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## Diversity as a Dead-End

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# Diversity as a Dead-End

Kenneth B. Nunn\*

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## I. INTRODUCTION

In January 2007, pictures surfaced on the Internet of a party hosted by a group of law students at the University of Connecticut.<sup>1</sup> The posted pictures were not flattering. While the students were doing nothing illegal, the behavior depicted in the photographs is hardly reflective of the type of conduct one would expect from future lawyers, judges, and political leaders. In fact, the pictures caused a firestorm of controversy and the interim dean and incoming dean of the school issued the obligatory expressions of

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1. Grace E. Merritt, *Off-Campus Party Theme Called Racially Insensitive: Law School Plans Session to Deal with "Hurtful" Actions*, HARTFORD COURANT, Jan. 25, 2007, at 2.

concern.<sup>2</sup> Unfortunately, the subject of the pictures, a “ghetto party,” is not a rare phenomenon on majority white college campuses.<sup>3</sup> In this post-civil rights era, ghetto parties have occurred with regular frequency on historically white college campuses attended by clean-cut middle- and upper-class white students.<sup>4</sup>

A “ghetto party” is a type of costume party where privileged white students dress up as low income Black<sup>5</sup> or Latino inner city residents and act in ways that they perceive these inner city residents would act.<sup>6</sup> White students adopt the dress codes, language styles, and body postures stereotypically possessed by urban Blacks and Latinos in order to gain a sense of superiority, or to experience vicariously the thrill of acting in the unrestrained ways they attribute to members of these communities. Sometimes white students dress in blackface to emphasize the otherness of the people they mock and to connect, consciously or unconsciously, with old racist tropes.

A few pictures illustrate the ghetto party phenomenon succinctly. In Figure 1, from the University of Connecticut law school party, a white male student wears a do-rag, a large bejeweled chain, and conspicuous gold-capped teeth, (otherwise known as a “grill”).<sup>7</sup> A young woman, who is wearing a baseball hat set askew and covered by a hooded jacket, accompanies him.<sup>8</sup> Both white students are mocking styles of dress exhibited by young urban African-Americans. In Figure 2, also from the University of Connecticut law school party, a young woman who appears to

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2. *See id.*

3. College Racism Roundup « Vox ex Machina, <http://voxexmachina.wordpress.com/college-racism-roundup/> (last visited Nov. 1, 2007) (displaying blogs that contain discussions and images of more than thirty such parties).

4. *See id.*

5. I use “Black” and “African-American” interchangeably throughout this article to refer to American citizens of African descent. “Black” denotes racial and cultural identity rather than mere physical appearance and is therefore capitalized. The word “white,” on the other hand, is not capitalized because it is not ordinarily used in this sense. *See* Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487, 487 n.1 (“[White] . . . denotes a number of separate ethnic or cultural groups.”). Some commentators have offered a political rationale for the capitalization of terms describing people of African descent, arguing that the use of lower case terms to describe Blacks indicates their lower status vis-à-vis other ethnic groups whose descriptors are capitalized. *See, e.g.,* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 4 n.12 (1991).

6. *See* Scott Farwell, Joshua Benton & Kristen Holland, *Students: Dress Not Offensive—Highland Park: Some Say High School’s Theme Days Crossed Racial Line*, DALLAS MORNING NEWS, Oct. 28, 2005, at 1B.

7. Figure 1, [http://lic.law.ufl.edu/~nunn/Figure\\_1.jpg](http://lic.law.ufl.edu/~nunn/Figure_1.jpg); *see also* The Smoking Gun, Another Celebration of Black Culture, <http://www.thesmokinggun.com/archive/years/2007/0125072/uconn1.html> (last visited Apr. 8, 2008).

8. Figure 1, *supra* note 7.

be pregnant wears a Baby Phat top while holding a bottle of wine.<sup>9</sup> Baby Phat is a clothing line that is popular in inner city areas and has a predominantly Black clientele.<sup>10</sup> Figures 3 and 4 are from a ghetto party held at Clemson University in January, 2007.<sup>11</sup> In Figure 3, a white male student is shown in blackface.<sup>12</sup> Figure 4 shows three white female students posing.<sup>13</sup> The female student on the left has stuffed her pants with some material in order to enhance the size of her buttocks.<sup>14</sup> In each of these pictures, alcohol containers are displayed prominently, as if the students intend to emphasize the licentious character of their behavior.

