18. R.J. Snell, *Upon This Rock: Human Realism and Geivett's Myth*, 9 PHILOSOPHIA CHRISTI 365, 365 (2007) (quoting R. Douglas Geivett, *Is God a Story? Postmodernity and the Task of Theology*, in CHRISTIANITY AND THE POSTMODERN TURN: SIX VIEWS 37-38 (Myron B. Penner ed., 2005)).

19. *Id.* at 365-66.

20. *Id.* at 368 (quoting THE LONERGAN READER 388 (Mark D. Morelli & Elizabeth A. Morelli eds., 1997)).

conform to the likelihood that “we come to live, not as the infant in the world of immediate experience, but in a far vaster world that is brought to us through the memories of other men, through the common sense of community, through the pages of literature, through the labors of scholars.”<sup>21</sup> Claims and counter-claims compete as part of America’s conversation regarding race and equal protection. This competition is consistent with the observation that we, all of us, inhabit a larger world that is mediated by meaning, but which transcends “anyone’s immediate experience. . . . [W]hat is meant is not only experienced but also somehow understood and, commonly, [perhaps] also affirmed.”<sup>22</sup>

Given America’s absence of a shared and deeply understood racial history, or a uniform understanding of justice, we should not be surprised that contrasting judgments arise from inspecting the Niagara of words that have been used to justify or destabilize Supreme Court proclamations about race. Inevitably such vivisections improve the lives and the career prospects of the various speakers but deliver few benefits to the truly disadvantaged among us. In *Adarand Constructors, Inc. v. Pena*, for example, the Court examined an equal protection challenge under the Fifth Amendment where Justice O’Connor noted that “[t]he Court’s failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action.”<sup>23</sup> The repercussions of that failure go beyond what appellees or appellants experience. Instead, this failure affirms indeterminacy.

In a series of recent cases,<sup>24</sup> members of the Court have offered a number of differing opinions. Differences arose about whether deference to a university’s educational judgment can be justified or instead whether such deference constitutes a violation of the Constitution.<sup>25</sup> Additional distinctions emerge regarding whether the First Amendment protects or is immaterial to a public university’s use of race in admissions,<sup>26</sup> and whether the prospect of future educational progress in minority communities sustains contemporary

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21. *Id.*

22. *Id.*

23. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 221 (1995).

24. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

25. *Compare Grutter*, 539 U.S. at 328 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”), *with id.* at 386–87 (Rehnquist, C.J., dissenting) (“I do not believe that the Constitution gives the Law School such free rein in the use of race.”).

26. *Compare id.* at 329 (majority opinion) (“In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy . . . .”), *with id.* at 362 (Thomas, J., dissenting) (“[U]nder strict scrutiny, the Law School’s assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference, grounded in the First Amendment or anywhere else.”).

justifications for race-based preferences.<sup>27</sup> Whether one agrees or disagrees with *Grutter*,<sup>28</sup> *Gratz v. Bollinger*,<sup>29</sup> or *Parents Involved*,<sup>30</sup> disputes surface about the presence of unlawful racial balancing.<sup>31</sup> Though educational benefits may evolve from diversity, tension arises over whether a critical mass of minority students defined in reference to these benefits is allowable or impermissible.<sup>32</sup> Conflict also emerges over whether the “historic deficit of traditionally disfavored minorities” in certain professions is important or irrelevant,<sup>33</sup> or whether courts should defer or decline to defer to claims of good faith by governmental units.<sup>34</sup> Difficulties materialize regarding whether interpretations of the Equal Protection Clause should vary with the reasons for using race as a determinant.<sup>35</sup> Questions surface about whether attempts to regulate the enrollment of blacks and other minorities in educational programs constitute a “badge of inferiority,”<sup>36</sup> or amount to a defensible remedy aimed at eradicating the effects of the nation’s history of racial segregation, white supremacy, and societal discrimination.<sup>37</sup> Such discussions are often tinged with paradox. An additional paradox issues forth because black students attending Historically Black Colleges “experience superior cognitive development” in environments that are not integrated<sup>38</sup> and “report higher

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27. See, e.g., *id.* at 346 (Ginsburg, J., concurring).

28. 539 U.S. 306 (2003).

29. 539 U.S. 244 (2003).

30. 127 S. Ct. 2738 (2007).

31. See, e.g., *Grutter*, 539 U.S. at 323 (majority opinion) (endorsing Justice Powell’s *Bakke* opinion in which he rejected the “interest in ‘reducing the historic deficit of traditionally disfavored minorities in medical schools . . .’ as an unlawful interest in racial balancing” (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978))).

32. *Id.* (“As part of its goal of ‘assembling a class that is both exceptionally academically qualified and broadly diverse,’ the Law School seeks to ‘enroll a “critical mass” of minority students.’ The Law School’s interest is not simply ‘to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.’ That would amount to outright racial balancing, which is patently unconstitutional.” (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.) (citations omitted))).

33. *Bakke*, 438 U.S. at 306 (opinion of Powell, J.).

34. *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting).

35. See *id.* (“Before the Court’s decision today, we consistently applied the same strict scrutiny analysis regardless of the government’s purported reason for using race and regardless of the setting in which race was being used. We rejected calls to use more lenient review in the face of claims that race was being used in ‘good faith’ . . .”).

36. *Id.* at 373 (Thomas, J., concurring in part and dissenting in part) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment)).

37. See *Bakke*, 438 U.S. at 310 (opinion of Powell, J.) (rejecting an interest in remedying societal discrimination).

38. *Grutter*, 539 U.S. at 364 (Thomas, J., concurring in part and dissenting in part) (citing Lamont Flowers & Ernest T. Pascarella, *Cognitive Effects of College Racial Composition on African American Students After 3 Years of College*, 40 J. COLL. STUDENT DEV. 669, 674 (1999)

academic achievement than those attending predominantly white colleges.”<sup>39</sup>

Viewpoints on race and education are not necessarily predetermined by race, ethnicity, or political preference. Some progressives favor integration.<sup>40</sup> Others have discovered the benefits of racial separation.<sup>41</sup> Both liberals and conservatives can be found on each side of the school choice divide. Some commentators proclaim the advantages of diversity,<sup>42</sup> while others note that diversity is a nebulous concept that is infinitely elastic and capable of various meanings.<sup>43</sup> At times, conservatives and liberals appear to favor public school diversity so long as it does not disturb their own children’s education or diminish their housing values.<sup>44</sup>

The Milton, Massachusetts case is instructive.<sup>45</sup> During the spring of 2007, the “town officials in th[e] affluent Boston suburb changed the elementary-school assignments for 38 streets—and sparked outrage. Some white families had been reassigned to Tucker, a mostly black school which has historically had Milton’s lowest test scores.”<sup>46</sup> Possibly imagining that minority schools are inherently bad,<sup>47</sup> and presuming race is a proxy for educational proficiency,

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(noting “the growing evidence that . . . heterogeneity actually impairs learning among black students”).

39. *Id.* at 365 (citing Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 35 (1992)).

40. *See, e.g.*, Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 267 (2006) (“[R]adical integration[] should both form the centerpiece of a progressive social agenda and be aggressively advanced as a political goal.”).

41. *See, e.g.*, ROY L. BROOKS, *INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY* 190 (1996) (finding value in “limited separation,” which can be defined as “voluntary racial isolation that serves to support and nurture individuals within the group without unnecessarily trammeling the interests of other individuals or groups”).

42. *See, e.g.*, Cruz Reynoso & Cory Amran, *Diversity in Legal Education: A Broader View, a Deeper Commitment*, 52 J. LEGAL EDUC. 491, 492 (2002) (“[S]chools must come to view diversity as synonymous with excellence in[] education. . . . [C]ompetition, globalization, and the demands of our increasingly complex and dynamic society, will require that ‘diversity’ be a multidimensional concept. . . . Diversity must become the thriving norm.”).

43. *See, e.g.*, Michael Selmi, *Race in the City: The Triumph of Diversity and the Loss of Integration*, 22 J.L. & POL. 49, 79 (2006) (“Diversity . . . can be anything to almost anyone: a slogan or a mandate, a program or a label, but there need not be any shared purpose. . . . [A]ny concept that can be used liberally and interchangeably by Republican and Democratic Presidents alike is probably a term without significant content.”).

44. *See, e.g.*, Joseph Pereira, *School Integration Efforts Face Renewed Opposition*, WALL ST. J., Oct. 11, 2007, at A1.

45. *Id.*

46. *Id.*

47. *See* Wendy Parker, *Valuing Integration: Lessons from Teachers*, WAKE FOREST U. LEGAL STUD. RES. PAPER SERIES, Sept. 2007, at 4, <http://ssrn.com/abstract=1014366> (noting minority support for segregation because of “integration’s failure to deliver educational quality and its assumption that all-minority schools are bad schools”).

one white parent remarked that he did not feel good about putting his daughter in an inferior school.<sup>48</sup> He is not alone. In one of America's most progressive states, in one of its most liberal towns where the state's African American governor resides, the parents, while supportive of diversity, were distressed by the prospect of serious integration.<sup>49</sup>

At the same time, Professor Michelle Adams, a thoughtful proponent of "radical integration," illuminates a counter-trend characterized by "the emergence of [separate] black, middle-class suburban enclaves."<sup>50</sup> While this move perpetuates racial isolation and promotes what Dworkin labels a "national disgrace,"<sup>51</sup> this development is provoked in part by the attraction of voluntary separation, which guarantees that black people maintain control and reflects a desire to preserve a "cultural heritage[] that distinguish[es] them from other groups."<sup>52</sup> Such maneuvers, driven by sincere individual choice, raise the following question: Does observed separation by African Americans into black enclaves, by whites into largely white neighborhoods, or by Jews into largely Jewish areas,<sup>53</sup> constitute segregation that should alarm us? Attempts to calculate the benefits of separation weighed against the risk of integration bring to mind the dilemma faced by the educated Jews of Breslau during Prussian-era Germany. Alisdair MacIntyre writes:

[They] could not have been unaware not only of continuing old-fashioned anti-Semitism, but also of the double character of most German . . . cultural responses to the recent emancipation of the Jews, of the terrible inability of late nineteenth[-century] Germans to allow Jews to be Jews and yet to be Germans too, [as well as] the all too common German insistence that the Jew who remained faithful to Judaism thereby made her or himself less of a German.<sup>54</sup>

In addition to the difficulties associated with the desire of many Americans to separate into racial and ethnic enclaves, complications surface because arguments favoring integration are undermined by reliance on questionable evidence. Consider Professor Parker's assertion that America should value integration, particularly teacher integration: because "student segregation has had a negative effect on the experience level of teachers for minority students" as a result of the fact that "white teachers typically flee minority schools as soon as they are able, and . . . the number of minority teachers is inadequate to

48. Pereira, *supra* note 44.

49. *See id.*

50. Adams, *supra* note 40, at 266-67.

51. Dworkin, *supra* note 9, at 92.

52. Adams, *supra* note 40, at 266-67.

53. *See, e.g.,* Lisa W. Foderaro, *Hasidic Public School Loses Again Before U.S. Supreme Court, but Supporters Persist*, N.Y. TIMES, Oct. 13, 1999, at B5 (discussing the attempt by Hasidic Jews to carve out a separate public school district in upstate New York).

54. ALASDAIR MACINTYRE, EDITH STEIN: A PHILOSOPHICAL PROLOGUE, 1913-1922, 12-13 (2006) [hereinafter MACINTYRE, EDITH STEIN].

staff fully minority schools.”<sup>55</sup> Here, Parker argues, educational research reveals that teachers’ experience has an impact on student success.<sup>56</sup> She asserts that student integration is necessary to ensure an increase in the number of experienced teachers who teach minority students.<sup>57</sup> She argues that this development is needed to improve the academic performance of such students.<sup>58</sup> This claim is problematic. Professor Greene shows that while it is true that “teachers do get a little more effective in their first few years of teaching as they learn how to cope in the classroom, . . . [a]fter those first few years teachers do not tend to get more effective with further years of experience.”<sup>59</sup> Indeed, “some evidence [shows] that teachers get *less* effective in the later stages of their careers, perhaps because of adverse incentives arising from the inability of most schools to fire veteran teachers even when their performance is very poor.”<sup>60</sup> This implies that Parker’s assumption that the teacher experience data supports integration is contestable.