Figure 5 features a white female student from Tarleton State University in Texas.<sup>15</sup> She is dressed like Aunt Jemima, a stereotypical Black image,<sup>16</sup> with a handkerchief on her head. She is holding a bottle of pancake syrup in one hand and bottle of malt liquor wrapped in a paper bag in the other.<sup>17</sup> The picture was taken at a ghetto party the students held to commemorate the Martin Luther King, Jr. holiday.<sup>18</sup>

While these pictures are not necessarily exemplary of college student behavior, they are significant. They demonstrate the continuing salience of race on college campuses after years of integration and during an era of official colorblindness. The students depicted in these pictures may not be virulent "Bull Connor" racists, but they are evidently willing to enhance their own social standing by denigrating someone else's or, at the very least, they are prepared to entertain and titillate themselves without regard for the feelings of others. That their targets are vulnerable sectors of the African-American community simultaneously shows their ignorance of Black culture and their disdain for the African-American community as a whole. What

9. Figure 2, [http://lic.law.ufl.edu/~nunn/Figure\\_2.jpg](http://lic.law.ufl.edu/~nunn/Figure_2.jpg).

10. See Ann Brown, *Simmons Gets \$140 Million for Clothing Labels*, 34 BLACK ENTERPRISE, Mar. 2004, at 25 (describing Baby Phat as one of the "crown jewels" of the urban fashion market).

11. See generally IndependentMail.com, Blacks Mimicked; Racial Relations Questioned, <http://www.independentmail.com/news/2007/jan/29/student-dress-party-sparks-race-dialogue/> (last visited Apr. 8, 2008).

12. Figure 3, [http://lic.law.ufl.edu/~nunn/Figure\\_3.jpg](http://lic.law.ufl.edu/~nunn/Figure_3.jpg).

13. Figure 4, [http://lic.law.ufl.edu/~nunn/Figure\\_4.jpg](http://lic.law.ufl.edu/~nunn/Figure_4.jpg).

14. *Id.*; see Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1739 (2000) (describing large buttocks as a "racial marker" associated with persons of African descent).

15. Figure 5, [http://lic.law.ufl.edu/~nunn/Figure\\_5.jpg](http://lic.law.ufl.edu/~nunn/Figure_5.jpg).

16. See Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 644 (2000) (describing history and use of the Aunt Jemima image).

17. Figure 5, *supra* note 15.

18. See The Smoking Gun, *Outrage Over Texas College MLK Party*, <http://www.thesmokinggun.com/archive/years/2007/0125071mlk1.html> (last visited Apr. 8, 2008).

matters here is not whether all white students participate in these kinds of parties, but why some number of otherwise intelligent college or law students would find a ghetto party to be an attractive social outlet.

One cannot help but wonder, upon seeing pictures such as these, whether the Supreme Court's rulings on diversity in higher education have made any difference at all. Of course, the answer to this question depends both on how one frames the problem represented by the "ghetto party" phenomenon and how one interprets the Supreme Court's diversity jurisprudence.<sup>19</sup> Certainly, it could be argued that the ghetto partygoers suffer from a lack of exposure to African-American people and culture. On the other hand, the inverse could be true. It may be that the presence of African-American students on historically white campuses has generated this new entertainment trend as a form of backlash. In other words, the problem raised by the ghetto parties could be framed either as one resulting from an existent monoculture, with an insufficient distribution of people of African descent, or as one that is in essence the result of an oppressive power hierarchy. To illustrate this latter possibility, consider that in 1850, when Africans in South Carolina constituted almost sixty percent of the population,<sup>20</sup> their problem was not insufficient numbers, but a brutal and dehumanizing slavery.

Even if the problem was isolated to one resulting from a monocultural environment, the Supreme Court's diversity cases could only assist if they defined diversity in a way that allowed institutions to admit significant numbers of the type of individuals that the institutions were lacking.<sup>21</sup> In the remainder of this essay, I argue that this is precisely what the Supreme Court's cases on diversity do not do. Furthermore, I argue that the Supreme Court's view of diversity is flawed because it does not address existing power differentials between Blacks and whites. As a result, it is my contention that diversity, as it is defined by the Supreme Court, is a dead-end for those who are concerned about social justice and equity in higher education.

In Part II of this article, I explore the origins of the diversity concept and contrast it with the competing concept of remediation.<sup>22</sup> In Part III, I summarize the Supreme Court's recent jurisprudence on diversity and examine how the Supreme Court defines diversity for purposes of permitting

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19. See discussion of the Supreme Court's rulings on diversity *infra* notes 77-136 and accompanying text.

20. See CAMPBELL GIBSON & KAY JUNG, U.S. CENSUS BUREAU, SOUTH CAROLINA—RACE AND HISPANIC ORIGIN: 1790 TO 1990, <http://www.census.gov/population/documentation/twps0056/tab55.pdf> (last visited Nov. 5, 2007).

21. See discussion *infra* Part IV.C.

22. See *infra* notes 26-76 and accompanying text.

affirmative action in higher education.<sup>23</sup> In Part IV, I point out some critical shortcomings with the Supreme Court's definition of diversity.<sup>24</sup> I conclude with the observation that diversity, as it is presently conceptualized, is a bad choice for social justice advocates and suggest an alternative course of action for the future.<sup>25</sup>

## II. ORIGINS OF THE DIVERSITY CONCEPT

When affirmative action policies were first implemented in the 1960s, they were invariably justified on remedial grounds.<sup>26</sup> Almost by definition, "affirmative action" was understood to mean private or government policies "adopted to correct or compensate for past or present discrimination . . . ."<sup>27</sup> Most of these early examples of affirmative action arose in the employment context and earned judicial approval of their remedial justifications.<sup>28</sup> When an early affirmative action program, commenced under Title VII, finally reached the Supreme Court in *United Steelworkers v. Weber*,<sup>29</sup> the Court based its approval of the plan on its remedial character.<sup>30</sup> Describing the plan as a "temporary measure" intended to "eliminate a manifest racial imbalance" in the union workforce, the Court approved the plan because it did not excessively harm white employees and was "designed to break down old patterns of racial segregation and hierarchy."<sup>31</sup> Furthermore, the Court emphasized, the plan helped fulfill Title VII's remedial purpose to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."<sup>32</sup> By the end of affirmative action's first

23. See *infra* notes 77–134 and accompanying text.

24. See *infra* notes 137–215 and accompanying text.

25. See *infra* note 217 and accompanying text.

26. For a historical overview of the early years of affirmative action policies, see generally JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* (1996).

27. Anthony M. Platt, *The Rise and Fall of Affirmative Action*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 67, 72 (1997).

28. See, e.g., *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971) (approving affirmative action plan designed to eliminate "the effects of past racial discriminatory practices and . . . mak[e] meaningful in the immediate future the constitutional guarantees against racial discrimination . . ."). For a discussion of other cases similarly approving early affirmative action efforts, see Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 683–687 (2004).

29. 443 U.S. 193 (1979).

30. *Id.* at 208.

31. *Id.*

32. *Id.* (citing 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey)).

decade, courts generally approved affirmative action and other race-conscious measures, so long as they were established to eliminate present effects of past or current discrimination.<sup>33</sup>

The diversity rationale for affirmative action was not introduced until 1978 in the leading Supreme Court case of *University of California Regents v. Bakke*.<sup>34</sup> In *Bakke*, the Court considered whether the U.C. Davis School of Medicine violated statutory or constitutional prohibitions against race discrimination when it set aside sixteen out of one hundred entering-class seats for racial minority group applicants.<sup>35</sup> Four Justices concluded that the U.C. Davis admissions program was permissible as a race-conscious measure under the Constitution.<sup>36</sup> Four other Justices held that the plan unlawfully used race in violation of Title VI and did not reach the constitutional issue.<sup>37</sup> Justice Powell also found the plan unlawful, but did so on constitutional as well as statutory grounds.<sup>38</sup> As a result, the outcome in the *Bakke* case was fractured. Powell aligned with four Justices to permit Alan Bakke's admission to the medical school on the grounds that he established a Title VI violation.<sup>39</sup> However, Powell also formed a second majority with four other Justices in ruling that neither Title VI nor the Fourteenth Amendment provided an absolute bar to the use of race as an admissions factor in higher education.<sup>40</sup>

Powell's opinion, which only stated his own views and not those of the Court, became the leading statement on the legality of affirmative action in higher education in the years that followed.<sup>41</sup> According to Powell, "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education."<sup>42</sup> Powell struck down the U.C. Davis admissions plan on the grounds that it rigidly relied on racial factors<sup>43</sup> and did not consider each applicant as an individual while considering race as merely one diversity factor among many.<sup>44</sup>

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33. See Frymer & Skrentny, *supra* note 28, at 684-85.

34. 438 U.S. 265 (1978).

35. See *id.* at 275-78.

36. *Id.* at 378 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

37. *Id.* at 421 (Burger, C.J., Stewart, Rehnquist & Stevens, JJ., concurring in the judgment in part and dissenting in part).

38. *Id.* at 319-20.

39. *Id.* at 325.

40. *Id.* at 325-26.

41. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 323 (2003) (noting that Justice Powell's opinion in *Bakke* "has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views.").

42. *Id.* at 311-12.

43. *Id.* at 315.

44. *Id.* at 317.

It is important to note that *Bakke* did not replace the remedial justification for race-conscious admissions programs with the diversity justification. Rather it added another rationale alongside the remedial justification for policy makers to choose from. Because U.C. Davis administrators did not claim they had previously discriminated against minority applicants, “there was no judicial determination of a constitutional violation as a predicate for the formulation of a remedial classification.”<sup>45</sup> So at the end of the Court’s treatment of the issue in *Bakke* there were two justifications for race-conscious admissions: diversity, and remediation where present effects of past discrimination were shown.

While Justice Powell gave civil rights advocates a new basis for justifying affirmative action programs, he also began the process of restricting the application of remediation claims. Where some Justices had previously argued (as four Justices did in *Bakke*) that benign racial classifications designed to benefit minorities should be subject to a lesser, “intermediate” level of appellate review, Powell argued that all racial classifications should be subject to strict scrutiny and thus only justifiable by a substantial government interest.<sup>46</sup> Powell did not get the votes in *Bakke* to put the argument for intermediate scrutiny to rest, but later majorities in subsequent cases seized on his invitation to do so.