Equally important, Professor Greene shows “that on average private schools are actually *more* racially integrated than public schools.”<sup>61</sup> Although it is true that “the share of white students attending private schools . . . is double that of Hispanic and black students,”<sup>62</sup> those statistics belie the state of integration in private schools. First, having a greater number of minority students does not mean that schools are better integrated;<sup>63</sup> second, racially diverse students are not necessarily evenly distributed throughout the public school system;<sup>64</sup> and third, parents show greater confidence sending their children to racially diverse

55. Parker, *supra* note 47, at 35.

56. *Id.*

57. *Id.*

58. *Id.*

59. JAY P. GREENE ET AL., EDUCATION MYTHS: WHAT SPECIAL INTEREST GROUPS WANT YOU TO BELIEVE ABOUT OUR SCHOOLS—AND WHY IT ISN’T SO 60 (2005).

60. *Id.* (emphasis added). Professor Greene also describes evidence that suggests a low correlation “between teacher experience and student achievement.” *Id.* at 65. Among other myths that Professor Greene uncovers is “the money myth.” *Id.* at 8. Over the past thirty years, spending per pupil has doubled, but student performance, as measured by the National Assessment of Education Progress, has remained unchanged. *Id.* at 8–11.

61. *Id.* at 201 (emphasis added). *But see id.* at 201–02 (noting that while the American Federation of Teachers asserts that “‘private schools are . . . less racially diverse’ than public schools,” others argue that the private school voucher movement constitutes an attempt to escape integration (citation omitted)).

62. *Id.* at 204.

63. *Id.* at 203–04 (“More minority students, however, is not the same as more integration. If it were, then many Southern schools during the era of Jim Crow would have been wonderfully integrated due to their very high proportion of minority students. By this standard, *Brown v. Board of Education* was a terrible defeat for integration. . . . Clearly, what we really mean by integration is having a balanced mix of different racial groups rather than just greater numbers of certain groups.”).

64. *See id.* at 204 (“School systems themselves, whether public or private, are frequently segregated, but [the method of measuring the distribution of racial groups] has no way to detect segregation at that level.”).

private schools that demonstrate successful management of integration.<sup>65</sup> When parents have the option “to choose private schools, either with their own funds or with vouchers, they are more likely to enroll their children in racially mixed schools.”<sup>66</sup> Taken together, such data suggests that opposition to school choice, often led by proponents of integration, may intensify the same re-segregation trends that they criticize.<sup>67</sup>

At the same time, many “schools are failing[—a]chievement is down, violence is up, and no amount of money seems to insulate schools from these trends.”<sup>68</sup> One commentator puts it this way:

Fifty-eight percent of low-income 4th graders cannot read, and 61 percent of low-income 8th graders cannot do basic math. The magnitude of this educational malpractice is staggering: Of the roughly 20 million low-income children in K–12 schools, 12 million aren’t even learning the most elementary skills. These children have little hope of mastering the responsibilities of citizenship or the rigors of global competition.<sup>69</sup>

Educational malpractice occurs despite a rise in public education expenditure by more than seven hundred percent, in inflation-adjusted dollars, over the past fifty years.<sup>70</sup> The dire educational and economic circumstances facing many minorities, African Americans specifically,<sup>71</sup> have produced skepticism about the efficacy of progressive and liberal educational approaches, which reify this public school paradigm.<sup>72</sup> Doubt and dire educational circumstance combine to legitimize school choice initiatives.

Accumulated evidence demonstrates that “when educators do succeed at educating poor minority students up to national standards of proficiency, they invariably use methods that are radically different and more intensive than those employed in most American public schools.”<sup>73</sup> It is, of course, “no

65. *Id.* at 216 (noting “reports of significantly fewer racial conflicts in private schools”).

66. *Id.*

67. See, e.g., Harry G. Hutchison, *Liberal Hegemony? School Vouchers and the Future of the Race*, 68 MO. L. REV. 559, 594 (2003) [hereinafter Hutchison, *Liberal Hegemony?*] (contesting the claim that school choice contributes to racial fragmentation and showing that, instead, public schools contribute to racial isolation and subordination).

68. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 156 (1995).

69. Adam Meyerson, *Foreword* to SAMUEL CASEY CARTER, *NO EXCUSES: LESSONS FROM 21 HIGH-PERFORMING, HIGH-POVERTY SCHOOLS* 1 (4th ed. 2000).

70. See GREENE ET AL., *supra* note 59, at 10 fig. 1.1.

71. THERNSTROM & THERNSTROM, *supra* note 8, at 12 (“By twelfth grade, on average, black students are four years behind those who are white or Asian. Hispanics don’t do much better.”).

72. Hutchison, *Liberal Hegemony?*, *supra* note 67, at 562.

73. Kersten, *supra* note 8; see also Paul Tough, *What It Takes To Make a Student*, N.Y. TIMES, Nov. 26, 2006 (Mag.), at 44, 50 (finding, in the article that Kersten relied on, that the charter schools “achieving the most impressive results with poor and minority students tend to

accident that . . . revolutionary schools” often operate “outside the traditional public [school] system.”<sup>74</sup> However worthy these new methods may be, radical reform that places the interest of disadvantaged Americans at the center (as opposed to the periphery) of debates about race and education remains an unlikely event because of the inescapable effects of the exclusionary and subordinating history of the common public school system,<sup>75</sup> as well as the exclusionary present of America’s system of higher education.<sup>76</sup> This process combines to suppress the interest of outsiders.<sup>77</sup>

Stanley Crouch illuminates this prospect:

The blues is a music about human will and human frailty, just as the brilliance of the Constitution is that it recognizes grand human possibility with the same clarity that it does human frailty, which is why I say it has a tragic base. Just as the blues assumes that any man or any woman can be unfaithful, the Constitution assumes that nothing is innately good, that nothing is lasting—nothing, that is, other than the perpetual danger of abused power.<sup>78</sup>

Instead of accepting prevailing paradigms, it is time for a commitment to new approaches that challenge critical assumptions connected to the rhetoric of diversity, integration, and constitutional adjudication. It is crucial to closely examine aspects of society and government that many believe to be innately good in order to ensure that they are not masking abuses of power. Consistent with this skepticism, I offer an inspection of Justice O’Connor’s jurisprudence through the prism of Critical Race Theory.

This approach is fortified by classical-liberal reformist views of disparate impact, and public choice analysis. When examining allegedly neutral areas of law, Critical Race Theory is able to find “concepts of ‘race’ and racism always already there.”<sup>79</sup> Critical Race Theory concludes that “America’s cultural identity, values, and meanings cannot be separated from its past and present social relations of domination and power.”<sup>80</sup> Equally important, classical-liberal reformists contend that “policy-makers should be held responsible for

follow three practices”: (1) “require many more hours of class time than a typical public school”; (2) set “explicit goals” for “classroom instruction and lesson planning”; and (3) “guide the behavior, and even the values of . . . students by teaching . . . character”).

74. THERNSTROM & THERNSTROM, *supra* note 8, at 7.

75. See generally Hutchison, *Liberal Hegemony?*, *supra* note 67, at 582–89 (describing how public schools embraced the ideology of racial and religious subordination).

76. See *infra* Part III.B.3.

77. As defined herein, the term “outsiders” includes African Americans and members of other disadvantaged groups.

78. STANLEY CROUCH, *THE ALL-AMERICAN SKIN GAME, OR, THE DECOY OF RACE: THE LONG AND THE SHORT OF IT*, 1990–1994 10 (1995).

79. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 750 (1994).

80. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2132 (1992).

any discriminatory effects of their programs, regardless of a lack of evidence of discriminatory intent.”<sup>81</sup> Public choice theory suggests that “[m]odern democratic states have themselves become weapons in the war of all against all, as rival interest groups compete with each other to capture government and use it to seize and redistribute resources among themselves.”<sup>82</sup> This process includes the coercive transfer of private resources to the government, which then relocates such resources as part of an effort to provide privileged modes of education for members of preferred groups.<sup>83</sup> If this view is accepted, then the centripetal tendency of the abusive process indicates that many policies, “evaluated honestly and realistically, would be found to lack any true basis in the public interest.”<sup>84</sup>

Merging Critical Race Theory, classical-liberal reformist views, and public choice will not lead to a consensus. The search for consensus constitutes an elusive search for what ultimately is an illusion because “consensus” views are ““never checked against actual opinions, least of all those of the most disadvantaged”” people among us.<sup>85</sup> Because public schools, universities, and American democratic institutions are “constituted by elites who are charged with policy deliberation,”<sup>86</sup> and because “the predominant opinions . . . in society . . . reflect the views of the social and intellectual elites who have the greatest access to public modes of expression,”<sup>87</sup> both Critical Race Theory proponents and classical-liberal reformists offer a corrective. They “believe that laws should be examined from an *outsider-premised* fairness perspective.”<sup>88</sup> Fairness to outsiders means fairness to those groups such as African Americans whose perspective and concerns “have not traditionally been part of legal scholarship.”<sup>89</sup> Justice O’Connor and the Supreme Court have given governmental units permission to implement race-conscious initiatives that appear to transform the pursuit of racial justice into diversity

81. Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 94 (1997) [hereinafter Hutchison, *Toward a Critical Race Reformist Conception*].

82. JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 4 (1993).

83. *See id.* at 11–12 (noting that “all modern states operate vast redistributive welfare systems . . . [and] exist[] in practice to satisfy the private preferences of collusive interest groups”).

84. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 382 (1981).

85. Bernard Yack, *Liberalism Without Illusions: An Introduction to Judith Shklar's Political Thought*, in *LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR* 1, 8–9 (Bernard Yack ed., 1996) (quoting JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 115 (1990)).

86. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 169 (2002).

87. Yack, *supra* note 85, at 8–9.

88. Hutchison, *Toward a Critical Race Reformist Conception*, *supra* note 81, at 94 (emphasis added).

89. Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 684 (1992).

rhetoric. In the sections that follow, I argue that paradox shadows such adjudication. Part II examines the transformation of the nation's presumed commitment to racial justice into evolving standards of diversity. Part III concentrates on the contested jurisprudence of Justice O'Connor.

## II. FROM RACIAL JUSTICE TO DIVERSITY

Diversity as a "highly individualized" treatment acceptable to the Supreme Court has apparently attained new potency,<sup>90</sup> but this move has not occurred in a vacuum. Diversity in the United States "is itself remarkably diverse—and dynamic. Like a blastula of cells undergoing mitosis, American society constantly proliferates new divisions and differentiations. Some of this merely reconfigures the familiar, reshuffling old decks, but much of it creates unprecedented forms of social life."<sup>91</sup> Diversity as a goal operates as a component of the new cosmopolitanism, which presumes that deep differences, whether racial, religious, or ideological, are unimportant.<sup>92</sup> Larry Alexander reveals how "cosmopolitanism . . . tends to homogenize and shallow out the various ways of life" because "[i]f there are many paths to truth or salvation, then little is at stake in finding a path."<sup>93</sup> Therefore, appreciating both the adverse effects of societal discrimination and the necessity to engage in serious efforts to eradicate the continuing effects of white supremacy as part of a core struggle for racial equality<sup>94</sup> appears lost in the pursuit of the superficial. For some, this move has been exacerbated by the formation of a society comprised of highly individualistic people who either collectively or individually appear to be motivated by a bundle of incompatible preferences. They can be described as "[u]ncommitted, restless, . . . ever-open, . . . 'conversion prone' and therefore congenitally ready to be converted and reconverted *ad nauseam*—without the conviction that would stop the dizzying spin and allow them to be at home somewhere."<sup>95</sup> Diversity as cosmopolitanism appears to be consistent with several possibilities, including the possibility that some individuals might be captivated by Nietzschean self-mastery and the will to power.<sup>96</sup> Others may be consumed by the pursuit of postmodern identity

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90. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

91. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 3 (2003).