In *Wygant v. Jackson Board of Education*,<sup>47</sup> Justice Powell again authored an opinion seeking to establish strict scrutiny as the standard for all racial classifications, this time gaining a plurality in support of his reasoning.<sup>48</sup> In *Wygant*, the Supreme Court struck down a collective bargaining agreement that allowed a school board to lay off white teachers with greater seniority before laying off minority teachers with lesser seniority.<sup>49</sup> All racial classifications, Powell wrote, “must be justified by a compelling governmental interest”<sup>50</sup> and achieved by means that are “narrowly tailored” to accomplish that interest.<sup>51</sup> The Court found that the school board could not justify the racially based layoffs as a means of combating societal discrimination.<sup>52</sup> More damaging to remedially based affirmative action claims was the Court’s deployment of the “narrowly

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45. *Id.* at 301.

46. *Id.* at 305-06.

47. 476 U.S. 267 (1986).

48. *Id.* at 269.

49. *See id.* at 284.

50. *Id.* at 274.

51. *Id.*

52. *Id.* at 283.



tailored” prong to forbid altogether the use of layoffs as a mechanism for relief when the layoffs would affect “innocent [white] individuals.”<sup>53</sup> Justice Powell argued in the plurality opinion that the layoff plan was not narrowly tailored because the school board could have sought to increase the number of minority teachers through hiring goals for new teachers.<sup>54</sup> Powell’s argument ignored the fact that subsequent layoffs could eviscerate any advances made in the numbers of minority teachers through the use of hiring goals. But in Powell’s view, it was too great a burden for currently employed teachers to give up their jobs in favor of minority teachers with lesser seniority.<sup>55</sup> In other words, the application of strict scrutiny meant that some forms of relief were not permissible if they would impact whites not personally responsible for discriminatory conduct.

Following *Wygant*, in *City of Richmond v. J.A. Croson Co.*<sup>56</sup> and *Adarand Constructors, Inc. v. Peña*,<sup>57</sup> the Court solidified the hold of the strict scrutiny standard in affirmative action cases. *Croson* rejected the City of Richmond, Virginia’s minority business set-aside plan, which required contractors receiving city contracts to subcontract at least 30% of their contracts to minority businesses.<sup>58</sup> In an opinion, this time authored by Justice O’Connor, five justices agreed that strict scrutiny was the appropriate standard to apply to the set-aside plan.<sup>59</sup> Strict scrutiny review required the City of Richmond to muster rigorous proof of past discrimination, and the Court found that it had failed to do so.<sup>60</sup> Additionally, the Court found that the plan was not narrowly tailored because the 30% set-aside was a rigid quota,<sup>61</sup> the plan included groups such as “Eskimos or Aleuts” whom the City of Richmond did not discriminate against,<sup>62</sup> and the city did not consider other race-neutral (and certainly less effective) means of increasing minority contractors such as training and race-neutral financing.<sup>63</sup>

In *Adarand Constructors*, the Supreme Court subjected to strict scrutiny federal legislation requiring a 10% minority set-aside for highway

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53. *Id.*

54. *Id.* at 282.

55. According to Justice Powell, “[w]hile hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive.” *Id.* at 283.

56. 488 U.S. 469 (1989).

57. 515 U.S. 200 (1995).

58. *Croson*, 488 U.S. at 477.

59. *Id.* at 494.

60. In fact, the Court found that “[t]he 30% quota cannot in any realistic sense be tied to any injury suffered by anyone.” *Id.* at 499.

61. *Id.* at 508.

62. *Id.* at 506.

63. *Id.* at 507.

construction.<sup>64</sup> Five years earlier, in *Metro Broadcasting, Inc. v. Federal Communications Commission*,<sup>65</sup> the Court had ruled that benign racial preference plans established by the federal government under the Fifth Amendment were to be evaluated under intermediate scrutiny.<sup>66</sup> The lesser burden in federal affirmative action cases was appropriate, according to the Court in *Metro Broadcasting*, due to the federal government's special obligation to pursue racial justice.<sup>67</sup> In *Adarand*, the Court reversed field, holding that "all racial classifications, imposed by [any] governmental actor, must be analyzed by a reviewing court under strict scrutiny."<sup>68</sup> The majority opinion in *Adarand*, drafted by Justice O'Connor, finally put to rest any belief that government efforts to dismantle American apartheid should be evaluated under a lesser standard of constitutional review, thus accomplishing what Justice Powell set out to do seventeen years earlier in *Bakke*.

The upshot of the Court's efforts to establish strict scrutiny as the standard of review in affirmative action cases was to frustrate governmental efforts to address preexisting inequalities through remedial cases. It should be remembered that the Court's strict scrutiny cases were not decided in an ideological vacuum. At the same time the Court was attempting to tighten the standard of review applied to race-conscious government measures, the backlash against affirmative action was in full throttle. Propositions against affirmative action policies passed in Washington<sup>69</sup> and California,<sup>70</sup> a Fifth Circuit decision invalidated the affirmative action program at the University of Texas,<sup>71</sup> and pundits and opinion leaders railed against the unfairness of "reverse discrimination."<sup>72</sup> In this atmosphere, whites were the new innocent victims of racial oppression and Blacks and other minority groups the new racist oppressors. It was not hard to conclude from this climate that

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64. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 208 (1995).

65. 497 U.S. 547 (1990).

66. *Id.* at 596-97.

67. *Id.* at 565-66.

68. *Adarand*, 515 U.S. at 227.

69. WASH. REV. CODE § 49.60.400 (1998) (added by Initiative Measure No. 200, approved Nov. 3, 1998).

70. CAL. CONST., art. I, § 31 (1996) (added by Initiative Measure Prop. 209, approved Nov. 5, 1995).

71. *Hopwood v. Texas*, 236 F.3d 256 (2000).

72. See, e.g., Mona Charen, *The Answer to Racial Discrimination Cannot Be More Discrimination*, ST. LOUIS POST-DISPATCH, Dec. 14, 1997, at B3; Philip Shenon, *Meese Sees Racism in Hiring Goals*, N.Y. TIMES, Sept. 18, 1985, at A16.

continuing to justify affirmative action solely on the basis of white wrongdoing was simply not prudent.

These developments may have led some civil rights advocates to abandon the remedial prong and seek greener pastures in the diversity justification for affirmative action. In fact, in the *Grutter* case, the University of Michigan<sup>73</sup> consciously avoided the remedial argument altogether.<sup>74</sup> This decision turned out to be a good one, because although the remedial argument was raised by the intervenors<sup>75</sup> in the case, it was rejected at the trial-court level, dismissed by the Sixth Circuit, and seemed to hold no interest for the Supreme Court, which granted certiorari only on the diversity question.<sup>76</sup>

### III. RECENT SUPREME COURT JURISPRUDENCE ON DIVERSITY

Before advancing to my argument that the diversity concept leaves much to be desired for social justice activists, I pause here to briefly review the Supreme Court's most recent pronouncements on what diversity is and when it can be used. The most significant and the most anticipated of these were the twin 2003 decisions concerning the University of Michigan, in which the Supreme Court addressed the question of diversity in higher education for the first time since it decided *Bakke* in 1978.<sup>77</sup> The Supreme Court also discussed diversity, this time in the context of primary and secondary education, in a decision issued in the summer of 2007 involving student assignment in the Seattle, Washington and Jefferson County, Kentucky school districts.<sup>78</sup>

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73. The University of Michigan Law School was represented in *Grutter* by the keynote speaker at this symposium, John Payton.

74. See *Grutter v. Bollinger*, 539 U.S. 306, 327-28 (2003). "Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining 'the educational benefits that flow from a diverse student body.'" (quoting Brief of Respondents at i, *Grutter*, 539 U.S. 306 (No. 02-241) (2003))

75. The remedial argument that the University's affirmative action plans could be justified as efforts to address past discrimination was raised by the student intervenors represented by Miranda Massie in the law school case, and by Theodore Shaw and the NAACP Legal Defense Fund in the undergraduate case. WENDY PARKER, *THE STORY OF GRUTTER V. BOLLINGER: AFFIRMATIVE ACTION WINS*, at 8-9, <http://www.law.wfu.edu/Prebuilt/bookchapter.pdf> (last visited Jan. 16, 2008). See also Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201, 215 (2006).

76. Indeed, both Shaw and Massie were denied time to participate in the oral arguments before the Court. *Id.* at 216.

77. See generally *Grutter*, 539 U.S. at 328.

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

A. *The University of Michigan Cases*

In *Grutter v. Bollinger*,<sup>79</sup> plaintiff Barbara Grutter challenged the use of race as a factor in admissions at the University of Michigan Law School.<sup>80</sup> The plaintiffs in a companion case, *Gratz v. Bollinger*,<sup>81</sup> challenged undergraduate admission procedures at the University of Michigan.<sup>82</sup> While race was used as a selection factor at both levels of the university, it was used in different ways. For undergraduate admissions, students were admitted pursuant to a point system.<sup>83</sup> Applicants could be awarded points for their “high school grade point average, standardized test scores, academic quality of an applicant’s high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership.”<sup>84</sup> Most controversial was the fact that applicants could be awarded points for “membership in an underrepresented racial or ethnic minority group.”<sup>85</sup>

Law school admissions did not depend on a point system of fixed values for student attributes.<sup>86</sup> Rather, students were admitted after each application received individual review and was evaluated on “all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.”<sup>87</sup> The attainment of diversity, broadly defined, was given “substantial weight” in the admissions process.<sup>88</sup> And while “the policy [did] not define diversity ‘solely in terms of racial and ethnic status,’”<sup>89</sup> the policy did, however,

reaffirm the Law School’s longstanding commitment to “one particular type of diversity,” that is, “racial and ethnic diversity with

79. 539 U.S. 306 (2003).