92. *See, e.g.*, LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 169 (2005) (noting that this "conception of liberalism admits to being itself a way of life," with "a diversity of religions, associations, occupations, ideas, and so forth . . . from which to choose").

93. *Id.*

94. *See, e.g.*, Adams, *supra* note 40, at 263–64 (asserting the view that a central purpose of integration was combating racism).

95. OS GUINNESS, *THE CALL: FINDING AND FULFILLING THE CENTRAL PURPOSE OF YOUR LIFE* 10 (2003).

96. *Id.* at 22.

construction or, in a purely suburban move, the body.<sup>97</sup> This contemporary obsession with the body may crumple into an “enduring fascination” with cookbooks, health foods, and aromatherapy.<sup>98</sup>

How did the nation exchange its commitment to racial justice for diversity as a cosmopolitan objective? Provisional answers are available. Professor Adams establishes that integration was once seen as a “vital structural component” of an effort to eradicate racial segregation and white supremacy.<sup>99</sup> Today, some argue that integration is synonymous with a process whereby members of minority groups “adopt[] the customs and attitudes of the prevailing culture.”<sup>100</sup> Adams insists that “the present-day integrationist vision . . . oversimplifies the emotional discomfort and identity sacrifice that are associated with integration.”<sup>101</sup> She argues that “[i]ntegration no longer captivates the progressive imagination” as a device for “eliminating racial inequality.”<sup>102</sup> Professor Michael Selmi’s intuition suggests that only rare voices persist in “advocating for the importance of integrated institutions, [and] those voices are dwarfed by the critiques of integration and the contemporary affinity for choice.”<sup>103</sup> He also suggests the move to discount integration may reinvigorate de facto segregation.<sup>104</sup> Whatever its presumed advantages may be, “integration has fallen deeply among our social priorities among blacks and whites alike. Diversity, on the other hand, is everywhere, and one would be hard pressed to find a devoted critic of the concept of diversity.”<sup>105</sup>

It is clear that America’s public institutions have decisively endorsed the rhetoric of diversity. The question, “What is diversity?” like Hart’s famous question, “What is law?”<sup>106</sup> has been asked and answered on many occasions without a sound resolution. The ancient world did not think that diversity was a positive ideal.<sup>107</sup> Indeed, it can be shown that “this ideal, [now] so familiar at the turn of the new millennium, has no real antecedent in American thought.”<sup>108</sup> Thus, public law’s pursuit of it is “truly unprecedented.”<sup>109</sup> The question becomes: does the move to both reify diversity and diminish

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97. *Id.*

98. *Id.*

99. Adams, *supra* note 40, at 263–64.

100. *Id.* at 264 (using Dictionary.com’s definition of “assimilation”).

101. *Id.*

102. *Id.*

103. Selmi, *supra* note 43, at 75 (footnote omitted).

104. *See id.*

105. *Id.* (footnote omitted).

106. H.L.A. HART, *THE CONCEPT OF LAW* 1 (2d ed. 1994).

107. SCHUCK, *supra* note 91, at 40–41 (“Neither Herodotus nor subsequent historians, however, have identified societies valuing diversity as a positive ideal to be celebrated and actively and collectively pursued. Most often, diversity was seen as a potentially dangerous condition that threatened social turmoil and hence must be carefully controlled.”).

108. *Id.* at 41.

109. *Id.*

integration as a serious goal allow policy-makers to ignore society's central role in entrenching racial inequality?<sup>110</sup>

### III. JUSTICE O'CONNOR: FROM *GRUTTER* TO THE FUTURE

#### A. *Prolegomena to Grutter*

Establishing the deep structure behind the Court's recent decisions in *Grutter*<sup>111</sup> and *Parents Involved*<sup>112</sup> requires an examination of America's Equal Protection Clause platform. Professors David Bernstein and Ilya Somin maintain that "[n]o line of cases enhanced the prestige of the Supreme Court as much as *Brown v. Board of Education* and other decisions vindicating the rights of African Americans."<sup>113</sup> Before achieving iconic status, *Brown* "was criticized by some prominent liberal legal scholars for overruling the democratic process."<sup>114</sup> Today, *Brown* has come under attack by "revisionist scholars associated with the political left"<sup>115</sup> who believe that commentators have "vastly exaggerated the importance of *Brown* to the African-American freedom struggle."<sup>116</sup> If this intuition is correct, adjudication may promise more than it delivers.

In *Brown*, the Supreme Court ordered a segregated school system to be dismantled with "all deliberate speed."<sup>117</sup> *Brown* led to a series of opinions culminating in a decision requiring school districts to terminate segregated school systems immediately.<sup>118</sup> As the Court later described, "[i]t was not the inequality of the facilities but the fact of *legally* separating children on the basis of race on which the Court relied to find a constitutional violation in

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110. See, e.g., Adams, *supra* note 40, at 275 ("My vision of integration is radical . . . [I]t recognizes that racial segregation is the root or source of racial inequality and that racial integration is the only adequate antidote. Racial segregation structures, maintains, and perpetuates inequality across virtually every indicia of social, political, educational and economic well being.").

111. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (allowing race conscious admissions grounded in the notion that educational diversity constitutes a compelling interest that is narrowly tailored to the government's interest).

112. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007) (disallowing reliance on race as a basis for assigning students in order to achieve racial balance within a predetermined range based on the racial composition of the school district as a whole).

113. David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 593 (2004) (book review) (citation omitted).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

118. See, e.g., *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam) ("Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.").

1954.”<sup>119</sup> Thus, “[o]nce there has been a showing of deliberate segregation of schools, school authorities must develop a plan which will provide immediate relief.”<sup>120</sup> Although there is now a fundamental disagreement between the liberal and conservative wings of the Supreme Court about what *Brown* requires,<sup>121</sup> it can be argued that courts could *only* order desegregation “if there has been a showing of purposeful segregation.”<sup>122</sup> *Brown I*,<sup>123</sup> *Brown II*,<sup>124</sup> and subsequent school-desegregation decisions of the Supreme Court do not require all public schools to be racially integrated.<sup>125</sup> “Rather, the decisions require that public schools not be racially segregated.”<sup>126</sup> This calculus fortifies the distinction between de jure and de facto segregation.<sup>127</sup> De jure segregation requires some purposeful act by government authorities, whereas de facto segregation depends primarily on housing and migration patterns that are not directly connected to evidence of purposeful governmental action.<sup>128</sup>

When attention turns to affirmative action, problems arise because it is likely that no one has ever satisfactorily defined the term.<sup>129</sup> One commentator writes that affirmative action, “[t]o its supporters, [has] meant racial and social justice, a compensation for past and present discrimination.”<sup>130</sup> As thus conceived, affirmative action, like integration, “would eradicate the advantages whites had accrued through segregation.”<sup>131</sup> Affirmative action’s critics charge that it “has only perpetuated the problem of discrimination while creating a host of new problems.”<sup>132</sup> The intensity of this debate is fueled by a clash among three conflicting conceptions of discrimination: intentional, societal, and unconscious racism. Conventional constitutional adjudication holds that remedying the effects of past intentional discrimination is a

119. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767 (2007) (emphasis added).

120. NOWAK & ROTUNDA, *supra* note 1, at 764.

121. *Compare Parents Involved*, 127 S. Ct. at 2800 (Breyer, J., dissenting) (noting “that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so”), *with id.* at 2768 (majority opinion) (arguing that the way to “remove[] the vestiges of past segregation . . . is to stop assigning students on a racial basis” (citation omitted)).

122. NOWAK & ROTUNDA, *supra* note 1, at 764.

123. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954).

124. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

125. NOWAK & ROTUNDA, *supra* note 1, at 765.

126. *Id.*

127. *Id.*

128. *Id.* (explaining that while de jure segregation is actionable, de facto desegregation does not require judicial intervention).

129. Steven Yates, *What Went Wrong with Affirmative Action (And Why It Never Could Have Gone Right)*, LEWROCKWELL.COM, Jan. 25, 2003, <http://www.lewrockwell.com/yates/yates70.html>.

130. *Id.*

131. Adams, *supra* note 40, at 272.

132. Yates, *supra* note 129, at 1.

compelling governmental interest sufficient to withstand the strict scrutiny standard,<sup>133</sup> whereas societal discrimination cannot withstand strict scrutiny analysis.<sup>134</sup> Nor has the Court or the nation embraced Charles Lawrence's path-breaking analysis showing how persistent, unconscious racism hinders the progress of minorities,<sup>135</sup> particularly African Americans.

Unless provable evidence of intentional discrimination can be found, affirmative action as a voluntary remedy, calibrated to compensate for the present effects of past racial injustice, fails to shelter race-conscious decision-making. This is true despite the contested possibility that public schools are more segregated today than they were prior to *Brown*, and despite the disputed prospect that "[c]urrent resegregation trends threaten thirty years of progress."<sup>136</sup> Thus, government policy-makers who implement voluntary race-conscious policies, either to achieve their own interest or the interest of others, emphasize diversity and hope this interest can be found adequate to withstand strict scrutiny.<sup>137</sup> It is possible, and I think very likely, that this move confirms Derrick Bell's observation that "the concept of diversity . . . is a serious distraction in the ongoing efforts to achieve racial justice."<sup>138</sup>

Given Derrick Bell's skepticism, Justice O'Connor's *Grutter* opinion should be considered warily. Reviewing the disputed racial classifications under strict scrutiny, the Court had to determine whether the University of Michigan Law School's classification scheme was narrowly tailored to further a compelling governmental interest.<sup>139</sup> For the first time, a majority of the Court embraced

133. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (instructing that racial balancing should only be used as a solution to a de jure constitutional violation); see also *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) ("But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.").

134. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (opinion of Powell, J.) ("[T]he purpose of helping certain groups . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility . . .").

135. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes." (citation omitted)).

136. Eboni S. Nelson, *Parents Involved & Meredith: A Prediction Regarding the (Un)Constitutionality of Race-Conscious Student Assignment Plans*, 84 DEN. U. L. REV. 293, 297 (2006). But see *Thernstrom & Thernstrom*, *supra* note 8, at 6 (directly contesting this claim by stating "[s]chools are not becoming 'resegregated'; they cannot, in any case, magically become racially balanced given existing residential patterns").

137. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2755 (2007) ("[B]oth school districts assert additional interests . . . to justify their race-based assignments. . . . Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment . . .").

138. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

139. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

diversity as a compelling interest that satisfies strict scrutiny.<sup>140</sup> Citing *Richmond v. J.A. Croson Co.*<sup>141</sup> with approval, Justice O'Connor held that strict scrutiny is required because, absent searching inquiry, the courts "have no way to determine what 'classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simply racial politics."<sup>142</sup> Evidently, "the distinction between illegitimate and benign policies remain[s] crucial,"<sup>143</sup> allowing "race-based action [when] necessary to further a compelling governmental interest."<sup>144</sup> Justice O'Connor made clear that "[c]ontext matters when reviewing race-based governmental action," and accordingly, courts "must take relevant differences into account."<sup>145</sup>

### B. *Toward a Critical Race View of the Cathedral*

Charged with the resolution of a dispute at the heart of the intersection of race and higher education, the *Grutter* opinion represents an extension of a quarter-century (from 1978 to 2003) of wrangling "concerning government policies that were designed to create racial diversity in schools."<sup>146</sup> Justice O'Connor's resolution of the pending question—whether diversity designed to create a critical mass of underrepresented students provides sufficient educational benefits to constitute a compelling purpose within the meaning of strict scrutiny<sup>147</sup>—required a review of a constellation of issues that have plagued affirmative-action preference programs for some time. She endorses Justice Powell's view that a diverse student body is a compelling state interest that can justify racial preferences in admissions<sup>148</sup> when the university's policy "d[oes] not purport to remedy past discrimination," but instead endeavors "to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination."<sup>149</sup> One interpretation of Justice Powell's *Bakke* decision is that "the Constitution [only] forbid[s] blatant quotas . . . but allow[s] more subtle systems of racial discrimination."<sup>150</sup> Justice O'Connor accepts that the achievable benefits of diversity must be the product of a narrowly tailored

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140. *Id.* at 325.