80. *Id.* at 317.

81. 539 U.S. 244 (2003).

82. *Id.*

83. *Id.* at 255-57.

84. *Id.* at 255.

85. *Id.* There was also a supplementary discretionary review process, used for students who possessed a minimum point score and could offer “high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography.” *Id.* at 257.

86. *Grutter*, 539 U.S. at 315 (2003).

87. *Id.*

88. *Id.* at 316 (quoting University of Michigan, Law School Admission Policy, *reprinted in* Petition for Writ of Certiorari at App. 118, *Grutter*, 539 U.S. 306 (No. 02-241) (2003)).

89. *Id.* (quoting University of Michigan, Law School Admission Policy, *supra* note 88).

special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.”<sup>90</sup>

The law school admitted that it sought to enroll a “critical mass” of students from these underrepresented groups.<sup>91</sup>

Following its earlier precedents in *Wygant*, *Croson*, and *Adarand*, the Supreme Court evaluated the Michigan Law School plan using the strict scrutiny standard of review.<sup>92</sup> This required the University of Michigan to demonstrate that the use of race in its law school admissions served a “compelling” government interest and that its use of race was “narrowly tailored” to accomplish that interest.<sup>93</sup> Noting that strict scrutiny review did not mean “strict in theory, but fatal in fact,”<sup>94</sup> the Court approved the race-conscious admissions plan.<sup>95</sup> Writing for a 5-4 majority, Justice O’Connor found diversity to be a compelling state interest in part because the law school and its amici determined that diversity was essential to the law school’s educational mission, a finding to which the Court deferred out of respect for the “expansive freedoms of speech and thought associated with the university environment.”<sup>96</sup> O’Connor also reasoned that a diverse student body enhanced the learning process,<sup>97</sup> prepared graduates for a diverse workforce and global marketplace,<sup>98</sup> and promoted the cultivation of a diverse set of future leaders.<sup>99</sup>

The *Grutter* majority also found that the law school admissions plan met the second prong of the strict scrutiny analysis in that it was narrowly tailored.<sup>100</sup> Several factors led the Court to this conclusion: the law school did not employ a quota, “insulat[ing] the individual from comparison with

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90. *Id.* (quoting University of Michigan, Law School Admission Policy, *supra* note 88).

91. *Id.* (quoting University of Michigan, Law School Admission Policy, *supra* note 88).

92. *Id.* at 326.

93. *Id.*

94. *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

95. *See id.* at 343.

96. *Id.* at 329.

97. In detailing the educational benefits of diversity, O’Connor emphasized that the Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” These benefits are “important and laudable,” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.”

*Id.* at 330 (quoting the District Court’s opinion).

98. *Id.*

99. *Id.* at 332.

100. *Id.* at 334.

all other candidates for the available seats”;<sup>101</sup> the policy used race in a “flexible, nonmechanical way”;<sup>102</sup> the law school engaged in a “individualized, holistic review of each applicant’s file”;<sup>103</sup> race was only used as a way to distinguish between otherwise qualified students and no unqualified students were admitted because of their race;<sup>104</sup> and the law school considered and gave “substantial weight to diversity factors besides race.”<sup>105</sup> Noting that “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,”<sup>106</sup> but only “serious, good faith consideration of workable race-neutral alternatives,”<sup>107</sup> the Court found that the University of Michigan had met constitutional requirements.<sup>108</sup> As O’Connor pointed out, the law school considered, and properly rejected, various alternatives as infeasible.<sup>109</sup> These included a lottery for admission, lower admissions standards, and percentage plans, all of which were inconsistent with the institution’s mission and precluded careful individualized review.<sup>110</sup>

The undergraduate affirmative action program did not fare so well under the Court’s narrow tailoring analysis. The Court rejected the undergraduate admissions scheme because unlike the law school plan, it assigned a fixed point value to an applicant’s race.<sup>111</sup> Chief Justice Rehnquist’s opinion in *Gratz* noted “[e]ven if [a student’s] ‘extraordinary artistic talent’ rivaled that of Monet or Picasso, the applicant would receive, at most, five points . . . .”<sup>112</sup> On the other hand, each minority candidate automatically received twenty points, which meant that under the policy “virtually every qualified underrepresented minority applicant [was] admitted.”<sup>113</sup>

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101. *Id.*

102. *Id.*

103. *Id.* at 337.

104. *Id.* at 338.

105. *Id.*

106. *Id.* at 339.

107. *Id.*

108. *Id.* at 343.

109. *Id.* at 340.

110. *Id.*

111. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

112. *Id.* at 273.