141. 488 U.S. 469 (1989) (plurality opinion).

142. *Grutter*, 539 U.S. at 326 (quoting *Croson*, 488 U.S. at 493).

143. Dworkin, *supra* note 9, at 95.

144. *Grutter*, 539 U.S. at 327.

145. *Id.* (internal quotation marks omitted).

146. NOWAK & ROTUNDA, *supra* note 1, at 807.

147. *Grutter*, 539 U.S. at 327–29.

148. *Id.* at 325.

149. *Id.* at 319.

150. Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 NW. U. L. REV. 249, 275 (2004) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–320 (1978) (opinion of Powell, J.)).

approach that appears more or less subtle. Narrow tailoring apparently requires “serious, good faith consideration of workable race-neutral alternatives.”<sup>151</sup> Though the dissent questions whether Michigan seriously considered race-neutral alternatives,<sup>152</sup> Justice O’Connor accepts the following propositions: (1) “today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints”;<sup>153</sup> (2) “[t]he Law School’s educational judgment that diversity is essential to its educational mission is one to which [the Court should] defer”;<sup>154</sup> (3) “given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in [America’s] constitutional tradition”;<sup>155</sup> (4) “education . . . is the very foundation of good citizenship”;<sup>156</sup> and (5) law schools, as training grounds for the nation’s leaders, must have “legitimacy in the eyes of the citizenry,” purchased by providing a pathway that is “visibly open to talented and qualified individuals of every race and ethnicity.”<sup>157</sup>

Not everyone agrees. Justice Kennedy asserts that Justice O’Connor’s decision, premised on deference to the university’s good faith, departs from any meaningful strict scrutiny, and accordingly, “the Court lacks authority to approve” of racially based admission policies, “even in this modest, limited way.”<sup>158</sup> As we have seen, evidence exists showing that African American students thrive in racially homogenous environments, such as those provided by Historically Black Colleges.<sup>159</sup> The persistence of such evidence provokes suspicion regarding the Supreme Court’s ready acceptance of the putative benefits derived from a critical mass of students, including the educational returns resulting from diversity. Benefits purportedly include “cross-racial understanding,” “breaking down racial stereotypes,” and making classroom discussions “livelier, more spirited, and . . . more enlightening.”<sup>160</sup> Such claims are not falsifiable and hence remain unverifiable. The relevant question from an outsider-fairness approach is whether these purported benefits deliver a tangible return to black students and other minorities or, alternatively, imply

151. *Grutter*, 539 U.S. at 339.

152. *Compare id.* at 340 (“[T]he Law School sufficiently considered workable race-neutral alternatives.”), *with id.* at 394 (Kennedy, J., dissenting) (“The Court . . . is willing to be satisfied by the Law School’s profession of its own good faith.”).

153. *Id.* at 330 (majority opinion).

154. *Id.* at 328.

155. *Id.* at 329.

156. *Id.* at 331 (quoting *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954)).

157. *Id.* at 332.

158. *Id.* at 387 (Kennedy, J., dissenting).

159. *See, e.g., id.* at 364–65 (Thomas, J., concurring in part and dissenting in part) (discussing the “evidence that racial . . . heterogeneity actually impairs learning among black students”).

160. *Id.* at 330 (majority opinion) (internal quotation marks omitted).

that benefits are nowhere to be found. Failure to address this question, when coupled with data suggesting that black students thrive in a nondiverse environment and that public schools disfavor black students and other minority students, supports the inference that the interests of outsiders are irrelevant to the Court and the university's admission calculus.

Whether O'Connor, Kennedy, or the university is correct, decision-making within the race-conscious arena is tainted by paradox. For present purposes, I intend to focus on four hypotheses connected with O'Connor's opinion in *Grutter*: (1) the prospect that although outright racial balancing remains impermissible, the goal of attaining a critical mass of students can nonetheless transform an admissions program into an *acceptable* form of racial balancing so long as it is not obvious about the use of race; (2) the possibility that the doctrine of strict scrutiny can be newly interpreted to permit race-conscious redress for societal discrimination, which signals that *Gratz* and *Parents Involved* may have been wrongly decided; (3) the likelihood that *Grutter* can be understood as an effort to conceal the law school's exclusionary policies; and (4) that critics who praise Justice O'Connor's decision in *Grutter* while expressing contempt for the Court's subsequent opinion in *Parents Involved* should understand that Justice O'Connor's concurrence in *Gratz* established the foundation for the latter decision.

### 1. Racial Balancing and the Non-Obvious Use of Race?

First, compare Justice O'Connor's reliance on the Michigan Law School's good faith operation of its admissions program<sup>161</sup> with her determination that outright racial balancing is impermissible.<sup>162</sup> Based on (1) Justice O'Connor's assertion that "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals *regardless* of race or ethnicity";<sup>163</sup> (2) Justice Powell's determination that an admissions policy with racial quotas is impermissible;<sup>164</sup> and (3) that the percentage of African American students admitted by the University of Michigan's law school *mirrors*, almost precisely, the percentage of black applicants,<sup>165</sup> it is possible to infer the following proposition: the goal of attaining a critical mass of underrepresented students can transform a program into an *acceptable* form

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161. *Id.* at 336–37 (accepting the conclusion that "[s]ome attention to numbers . . . does not transform a flexible admissions system into a rigid quota," particularly when race is used as a plus factor).

162. *Id.* at 329–30 (accepting that "outright racial balancing . . . is patently unconstitutional").

163. *Id.* at 331 (emphasis added).

164. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.).

165. *Grutter*, 539 U.S. at 383–85 (Rehnquist, C.J., dissenting) (discussing the precise correlation between the percentage of the law school's pool of applicants who are members of three minority groups (African American, Hispanic, and Native American) and the percentage of the admitted applicants who are members of these same groups).

of racial balancing so long as the admissions policy does not obviously focus on race.<sup>166</sup> One way of not obviously focusing on race is to use race as a “plus factor” that constitutes “only one element in a range of factors” enabling the institution to attain a diverse student body.<sup>167</sup> The option of enrolling a critical mass of minorities through a form of individualized treatment supplies constitutional cover for what would otherwise represent impermissible racial balancing.<sup>168</sup> But as Professors Nowak and Rotunda suggest, this is not without risk for members of minority groups.<sup>169</sup> “When the government distributes benefits under a strict quota system,” it ultimately “burdens members of minority races” by limiting their participation in society’s institutions, and may in due course limit their rights by accepting and augmenting “the bias of members of the majority race.”<sup>170</sup>

Professor Rodriguez forcefully argues that

individualized consideration does not restrain [admissions officers’] race-based judgments—it unleashes them. Individualized consideration gives state actors the power not just to notice race, as [a] mechanical interpretation does, but also to define race, on a case-by-case basis. This power means race will be treated as more relevant to some applicants than to others.<sup>171</sup>

Such a move “creates a stereotyping danger” and “demands that people perform their ethnicity for admissions officers.”<sup>172</sup> “These performances help shape the ways minorities see themselves and their role in the United States,” and provide a “powerful incentive[ for minority applicants] to play the script that the dominant culture has written for its minorities.”<sup>173</sup>

## 2. Remedying Societal Discrimination in the Mirror of Strict Scrutiny?

The second paradox is connected with Justice O’Connor’s acceptance of the Court’s long-held conclusion that remedying the legacy of societal

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166. See Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007).

167. See, e.g., *Grutter*, 539 U.S. at 324, 334 (citing *Bakke*, 438 U.S. at 314–16 (opinion of Powell, J.)).

168. See *Gratz v. Bollinger*, 539 U.S. 244, 276, 280 (2003) (O’Connor, J., concurring) (finding impermissible a race-conscious admissions policy that lacks individualized consideration); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007) (disallowing the school districts’ approaches as a form of balancing).

169. NOWAK & ROTUNDA, *supra* note 1, at 791.

170. *Id.* (footnotes omitted).

171. Cristina M. Rodriguez, *Against Individualized Consideration*, 5 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 08-18, 2008), available at <http://ssrn.com/abstract=1148352>.

172. *Id.* at 6–7.

173. *Id.* at 7–8.

discrimination does not comply with the mandates of strict scrutiny<sup>174</sup> because it “cannot be deemed sufficiently compelling to pass constitutional muster.”<sup>175</sup> It is possible, of course, that she now disagrees, but trapped by her own language in earlier cases,<sup>176</sup> she may find it difficult to acknowledge the modification of her position. In fact, Chief Justice Rehnquist found such a change. He concluded that Justice O’Connor and the Court had decided to vitiate the strict scrutiny standard in favor of leniency when the governmental unit could adduce evidence that race was being deployed in good faith.<sup>177</sup> This move may implicate either an alteration in the substance of the compelling interest prong *or* the infusion of leniency with respect to the narrow-tailoring component of the strict scrutiny test. Perhaps, concluding that her a priori understanding of strict scrutiny is impoverished by her ex post inspection of the effects of the Court’s standard of review, Justice O’Connor now believes that societal discrimination is sufficiently delineated to allow reasonable observers to enforce race-conscious redress. One way of facilitating this move is to lower the standard of review either directly or indirectly. If so, an intriguing (but difficult to prove) possibility emerges, namely, that *Grutter actually* stands for the proposition that public school districts and public universities are entitled to voluntarily remedy the intergenerational effects of societal discrimination.<sup>178</sup> It is possible to speculate that earlier precedent precluding this move has been overruled covertly without the Court giving linguistic expression to its newly discovered leniency in the face of the governmental unit’s good faith claims.

If this is the implied meaning of Justice O’Connor’s opinion in *Grutter*, it follows that one view of the cathedral suggests that *Parents Involved* and *Gratz* were wrongly decided.<sup>179</sup> In both cases the government dispensed with

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174. *Grutter v. Bollinger*, 539 U.S. 306, 323–24 (2003) (endorsing Justice Powell’s proposition that neither an interest in “reducing the historic deficit of traditionally disfavored minorities” in a profession, nor “remediating societal discrimination,” justify race-conscious decision-making (internal quotation marks omitted)).

175. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 288 (1986) (O’Connor, J., concurring in part and dissenting in part) (“[A] governmental agency’s interest in remediating ‘societal’ discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.”).

176. *See, e.g., id.*

177. *Grutter*, 539 U.S. at 365 (Rehnquist, C. J., dissenting).

178. To her credit, Justice Ginsburg, whose opinion Justice Breyer joined, states the obvious. *See Grutter*, 539 U.S. at 345 (Ginsburg, J., concurring) (“It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”).

179. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753–54 (“Like the University of Michigan undergraduate plan struck down in *Gratz*, the plans here ‘do not provide for a meaningful individualized review of applicants’ but instead rely on racial classifications in a ‘nonindividualized, mechanical’ way.” (internal citation omitted)).

individualized treatment in the sense articulated in *Bakke*.<sup>180</sup> Instead, the government directly supplied, or claimed to supply, group-based remedies premised on membership in racial or ethnic groups that have suffered from past racial disadvantages made tangible by current racial isolation.<sup>181</sup> Following Justice Stevens' understanding<sup>182</sup> and Dworkin's imprimatur,<sup>183</sup> one might argue that the university in *Gratz* and the school districts in *Parents Involved* voluntarily and legitimately imposed racial balancing as a remedy for societal discrimination,<sup>184</sup> or as a device for eradicating the effects of public school segregation.<sup>185</sup> Advocates of the use of race-conscious remedies might conclude that such a move could operate consistently with Justice Ginsburg's intuition,<sup>186</sup> and if explained adequately, might facilitate Professor Lawrence's understanding of unconscious racism, which diminishes the necessity of proving intent.<sup>187</sup>

Conceivably, this approach would support either of two remedial avenues: First, court-imposed remedies crafted to eliminate exclusionary admissions, educate outsiders in a serious way, and diminish the governmental unit's obsession with status; or second, judicial leniency sustained by evidence of a governmental unit's good-faith attempt to eradicate the vestiges of discrimination, which would enable the court to permit the unit to impose remedies on itself. But, even if attempts to sustain race-conscious remedies for societal discrimination in *Gratz* and *Parents Involved* are now seen as

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180. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314–15 (opinion of Powell, J.) (articulating that diversity as a justification cannot sustain a selection system in which members of particular ethnic groups are guaranteed places solely on the basis of race). See also *Parents Involved*, 127 S. Ct. at 2753–54 (“[U]nder each [school district] plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor.”); *Gratz v. Bollinger*, 539 U.S. 244, 270–72 (2003) (“[T]he University’s policy, which automatically distributes 20 points . . . to every single ‘underrepresented minority’ application solely because of race, is not narrowly tailored . . .”).

181. See, e.g., *Parents Involved*, 127 S. Ct. at 2753 (describing the difference between the school’s plans in *Parents Involved* and in *Grutter*, where the admissions program “focused on each applicant as an individual, and not simply as a member of a particular racial group,” and the “classification of applicants by race . . . was only as part of a ‘highly individualized, holistic review’” (quoting *Grutter*, 539 U.S. at 337)).

182. See, e.g., *Parents Involved*, 127 S. Ct. at 2799 (Stevens, J., dissenting) (citing the Court’s 1968 approval of a Massachusetts statute mandating racial integration in that state’s school system).

183. See Dworkin, *supra* note 9, at 92 (“No one doubts that avoiding academic ghettos is a desirable goal . . . . How can the Constitution be read to deny [states] that opportunity?”).

184. See, e.g., *Gratz*, 539 U.S. at 298 (Ginsburg, J., dissenting) (describing America’s “overtly discriminatory past, and the effects of centuries of law-sanctioned inequality [that] remain painfully evident in our communities and schools”).

185. *Parents Involved*, 127 S. Ct. at 2823 (Breyer, J., dissenting).

186. See *Grutter*, 539 U.S. at 345–46 (Ginsburg, J., concurring).

187. See generally Lawrence, *supra* note 135 (arguing, in part, that prejudices exist independent of overt racist motives, and that “traditional notions of intent” are inadequate for addressing societal discrimination).

permissible, and however unassailable the outcome in *Grutter* may be, the argument justifying its end result—race-conscious decision-making aimed at ensuring diversity—becomes questionable. This is because the law school's policy was *not* offered as a remedy for societal or intentional discrimination, and hence it is difficult to understand why its policy should be entitled to lenient scrutiny. Instead, the law school justified its admissions program on grounds that its policy provided benefits that accrued predominantly to the overall educational process,<sup>188</sup> and therefore largely to the benefit of non-minority students—those who do not come from disfavored backgrounds. If this inspection is correct, *Grutter* would likely fail lenient scrutiny analysis because the law school's good faith claims are not premised on the provision of tangible benefits to members of racially disadvantaged groups.

### 3. Does *Grutter* Conceal Exclusionary Policies?

Third, if *Grutter* truly precludes facially obvious racial balancing, then this case can be seen as an effort to *conceal* the law school's exclusionary policies and defend its elite status within the academic pantheon. Justice O'Connor asserts that the Constitution “derive[s] content by an interpretive process of inclusion and exclusion,”<sup>189</sup> but it is *impossible* to overlook the fact that the law school's basic admissions policy—predicated on the LSAT exam and the applicant's undergraduate grade point average—is designed to disfavor African Americans and other outsiders,<sup>190</sup> and appears to provide few benefits to the citizens of Michigan.<sup>191</sup> Here we should recall Edmund Husserl's claim that “[w]hen someone uses some particular linguistic expression, we have to distinguish between what the use of the expression . . . intimates and what the expression itself means.”<sup>192</sup> Although the petitioner's expert witness intimated “that race is not the predominant factor in the Law School's admissions calculus,”<sup>193</sup> disadvantaged minorities would have comprised less than five percent of the entering class in the year 2000 “instead of the actual figure of 14.5 percent” but for the challenged race-preference policy.<sup>194</sup> Stated another way, this means that more than two-thirds of the students from underrepresented minority groups ultimately admitted were in fact *initially*

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188. See *Grutter*, 538 U.S. at 314–16 (2003).

189. *Id.* at 327 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 343–44 (1960)).

190. See *id.* at 320.

191. See *id.* at 359 (Thomas, J., concurring in part and dissenting in part) (“In 2002, graduates of the [University of Michigan] Law School made up less than 6% of applicants to the Michigan bar, even though the Law School's graduates constitute nearly 30% of all law students graduating in Michigan.” (citation omitted)).

192. MACINTYRE, EDITH STEIN, *supra* note 54, at 42 (characterizing Husserl's consideration of language and meaning).

193. *Grutter*, 539 U.S. at 320.

194. *Id.*

excluded.<sup>195</sup> They were the tip of the iceberg. The law school's policy seeks to valorize a system of admissions that improves the overall educational process via diversity. Comprehensively understood, however, this system also sustains and defends the educational benefits available for privileged white students, administrators and faculty, and perhaps preserves legacy preferences or other devices favored by elites.<sup>196</sup> Coextensively, evidence accumulates that the racial diversity the University of Michigan prefers may impair learning among black students.<sup>197</sup> Nevertheless, contrary to the skepticism toward governmental racial classifications that she exhibited in *Adarand*,<sup>198</sup> Justice O'Connor, in *Grutter*, deferred to the good-faith educational judgment of the very university that created the exclusionary admissions policy in the first place.<sup>199</sup>

Nor is complicity in this process restricted to the university. The State of Michigan's education system is an organic holistic structure wherein the university and the law school as flagship institutions operate at the apex of this structure. This arrangement is funded by coercive transfers (taxes) from all of Michigan's citizens. Deference properly understood, consciously or unconsciously, promotes an educational scheme that eviscerates adequate educational opportunities for outsiders. This system maintains public schools that operate as "dropout factories"<sup>200</sup> while impairing enrolled students' educational performance and cognitive abilities. Deliberately or inadvertently, this approach is complemented by a university system seasoned with a touch of affirmative action that is standardized to camouflage failing public schools and the university's own participation in subordination. This process, taken as a whole, may provide evidence of the presence of derogatory racial stereotypes, perhaps repressed from consciousness, and prevents the law school from admitting its intent to publicly proclaim its preference for Caucasian students.<sup>201</sup>

From a Critical Race Theory perspective, deference to law school administrators—like deference to the university's co-conspirator, the state education system—materializes as a paradox that preserves racial disadvantages suffered by black Americans. Purchased with eternal surveillance, Critical Race analysis uncovers racism within the law school's admissions policy. Classical-liberal reformists, animated by the determination that policy-makers should be held responsible for the adverse effects of their programs and initiatives, regardless of a lack of evidence of discriminatory

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195. *See id.*

196. *See id.* at 368 (Thomas, J. concurring in part and dissenting in part).

197. *See id.* at 364.

198. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995).

199. *Grutter*, 539 U.S. at 328.

200. *See infra* note 296 and accompanying text.

201. *See Lawrence, supra* note 135, at 340 (describing examples of unconscious racism in society).

intent, find that disparate impact lurks in the background of the law school's admission policy.<sup>202</sup> Here the case is much stronger because "no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, law schools continue to use the test"<sup>203</sup> and thereby control admission.

Aside from classical-liberal reformist theories of disparate impact, public choice scholars show that, whether in private or in public, individuals are motivated by self-interest.<sup>204</sup> Coherent with this perception, Professor Lawrence argues that "the greatest stumbling block to any proposal to modify the intent requirement [in discrimination cases] will not be its lack of jurisprudential efficacy but the perception among those who give substance to our jurisprudence that it will operate against their self-interest."<sup>205</sup> Professor Lawrence also acknowledges Derrick Bell's view that "the interests of blacks in achieving racial equality have been accommodated only when they have converged with the interests of powerful whites: The legal establishment has not responded to civil rights claims that threaten the superior societal status of upper and middle class whites."<sup>206</sup>

The interests of privileged individuals are expressed in the university's admissions policy, and adducible evidence sustains this conclusion. *Grutter* and *Gratz* came before the courts in a peculiar posture. Black and Hispanic students, seeking to defend affirmative action, won federal court permission to intervene in both *Gratz* and *Grutter*.<sup>207</sup> The university embraced the intervenors' participation based on the contention that "[b]oth the intervenors and the university are fighting for the same thing: the preservation of a diverse student body."<sup>208</sup> The credibility of the university's purported embrace is vitiated by noting that the "intervenor students plan[ne]d to offer an argument that the university itself dispute[d]: that the university needs to have affirmative-action policies in place to remedy its own racial discrimination."<sup>209</sup>

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202. See, e.g., Preston C. Green, III, *Can Title VI Prevent Law Schools From Adopting Admissions Practices That Discriminate Against African-Americans?*, 24 S.U. L. REV. 237, 254–55 (1997) (analyzing the application of disparate impact theory as applied to law school admissions).

203. *Grutter*, 539 U.S. at 369–70 (Thomas, J., concurring in part and dissenting in part).

204. Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309, 310 (2002).

205. Lawrence, *supra* note 135, at 387.

206. *Id.* (citing Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980)).

207. *Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999).

208. *6th Circuit Court Says Black and Latino Students Can Join Michigan Affirmative Action Cases*, BLACK ISSUES HIGHER EDUC., Aug. 19, 1999, at 108 (quoting "Elizabeth Barry, University of Michigan associate vice-president and vice general counsel, [who] praised the [Sixth Circuit Court of Appeals] ruling.").

209. Peter Schmidt, *Minority Students Win Right to Intervene in Lawsuit Attacking Affirmative Action*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 3, 1999, at A68.

Successfully charging the University of Michigan as well as the State of Michigan with intentional discrimination might well have altered the dynamics of the case, the intensity of judicial scrutiny, possibly the outcome in *Gratz*, and the defensibility of the Court's *Grutter* decision in the court of public opinion. The latter point is relevant because the *Grutter* holding, approving racial preferences, was effectively overruled by the voters of the state of Michigan.<sup>210</sup> Furthermore, a successful indictment could have placed the university and the state under judicial supervision, complete with court-imposed remedies that differed in a substantial way from the university's preferred status-enhancing policies.

In addition, "there is much to be said for the view that the use of tests and other measures to 'predict' academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law."<sup>211</sup> My own experience leading a program providing an alternative pathway to law school matriculation<sup>212</sup> persuades me that an admissions system wedded solely to test scores, and perhaps "poisoned by numerous exceptions to 'merit,'"<sup>213</sup> can only be defended on the basis of subordination. Thus, the law school's sustained allegiance to measures that it knows (and hence *intends to*) produce racially skewed results that persistently disfavor black and Hispanic students should not be entitled to deference;<sup>214</sup> that is, unless the Court and the nation are prepared to endorse gormless procedures and untrustworthy rhetoric exemplified by the law school's participation in compartmentalization. Compartmentalization constitutes a mental process that enables the law school to sustain its asserted commitment to racial justice, while ignoring the exclusionary impact that its less-than-benign admissions policies impose on African Americans and other minorities.