113. *Id.*

## B. *The Seattle and Jefferson County School District Assignment Case*

*Parents Involved in Community Schools v. Seattle School Dist. No. 1*<sup>114</sup> consolidated two cases involving parent challenges to plans that relied on race to assign students to oversubscribed public schools.<sup>115</sup> One case arose out of Seattle, Washington; the other originated in the Jefferson County School district, which serves Louisville, Kentucky.<sup>116</sup> The Seattle district was sued for maintaining segregated school system in 1969 and 1977, but neither case resulted in a court finding of unlawful segregation.<sup>117</sup> The 1969 case ended when the Seattle school district adopted a voluntary busing plan, along with other changes in policies.<sup>118</sup> The 1977 suit ended in a formal settlement agreement with the Department of Health, Education, and Welfare's Office for Civil Rights that resulted in a new busing plan and student reassignment.<sup>119</sup> In 1999, the district adopted the challenged plan, which classified children as white or nonwhite, and used the racial classifications as a "tiebreaker" to allocate slots in particular high schools.<sup>120</sup>

The Jefferson County, Kentucky district was found to have engaged in unlawful segregation as a result of a lawsuit filed in 1972.<sup>121</sup> In 2000, the District Court declared the district a unitary district and dissolved the desegregation decree after finding that the district had taken sufficient steps to eliminate the vestiges of prior segregation.<sup>122</sup> In 2001, the district adopted a voluntary plan that classified students as "black" or "other" for purposes of maintaining racial balance for elementary school assignments and transfer requests.<sup>123</sup> This plan was the subject of the current suit. The plaintiffs in both the Seattle and the Jefferson County lawsuits were white parents whose children were denied placement in schools of their choice under the respective assignment plans.<sup>124</sup>

In a highly polarized five-to-four decision, the Supreme Court struck down the primary and secondary school assignment plans, ruling that the school district reliance on the diversity justification was inapposite.<sup>125</sup> Chief Justice Roberts' often strident opinion explained that the plans, which assigned students according to whether they were "white" or "nonwhite" in

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114. 127 S. Ct. 2738 (2007).

115. *Id.*

116. *Id.*

117. *Id.* at 2803-04 (Souter, J., dissenting).

118. *Id.*

119. *Id.* at 2804.

120. *Id.* at 2806-07.

121. *Id.* at 2806.

122. *Id.* at 2809.

123. *Id.* at 2746 (majority opinion).

124. *Id.* at 2738.

125. *Id.* at 2760.

Seattle, or “black” or “other” in Jefferson County, narrowly focused on race and not “diversity” as it was broadly defined in *Grutter*.<sup>126</sup> While the school boards’ conception of diversity only accounted for race (and only two races, at that), Roberts pointed out that the *Grutter* Court only approved the diversity justification because it was substantially broader than race alone.<sup>127</sup> Quoting *Grutter* extensively, Roberts wrote:

The diversity interest was not focused on race alone but encompassed “all factors that may contribute to student body diversity[,]” . . . [including] admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.”<sup>128</sup>

Roberts also found the school reassignment plans lacking because they focused on groups and did not provide the individual evaluation the Court found important in *Grutter*.<sup>129</sup> The Court found that the plans were not narrowly tailored because the degree of racial balance sought seemed to be based on demographic factors and not any underlying educational goal.<sup>130</sup> Finally, the Court refused to apply the diversity justification outside the higher education context, explaining that “[i]n upholding the admissions plan in *Grutter* . . . , this Court relied upon considerations unique to institutions of higher education, [such as] ‘the expansive freedoms of speech and thought associated with the university environment . . . .’”<sup>131</sup>

### C. Summary

Our review of the Supreme Court’s most recent diversity cases reveals that the Court has interpreted the diversity concept in a way that severely limits its use as a justification for race-conscious government action. Diversity in itself is not a legitimate government interest, in the view of the Court.<sup>132</sup> Diversity is only acceptable as a means to some other government

126. *Id.* at 2753.

127. *Id.* at 2753.

128. *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)).

129. *Id.*

130. *Id.* at 2755.

131. *Id.* at 2754 (quoting *Grutter*, 539 U.S. at 329).

132. See *supra* note 131 and accompanying text.



end.<sup>133</sup> The only ultimate end that the Court has approved for governments to seek through diversity is higher education.<sup>134</sup> Even then, the diversity sought must include a broad range of categories and cannot be limited to racial and ethnic diversity.<sup>135</sup> Efforts solely intended to obtain racial and ethnic diversity (or “racial balance” in the eyes of the Court) violate the command of the Equal Protection Clause.<sup>136</sup>

#### IV. WHY DIVERSITY FAILS AS A SOCIAL JUSTICE TOOL

When the Supreme Court first issued its decision in *Grutter*, there was some hope among social justice advocates that the decades-long judicial retraction of tools needed to provide true equality of opportunity had ended.<sup>137</sup> However, close examination of the Court’s *Grutter* decision and the Court’s subsequent decision in *Parents Involved* show these hopes were misplaced. Diversity is not a tool for social justice, and to the extent that diversity was seen as providing an alternative to the already-threatened remedial rationale for race-conscious remedies, then diversity has turned out to be a dead end.