The law school's selective admissions policy, inescapably linked to the "desire to select racial winners and losers"<sup>215</sup> and flavored with a token commitment to diversity, cannot be convincingly separated from the state's refusal to open its educational doors in a serious way to Michigan's

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210. Kimberly Chow, *Michigan Votes to Stop Affirmative Action in State Universities on Tuesday*, YALE DAILY NEWS, Nov. 9, 2006, available at <http://www.yaledailynews.com/articles/printarticle/18868> ("Michigan voters passed a state referendum banning the use of affirmative action . . .").

211. *Grutter v. Bollinger*, 539 U.S. 306, 367 (2003) (Thomas, J. concurring in part and dissenting in part).

212. From 1989 to 1993, I led a summer program at the University of Detroit Mercy School of Law, which allowed talented individuals from disadvantaged backgrounds to enroll in the law school after passing a pre-admissions course.

213. *Grutter*, 539 U.S. at 367–68 (Thomas, J., concurring in part and dissenting in part).

214. *See id.* *See also* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2778 (2007) (Thomas, J., concurring) (observing that the Supreme Court does not typically defer to state entities in assessing whether a given practice complies with its compelling interest test).

215. *Grutter*, 539 U.S. at 369 (Thomas, J., concurring in part and dissenting in part).

disadvantaged citizens.<sup>216</sup> This calculus sustains the interest and superior status of privileged white students and upper-middle class white administrators.<sup>217</sup> The law school's preferred approach indicates that underrepresented students should not be prized because they are excellent students who might benefit from a good education or because they might assist the nation in fulfilling its commitment to the eradication of inequality, but because they provide benefits to others; they assist the law school in maintaining both its prestige and status by creating the appropriate laboratory conditions required to educate *non-minority* students about the nuances associated with different ethnicities. A focus on prestige and status is by its very nature exclusive and not inclusive. To exclude means to shut out persons from place, society, and privilege or otherwise make it impossible for disfavored individuals and groups to attend or succeed.<sup>218</sup> The annual *U.S. News & World Report* survey shows that law school rankings are enhanced by the number of individuals they exclude.<sup>219</sup> Thus, sincere efforts aimed at sustaining an institution's status via its admissions process must be exclusionary at its core.

Unfortunately, Justice O'Connor and the Court defer to an educational process that is plumped up by a magician's conjuring trick: add a dollop of color so long as the exclusionary status-enhancing benefits of the institution remain intact. In the meantime, African Americans and Hispanics reap a bitter harvest of adversity connected to poor public schools: high attrition rates at college and at law school,<sup>220</sup> high failure rates on bar examinations,<sup>221</sup> and

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216. *Id.* at 368–69 (discussing some alternatives to the school's current admissions policy of "selective admissions").

217. See Lawrence, *supra* note 135, at 387.

218. See, e.g., 5 OXFORD ENGLISH DICTIONARY 508 (2d ed. 1989).

219. See *Special Report: America's Best Graduate Schools: Schools of Law*, U.S. NEWS & WORLD REP., Apr. 7–14, 2008, at 66 (showing that schools with the lower 2007 acceptance rates are the higher ranked law schools).

220. See, e.g., Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1771–75 & tbls. 3–5 (2006) (showing significant minority attrition "at every stage of the educational process"). According to Professor Sander, "Hispanics drop out of high school far more frequently than do whites, blacks, or Asians[, and i]n law school and on the bar, . . . they have very high attrition rates." *Id.* at 1773. In terms of black students, "the largest sources of . . . attrition come from college entrants not graduating and law school matriculates not entering the bar." *Id.* at 1774. Blacks make up to eight percent of entering law students, but make up only between five to six percent of new lawyers. *Id.*

221. See, e.g., Ilya Somin, "Active Liberty" and Judicial Power: What Should Courts Do to Promote Democracy?, 100 NW. U. L. REV. 1827, 1840 (2006) (book review) ("[Fifty percent] of African-American law students from a 1991 Law School Admissions Council sample either fail to graduate within five years of admission (41%) or graduate but do not take the bar (9%). The comparable rate for white students is 24% with 17% failing to graduate and 7% failing to take the bar." (citing Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1844 (2005) (footnote omitted))). According to Professor Somin, Ayres and Brooks conclude that some racial disparities emerge, because "law schools,

high attrition rates at large corporate law firms.<sup>222</sup> The combination of these effects, whether intentional or inadvertent, whether conscious or unconscious, serves to diminish the number of African American and Hispanic lawyers practicing in the State of Michigan and the United States. Because the State of Michigan's educational hierarchy instantiates policies that preserve educational malpractice in Michigan's elementary and high schools,<sup>223</sup> this constitutes proof of the state's complicity in an educational system, including university admissions, that validates minority inferiority. Overlooking the state's responsibility for this move allows diversity rhetoric to transform itself into a majoritarian device that blurs and flavors an ongoing process of exclusion that affirms that the University of Michigan Law School's admissions policies cannot be seen as part of a benign program. A more plausible explanation implies that its race-conscious admissions program is motivated by notions of racial inferiority and simple racial politics.

A lengthy inspection is not required in order to discover the ill-fated future destination of diversity rhetoric. Since *Grutter*, institutions of higher education have transformed diversity and its correlative objectives<sup>224</sup> into cosmopolitanism. Diversity programs have shifted their focus away from increasing minority access to education toward serving the broader and more abstract goal of promoting campus diversity.<sup>225</sup> One program, aimed at encouraging students from underrepresented backgrounds to participate in science and engineering, is instructive:

Of the 20 students in the program, 10 were Hispanic, with six coming from colleges in Puerto Rico and another born and raised in Peru. Five were black, with two born in Africa and two others the children of Jamaican immigrants. . . . Of the three white participants, one was a young man who routinely identifies himself on applications as "African-American" because his father was raised in Egypt.<sup>226</sup>

Deborah Jones Merritt explains that courts and policy-makers, when and if they act, are quite willing to ensure that "[s]elective colleges have just the 'right' mix of white and minority students, enough African American and Latino students to give the campus an urbane, cosmopolitan air without threatening the white campus majority."<sup>227</sup> It appears that society's elites

seeking to maximize diversity, admit 'high risk' black students without informing them of the high probability that they might fail to complete their studies." *Id.*

222. Sander, *supra* note 220, at 1820.

223. See *infra* Part III.C.

224. See Peter Schmidt, *From 'Minority' to 'Diversity,'* CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 3, 2006, at A24.

225. *Id.*

226. *Id.*

227. Deborah Jones Merritt, *Brown's Legacy: The Promises and Pitfalls of Judicial Relief*, 56 NEGRO EDUC. REV. 51, 53 (2005).

demand that encounters with race (particularly when encountering blacks and Hispanics) remain consistent with the notions of minority inferiority and elite privilege. The transmutation of diversity programs into a form of cosmopolitanism allows university administrators to trumpet their commitment to racial justice without revolutionizing their educational policies to truly reflect it. Against this background, the law school's self-portrayal as an institution committed to racial justice amounts to little more than "an outpouring of self-important romance" reminiscent of a 'late-night fit of drunken sentimentality.'"<sup>228</sup>

Critical Race scholarship indicates that the Court's liberals are willing to interpret the Fourteenth Amendment generously to reify race-conscious affirmative-action programs and policies<sup>229</sup> that "confer a benefit on white elite groups,"<sup>230</sup> while "perpetuat[ing] the existing racial hierarchy."<sup>231</sup> At the same time, those same liberals have proved *unwilling* to interpret the Constitution with the same generosity in order to provide outsiders with expanded opportunities to engage in educational experimentation, such as school vouchers, which may advance their educational and economic circumstances.<sup>232</sup> Although some members of the liberal wing of the *Zelman v. Simmons-Harris* Court may have preferred to remain oblivious to the ambition of black students to escape failing schools and insisted that their future be conscripted to serve the interests of educational bureaucrats,<sup>233</sup> Justice O'Connor, by contrast, was rightly concerned about the fate of outsiders.<sup>234</sup> Coherent with James Forman's research confirming that school choice has strong ties to the civil rights movement and black nationalism,<sup>235</sup> Justice O'Connor's concurrence in *Zelman* commendably allowed outsiders to

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228. See Steven D. Smith, *Conciliating Hatred*, 144 *FIRST THINGS* 17, 18 (2004) (quoting ROBERT F. NAGEL, *JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE* 61–62 (1994)).

229. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 n.1 (1995) (Stevens, J., dissenting).

230. Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 *COLUM. L. REV.* 1547, 1559 (1991) (book review).

231. *Id.*; see also Hutchison, *Liberal Hegemony?*, *supra* note 67, at 611–12 (giving additional context to Justice Stevens' *Adarand* dissent).

232. Delgado, *supra* note 230, at 1559.

233. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 684–85 (2002) (Stevens, J., dissenting) (dismissing as irrelevant the educational crisis confronting African Americans in the Cleveland School District).

234. See *id.* at 663–76 (O'Connor, J., concurring).

235. James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 *GEO. L.J.* 1287, 1288–89 (2005) ("[T]oo often missing from the historical account is the left's substantial—indeed, I would say leading—contribution to the development of school choice. . . . [T]hat choice has deep roots in liberal educational reform movements, the civil rights movement, and black nationalism.").

escape the racially discriminatory dropout factories furnished by the Cleveland school board.<sup>236</sup>

In *Grutter*, however, Justice O'Connor returns to a familiar judicial pattern: she defers to status, academic prestige, and Michigan's educational bureaucrats premised on the law school's asserted good faith.<sup>237</sup> Charles Lawrence "posits a connection between unconscious racism and the existence of cultural symbols that have racial meaning."<sup>238</sup> He argues that:

The "cultural meaning" of an allegedly racially discriminatory act is the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly. This test would thus evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance. A finding that the culture thinks of an allegedly discriminatory governmental action in racial terms would also constitute a finding regarding the beliefs and motivations of the governmental actors . . . .<sup>239</sup>

This approach uncovers the motivation and significance of governmental action based on the implicit, racial message contained in the government's conduct.<sup>240</sup> In keeping with Charles Lawrence, the cultural meaning of diversity rhetoric symbolizes a constraint on minority participation while providing a firewall to protect an institution's pursuit of status. Consistent with that intuition, Richard Delgado shows that race-conscious remedies were designed by members of dominant groups and produce scarce results.<sup>241</sup> These remedies preserve elite ideals, including the exclusion of the masses, which reinforce the continued economic and political dominance by elites.<sup>242</sup> Hence, it is doubtful that diversity rhetoric contributes to the eradication of the vestiges of discrimination, which are all too evident in American society.

#### 4. *Finding Paradox in Supreme Court Critics?*

The fourth hypothesis suggests that the answer to Dworkin's critique of the *Parents Involved* Court can be found in paradox. Finding no evidence that the districts' plans were implemented to remedy the effects of past intentional

236. See *Zelman*, 536 U.S. at 663 (O'Connor, J., concurring) ("I think it is worth elaborating on the Court's conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents. To do otherwise is to ignore how the educational system in Cleveland actually functions.").

237. See *Grutter v. Bollinger*, 539 U.S. 306, 328, 337-39 (2003).

238. Lawrence, *supra* note 135, at 324.

239. *Id.* (footnote omitted).

240. *Id.*

241. Richard Delgado, *Affirmative Action as a Majoritarian Device: Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1224 (1991).

242. *Id.* at 1224-25.

discrimination,<sup>243</sup> the government's interest in diversity appeared to be the only pathway to race-conscious student assignments.<sup>244</sup> *Grutter's* diversity rationale proved unavailing to the school districts in *Parents Involved* for two reasons. First, "*Grutter* 'relied upon considerations unique to institutions of higher education,'" and race, "standing alone," determined the school assignments of some students in the Seattle and Louisville districts.<sup>245</sup> Contrary to Justice O'Connor's insistence on the subtleties of individualized treatment, the school districts used "racial classifications in a 'nonindividualized, mechanical' way,"<sup>246</sup> as opposed to utilizing race as a plus factor.<sup>247</sup> Second, the school districts flubbed the "'narrow tailoring' prong of strict-scrutiny analysis because they had not seriously considered race-neutral alternatives."<sup>248</sup>

Nonetheless, Dworkin, in an obvious concession to paradox, praises O'Connor's *Grutter* decision<sup>249</sup> despite the fact that the decision, affirmed by her concurrence in *Gratz*, furnished the groundwork for the *Parents Involved* holding, which he detests.<sup>250</sup> Dworkin argues that O'Connor "upheld the University of Michigan Law School's race-conscious admission plan because the point and structure of that plan demonstrated beyond question that its purposes were legitimate."<sup>251</sup> Critical Race scholarship suggests this claim is dubious.<sup>252</sup> Dworkin rebukes Justice Roberts' assertion that the Court need not take a view on "whether 'racially concentrated' schools are educationally disadvantageous . . . because it would make no difference to its decision even if [those who thought] such schools seriously harmed students."<sup>253</sup> Here, Dworkin rightfully scolds the Court—if racially concentrated schools are necessarily harmful to outsiders.<sup>254</sup> At the same time, Dworkin overlooks the liberal wing of the Court's recent enthusiasm for dismissing the depth of the educational crisis that confronts minority parents in Cleveland, Ohio.<sup>255</sup> There is a cruel irony in the liberal wing's reliance on the First Amendment to deny black students the opportunity to attend better-performing and more highly

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243. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2752 (2007).

244. *Id.* at 2753.

245. Estreicher, *supra* note 14, at 240 (quoting *Parents Involved*, 127 S. Ct. at 2753–54).

246. *Parents Involved*, 127 S. Ct. at 2754 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276, 280 (2003) (O'Connor, J., concurring)).

247. *See id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

248. Estreicher, *supra* note 14, at 241.

249. *See* Dworkin, *supra* note 9, at 95.

250. *See id.* at 92, 94–95.

251. *Id.* at 95.

252. *See supra* Part III.B.1–3.

253. Dworkin, *supra* note 9, at 92.

254. *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2776–77 (2007) (Thomas, J., concurring) (describing the mixed evidence on this question); *infra* Part III.C.

255. *See, e.g.,* Hutchison, *Liberal Hegemony?*, *supra* note 67, at 611 (discussing the views of dissenting Justices Stevens, Souter, and Breyer in *Zelman*).

integrated schools.<sup>256</sup> But such is the “majestic equality of the law[.]”<sup>257</sup> It equips hierarchs (judicial or otherwise) with an acceptable vocabulary to cover their blindness to the plight of disadvantaged Americans when it suits their preferences. The jurisprudential effort to invalidate Ohio’s school choice program, premised largely “on implausible grounds[,] effectively constitutes a decision to preserve the racially stigmatizing effects of public schools for future generations.”<sup>258</sup>

Dworkin notes that Justice Kennedy’s concurrence in *Parents Involved* was more sanguine about the legitimacy of race-conscious programs in public schools<sup>259</sup> than was Chief Justice Roberts’ opinion,<sup>260</sup> but it is worth documenting that Kennedy’s equanimity is tempered by his dissent in *Grutter*.<sup>261</sup> Kennedy, perhaps O’Connor’s most faithful disciple, held that the school districts could legitimately concern themselves with preventing “*de facto* resegregation.”<sup>262</sup> Equally clear, “he found a special infirmity in the cities’ plans”: they made the use of race an obvious deciding factor.<sup>263</sup> Consistent with Justice Kennedy’s intuition, the *Parents Involved* Court ruling accepts that the *Grutter* decision stands for the proposition that “the law school did not count back from its applicant pool to arrive at the ‘meaningful number’” of minority students who were “necessary to achieve a genuinely diverse student body.”<sup>264</sup> On the other hand, one might argue that in *Parents Involved* the school districts only engaged in slightly different, yet impermissible, behavior when they endeavored to reach approximately the same result permitted in *Grutter*. If true, acceptable modes of race-conscious behavior depend largely on form as opposed to substance.

*Grutter*, *Gratz*, and *Parents Involved* concentrated on “whether affirmative action is *permissible*, not whether it is required.”<sup>265</sup> While Dworkin contends that the latter case is the opening salvo in a remarkable judicial insurrection, it is worth remembering that the primary question before the Supreme Court in both *Grutter* and *Gratz* was whether the admissions programs fixed the share of benefits so as to limit the participation of underrepresented minorities or

256. See *id.* at 612, 613–14, 617, 618–19 (specifically noting the *Zelman* dissenters’ deployment of an “inflexible interpretation of the Establishment Clause”).

257. ANATOLE FRANCE, *THE RED LILY*, in *THE SIX GREATEST NOVELS OF ANATOLE FRANCE* 837 (Winifred Stephens trans., 1918).

258. Hutchison, *Liberal Hegemony?*, *supra* note 67, at 629.

259. Dworkin, *supra* note 9, at 95.

260. *Id.* at 94.

261. See *Grutter v. Bollinger*, 539 U.S. 306, 387–88 (2003) (Kennedy, J., dissenting).

262. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (cited in Estreicher, *supra* note 14, at 242).

263. Dworkin, *supra* note 9, at 95–96.

264. *Parents Involved*, 127 S. Ct. at 2757.

265. See Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3, 3 (2004).

others, or whether the programs were sufficiently flexible to elude judicial preclusion. Answering in the affirmative in *Grutter*, O'Connor demurs in *Gratz*.<sup>266</sup> Race-conscious programs, characterized by an obvious use of race<sup>267</sup> without meaningful individualized review, and which are not narrowly tailored to the state's interest, thus cannot withstand *Grutter*'s deferential review. Consistent with this logic, the *Parents Involved* Court invalidated the school districts' obvious race-conscious policies, which were aimed at reducing racial homogeneity.<sup>268</sup> To be sure, both prongs of strict scrutiny—the compelling interest test and narrow tailoring—“have an ‘in-the-eye-of-the-beholder’ quality.”<sup>269</sup> According to Professor Estreicher, this is particularly true:

[A]fter the *Grutter* Court . . . accepted as a compelling interest race-based viewpoint diversity, and the [attendant] necessity of maintaining a “critical mass” of the under-represented racial viewpoint. Once that hurdle was cleared, insistence on narrow tailoring seems almost churlish. . . . Indeed, narrow tailoring appears paradoxical because if racial diversity is what the state is seeking (and can lawfully seek), racial preferences may be the best way to get there—hence, the lament . . . , highlighted in [Justice] Breyer[’s *Parents Involved*] dissent, that it is simply incoherent to require the state to get to a valid goal by the most circuitous route possible.<sup>270</sup>

Nevertheless, “guided by the principle that ‘[t]he Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race,’”<sup>271</sup> and animated by the non-preferment standard,<sup>272</sup> the Court invalidated the challenged school assignment plans.<sup>273</sup> The non-preferment principle is violated when students “would be placed in preferred schools or denied placement in preferred schools because of their

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266. See *Grutter*, 539 U.S. at 343–44; *Gratz v. Bollinger*, 539 U.S. 244, 276–77 (2003) (O'Connor, J., concurring).

267. The obviousness of the university's undergraduate admissions policy is verifiable. Beginning in 1998, the policy automatically distributed twenty points to every applicant who was a member of historically underrepresented racial and ethnic groups including African Americans, Hispanics, and Native Americans. *Gratz*, 539 U.S. at 254–56. Beginning in 1999, Michigan's admissions policy added an additional layer of review for some applications, but it is clear that the school admitted virtually every qualified applicant from underrepresented groups. See *id.* at 256–57.

268. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007).

269. Estreicher, *supra* note 14, at 243.

270. *Id.*

271. Nelson, *supra* note 136, at 325–26 (quoting *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring)).

272. Estreicher, *supra* note 14, at 249.

273. *Parents Involved*, 127 S. Ct. at 2746.

race.”<sup>274</sup> Dworkin disagrees. Citing Chief Justice Roberts, Dworkin observes that:

Seattle measured diversity only by the balance between white and nonwhite students, and Louisville only by the proportion of African-American students, in both cases neglecting the distinct diversity contributed by Asian-American, Latino, and other racial and ethnic groups. In fact, he said, these plans aimed not at diversity but at a particular racial balance, [which] was not, on its own, a compelling state interest.<sup>275</sup>

Conversely, Dworkin accepts that a court overly concerned with the pernicious effects of racial balancing cannot ignore Justice Breyer’s “unanswerable” dissent which determined that racial isolation has very serious educational disadvantages.<sup>276</sup>

Although Dworkin admits that contrary evidence exists, he claims the Court is entitled to *defer* to the educational judgment of school districts when they accept that “black students do significantly better when they are not in either almost all-black schools or schools with very few blacks.”<sup>277</sup> Dworkin’s readiness to defer to the judgment of educational bureaucrats must be bracketed. He condemns the eagerness of conservative Justices to defer to legislatures when they pass measures that political conservatives favor,<sup>278</sup> but in a stunning capitulation to irony, Dworkin urges deference to educational entities when they implement his preferences<sup>279</sup> despite their unanswerable complicity in the nation’s educational crisis.<sup>280</sup> Although it is possible that he has thought longer and harder about the effects of racial isolation than I have, I contend that instead of deferring to the educational judgment of school boards that have contributed to America’s ongoing educational malpractice, we should seriously consider the social science evidence that Dworkin is unprepared to accept. We should defer to the educational judgment of African American parents who prefer a well-educated child prepared to triumph over the vestiges of discrimination over a child whose proximity to white students vindicates the preferences of others. Accordingly, grounds for suspicion regarding the challenged school districts’ admissions plans persist. Such suspicion is incompatible with the deferential review that Dworkin and Justice Breyer favor.

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274. Estreicher, *supra* note 14, at 249

275. Dworkin, *supra* note 9, at 94.

276. *Id.* at 92.

277. *Id.*

278. *Id.*

279. *See id.*

280. *See generally* THERNSTROM & THERNSTROM, *supra* note 8, at 12–13 (showing that by the twelfth grade, both black and Hispanic students are almost four years behind their white and Asian counterparts).

### C. Grounds for Suspicion

Critical Race scholars should be just as distrustful of race-conscious public school plans as they are of similar university plans unless such plans serve to tangibly benefit the interest of marginalized students. The goal of the contested plans in Seattle and Louisville was the same: to *reduce* racial homogeneity in individual schools.<sup>281</sup> For current purposes, I concentrate on the Seattle district, wherein decreasing the level of racial homogeneity was achieved through racial tiebreakers.<sup>282</sup> Homogeneity was determined by a baseline established by the district's racial composition: "In the district's public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified by Seattle for assignment purposes as nonwhite."<sup>283</sup> The base-line was designed to impede the ability of certain students to select entrance in the more popular schools.<sup>284</sup> If a given public high school was oversubscribed (selected by too many students), and if the "school [was] not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls 'integration positive,' and the district employs a tiebreaker that selects for assignment students whose race 'will serve to bring the school into balance.'"<sup>285</sup>

Analyzed from a Critical Race perspective, the Seattle admissions plan arouses mistrust for a number of reasons. First, the district offered the customary rhetoric about the inherent educational value of diversity.<sup>286</sup> This vocabulary conceals the possibility that diversity denotes a limitation on the participation of members of particular disadvantaged groups and constitutes a distraction from educational reform that places the interest of outsiders at the center of the educational debate.

[U]nder the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not.<sup>287</sup>

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281. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007).

282. *Id.* at 2747 (describing the Seattle Public school plan).

283. *Id.*

284. See *id.*

285. *Id.* If racial tiebreakers were insufficient for selection purposes, non-racial tiebreakers were used during the next step in the selection process. *Id.*

286. *Id.* at 2754 ("The Seattle 'Board Statement Reaffirming Diversity Rationale' speaks of the 'inherent educational value' in '[p]roviding students the opportunity to attend schools with diverse student enrollment.'").

287. *Id.*

In the latter case, African Americans would be prevented from attending their preferred schools, while a white student would be welcomed. As the Court noted, “[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is ‘broadly diverse.’”<sup>288</sup> That is, unless diversity rhetoric can be understood as a vehicle for limiting the participation of black students and members of other disfavored groups.

To be sure, one might endeavor to justify race-conscious decision-making in Seattle in a more straightforward way: the purported necessity of creating racially integrated schools as a device to overcome racially segregated housing patterns.<sup>289</sup> If evidence sufficient to meet a high burden of proof can be adduced that shows the creation of racially integrated schools leads to improved cognitive achievement—including higher test scores<sup>290</sup> and lower drop-out rates—and otherwise operates as an efficacious remedy for past discrimination (intentional or otherwise), black students and their parents might have reason to celebrate the school districts’ heroic efforts.<sup>291</sup> However, the school districts themselves *declined* to either embrace the conclusion that they were guilty of intentional discrimination or to present evidence (persuasive or otherwise) that their current race-conscious policy constituted a remedy for past intentional discrimination.<sup>292</sup> Equally clear, the district failed to show that it had engaged in unconscious racism, declined to provide convincing evidence that African Americans and other outsiders received cognitive benefits from the district’s race-conscious approach, and refused to explain why a district committed to diversity nevertheless intentionally operated a single-race academy.<sup>293</sup> Taken together, these failures signal that the school system has a credibility problem when it comes to race.

Second, grounds for suspicion surface over the issue of deference to local school boards. Whether *Parents Involved* was correctly decided, or whether Justice Breyer’s well-argued dissent is correct, it is difficult to accept his proposal that the Court should, in deference to the school board’s judgment,

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288. *Id.*

289. *Id.* at 2755.

290. *See, e.g.,* THERNSTROM & THERNSTROM, *supra* note 8, at 4 (“Test scores matter. . . . They tell us precisely what we need to know if we have any hope of reforming education and closing the racial gap in academic achievement. Good tests measure the knowledge and skills that demanding jobs and college courses require.”).

291. *Cf. Parents Involved*, 127 S. Ct. at 2755 (declining to resolve the dispute on test scores).

292. *Id.* at 2761 (“Not even the school districts go this far, and for good reason.”).

293. *See id.* at 2777 n.12 (Thomas, J., concurring) (“Of course, if the Seattle school board were truly committed to the notion that diversity leads directly to educational benefits, operations [of an ‘African American Academy’] with such a high ‘nonwhite’ enrollment would be a shocking dereliction of its duty to educate the students enrolled in that school.”).

decline to invoke strict scrutiny.<sup>294</sup> The reason for this difficulty is clear: Substantial evidence shows that America's school boards have contributed to the nation's educational malpractice. Malpractice disproportionately disfavors African American students and other underrepresented minorities.<sup>295</sup> For example, a recent study conducted by Johns Hopkins University reveals that seventy-eight high schools in the State of Michigan with high concentrations of minority students have been labeled "dropout factories."<sup>296</sup> Twenty-one of Detroit's thirty-seven high schools made the list.<sup>297</sup> It makes little sense to respect the judgment of entities that have so far failed to educate black students, let alone eradicate the vestiges of discrimination in America. Rather than deference, as classical-liberal reformists caution, policy-makers who operate such deficient programs should be held responsible for the discriminatory effects of their programs, even if a lack of evidence of purposeful discriminatory intent can be found. A positive step in the right direction would arm parents with the presumptive legal right to pursue economic damages from incompetent and discriminatory school systems as a form of reparation.

Finally, the viability of diversity and integration to solve problems should give rise to escalating incredulity. Although Justice Ginsburg rightly argues that "we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools,"<sup>298</sup> suspicion arises over the possibility that diversity is being offered as a convenient panacea. At best, the evidence is mixed because "[p]erhaps desegregation does not have a single effect, positive or negative, on the academic achievement of African American students."<sup>299</sup> When and if white and minority students perform better academically in majority white schools, it is "likely that these schools provide greater opportunities to learn," but desegregation standing alone is not sufficient to

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294. See *id.* at 2766 (majority opinion) (discussing Justice Breyer's proposed deference and describing it as "fundamentally at odds with our equal protection jurisprudence" (internal quotation marks omitted)).

295. See *supra* notes 69–78 and accompanying text.

296. *Michigan Stung by Study's Dropout List*, DETROIT NEWS, Oct. 30, 2007, at B1. The Associated Press commissioned this analysis of Education Department data and its online presentation shows each state's high school statistics. ASSOCIATED PRESS, DROPOUT FACTORIES (2007), <http://hosted.ap.org/specials/interactives/wdc/dropout/index.html>.

297. *Michigan Stung by Study's Dropout List*, *supra* note 296. For a list of Detroit's thirty-seven high schools see *greatschools: The Parent's Guide to K-12 Success*, Detroit Public High Schools, <http://www.greatschools.net/schools.page?city=Detroit&lc=h&state=MI&st=public&showall=true>.

298. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting).

299. *Parents Involved*, 127 S. Ct. at 2776 (Thomas, J., concurring) (quoting Ronald D. Henderson et al., *High-Quality Schooling for African American Students*, in *BEYOND DESEGREGATION: THE POLITICS OF QUALITY IN AFRICAN AMERICAN SCHOOLING* 162, 166 (Mwalimu J. Shujaa ed., 1996)).

produce these desired results.<sup>300</sup> Belying its commitment to diversity, the Seattle school board “operates a K–8 ‘African-American Academy,’ which has a ‘nonwhite’ enrollment of 99%.”<sup>301</sup> Such incoherent behavior correlates with mounting incredulity regarding the legitimacy of government efforts that are premised on diversity rhetoric. Indeed, from a Critical Race perspective, mistrust of educational hierarchs ought to be the null hypothesis.

Moreover, attempts to exchange diversity, cosmopolitanism, or integration for an adequate education are likely to eviscerate the economic aspirations of outsiders, because a concentration “on demographic issues detracts from focusing on improving schools.”<sup>302</sup> Consistent with that claim, “Professor Bell has noted that the economic and political realities of urban America may mean that earnest implementation of the desegregation principle can actually hurt the educational opportunities afforded black children” in some cases.<sup>303</sup> The simple-minded pursuit of racial proximity or racial diversity as a classroom goal is not an adequate substitute for a serious commitment to improving the educational circumstances of African American students and other outsiders.

Derrick Bell’s assertion is supported by the fact that “in 1899, there were four academic public high schools in Washington D.C.”<sup>304</sup> Of the four, one was black and the other three were white.<sup>305</sup> Yet, on standardized tests given in 1899, “students in the black high school averaged higher test scores than students in two of the three white high schools.”<sup>306</sup> That same school “repeatedly equaled or exceeded national educational norms on standardized tests in the 1930s, 1940s, and early 1950s.”<sup>307</sup> From this evidence, it could be determined that racial proximity and racial diversity standing alone are not adequate substitutes for educational performance that transcends difficult circumstances and would enable black students to overcome the vestiges of slavery and discrimination.<sup>308</sup>

300. *Id.* at 2776–77 n.11 (quoting Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 744 (1998)).

301. *Id.* at 2777.

302. *Id.* at 2776 (quoting Henderson et al., *supra* note 299, at 166).

303. NOWAK & ROTUNDA, *supra* note 1, at 764 (citing Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976)).

304. THOMAS SOWELL, BLACK REDNECKS AND WHITE LIBERALS 204 (2005) [hereinafter SOWELL, BLACK REDNECKS].

305. *Id.*

306. *Id.*

307. *Id.*; Thomas Sowell, *Black Excellence—The Case of Dunbar High School*, 35 PUB. INT. 3, 8 (1974).

308. See SOWELL, BLACK REDNECKS, *supra* note 304, at 204. Difficult circumstances can be shown by examining the occupations of the parents of the children at this school: “As of academic year 1892–93, of the known occupations of these parents, there were 51 laborers, 25 messengers, 12 janitors, and one doctor.” *Id.*

Consistent with this intuition, in November 2007, Dr. Serge Herzog published the first study that objectively measured the “[e]ffects of ethnic [and] racial diversity among students and faculty on [the] cognitive growth of undergraduate students.”<sup>309</sup> “Using objective measures of compositional, curricular, and interactional diversity based on . . . enrollment records of [more than] 6,000 students at a public research university,” the study found that diversity failed to yield patterns that show a “positive correlation with objective measures of cumulative academic achievement.”<sup>310</sup> While additional research is needed, diversity if it promises anything at all, delivers substantially less than it promises. Individuals and groups animated by a serious interest in the educational progress of outsiders should be wary of diversity rhetoric whether it comes from the Supreme Court or other elites. Although such rhetoric may be in the interest of elites, it is unlikely that diversity, duly transmuted into cosmopolitanism, serves the interest of African Americans and other outsiders in obtaining an adequate education.

#### IV. CONCLUSION

From a Critical Race perspective, “[a] comprehensive and culturally informed inspection of the historical and sociological evidence demonstrates that . . . the purported contribution of public schools [and public universities] to [our] democracy [has] inescapably been fused . . . with racist oppression and apartheid-like exclusion, and thus contribute to social stratification.”<sup>311</sup> This grim history cannot be rescued by diversity rhetoric. Given this history, it is possible to understand that Justice O’Connor’s concurrence in *Zelman* constitutes her most promising decision, because she placed the interest of outsiders ahead of elites. She emphasized the parents’ right to exercise true private choice, because “[t]o do otherwise is to ignore how the educational system in Cleveland [and America] actually functions.”<sup>312</sup> She deserves our admiration because she was unwilling to conscript the interest of outsiders in order to reify liberal perspectives on the First Amendment.<sup>313</sup>

While diversity as a prolepsis—the present anticipation—of the cosmopolitan era fails to capture everyone, it now seems clear that Justice O’Connor’s recent explication of race and education favors the magisterium of diversity rhetoric combined with deference to the educational judgment of administrators who have contributed directly or inadvertently to America’s public education crisis. But of course, she is not alone. Whatever side one

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309. Serge Herzog, *Diversity and Educational Benefits: Moving Beyond Self-Reported Questionnaire Data*, EDUC. WORKING PAPER ARCHIVE, Nov. 19, 2007, at 1, <http://www.uark.edu/ua/der/EWPA/Research/Achievement/1799.pdf>.

310. *Id.* at 1, 38–40 (“[T]he statistical evidence scarcely permits a ringing endorsement of the view that racially diverse classrooms produce distinctively greater educational gains.”).

311. Hutchison, *Liberal Hegemony?*, *supra* note 67, at 629.

312. *Zelman v. Simmons-Harris*, 536 U.S. 639, 663 (2003) (O’Connor, J., concurring).

313. *See, e.g.*, Hutchison, *Liberal Hegemony?*, *supra* note 67, at 629–30.

takes in the various disputes that lie at the heart of the intersection of race and education, a distinct possibility surfaces: there is an ossifying contradiction between the interest of members of disadvantaged groups and what commentators claim on their behalf. Given the current state of play within the joints, race-conscious decision-making may produce ironic results that “justif[y] John Stuart Mill’s conclusion that ‘the benefits of constitutional democracy in government are not adequate to protect [disfavored groups and] individuals from the coercive power that can be exercised [or authorized] by a majority.’”<sup>314</sup> It is likely that elite decision-making everywhere, purportedly animated to solve the problem of racial isolation, can better be understood as serving the often concealed “majoritarian function of promoting popular preferences” and empowering bureaucrats “at the expense of minority interests.”<sup>315</sup> While scorning outsiders’ interest in an education that improves the cognitive achievement and economic prospects of their children, such decision-making denotes an abuse of power that often assumes a sense of tragic inevitability. A state that freezes out the interests of African Americans, Hispanics, and others has no serious claim on our allegiance.

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314. *Id.* at 640 (quoting PHILLIP E. JOHNSON, *THE RIGHT QUESTIONS: TRUTH, MEANING & PUBLIC DEBATE* 149 (2002)) (first alteration added).

315. Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1974 (1990).