Diversity fails as a social justice tool for six reasons discussed in greater detail below: (1) diversity is poorly defined and thus cannot be targeted on racial and ethnic inequality; (2) diversity encourages tokenism; (3) diversity stigmatizes African-Americans and other people of color; (4) diversity provides no mechanism for addressing ongoing racial inequities; (5) the Supreme Court’s diversity jurisprudence is colorblind and ignores existing racism; and (6) diversity endorses white supremacy and is a form of victor’s justice.

##### A. Diversity Is Poorly Defined

The Supreme Court in *Bakke*, *Grutter*, and *Parents Involved* has defined diversity so broadly that virtually any characteristic can contribute to “diversity.”<sup>138</sup> Playing the piccolo could make one diverse, having an

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133. See *supra* note 131 and accompanying text.

134. See *supra* note 131 and accompanying text. It remains to be seen whether the Roberts Court will permit the diversity justification as a means to meet other goals in governmental or business settings.

135. See *supra* notes 127-128 and accompanying text.

136. See *Parents Involved*, 127 S. Ct. at 2755 (“In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.”).

137. See, e.g., Susan Low Bloch, *Looking Ahead: The Future of Affirmative Action*, 52 AM. U. L. REV. 1507, 1519-20 (2003).

138. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (noting, in evaluating factors that contribute to diversity, that “[s]uch qualities could include exceptional personal talents,

interest in computer games could make one diverse, or being ideologically opposed to affirmative action could make one diverse. Consequently, diversity cannot be used to target racial and ethnic inequality because to do so would not comport with the Supreme Court's definition of diversity.<sup>139</sup> This is precisely what happened in *Parents Involved*, where the school districts' efforts to maintain racially and ethnically diverse schools were struck down.<sup>140</sup>

Because the definition of diversity is so diffused, the diversity argument cannot be used to attack the policies of schools that do not want to become racially and ethnically diverse. After all, they are just envisioning diversity in a different way. However, the diversity argument *can* be used to attack the policy of a school that seeks ethnic diversity too aggressively. Such a school would obviously not be considering diversity in the broadest possible sense.<sup>141</sup>

Diversity can be conceptualized in two ways—both as a process and a result. Most people use the term “diversity” in the sense of diversity of result. That is, they may say “I have a diverse art collection” or “I enjoy diverse foods.” What they mean by such statements is that at the end of the day, when they examine their art collection or their diet, they can see that they have acquired many different choices of food or art. What they ordinarily do not mean is that in the process of choosing food or art, they chose randomly, without attending to the effect of their choice on the choices they have already made. Sometimes, in order to ensure one has a

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unique work or service experience, leadership potential, maturity, the poor, or other qualifications deemed important. In short an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”); *see supra* note 128 and accompanying text; *see also supra* Part II.B.

139. *See Parents Involved*, 127 S. Ct. at 2757 (“Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts. This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent.”).

140. *Id.* at 2768.

141. For example, in *Parents Involved*, the Court determined that Franklin High School would have achieved a much more diverse incoming class of students had it not depended so heavily on race in making its enrollment decisions. *Parents Involved*, 127 S. Ct. at 2756. To counteract the fact that “nonwhite enrollment exceed 69 percent, and resulted in an incoming ninth-grade class . . . that was 30.3 percent Asian-America, 21.9 percent African-America, 6.8 percent Latino, 0.5 percent Native-America, and 40.5 percent Caucasian[.]” the school exercised a “racial tiebreaker.” *Id.* However, if the school had not done this, then “the class would have been 39.6 percent Asian-America, 30.2 percent African-American, 8.3 percent Latino, 1.1 percent Native-America, and 20.8 percent Caucasian.” *Id.*

diverse art collection, one must consciously forgo a Henry O. Tanner<sup>142</sup> and choose a Jacob Lawrence.<sup>143</sup>

But this kind of selectivity is precisely what the Supreme Court does not allow government actors to engage in, at least not when it comes to race.<sup>144</sup> What educational institutions cannot do is survey their student bodies or faculties, assess that they lack racial or ethnic diversity in particular areas, and then seek to select students or faculty that would provide the kind of diversity that the institutions do not have.<sup>145</sup> To do this would be to engage in the kind of “racial balancing” that the Court frowned on in *Parents Involved*.<sup>146</sup>

The Court can only do this because the Court decouples diversity from its ordinary meaning and substitutes an abstract meaning for diversity.<sup>147</sup> Diversity in the abstract becomes a legitimate government interest, but the Court assumes that racial and ethnic diversity in concrete terms is not valuable as such.<sup>148</sup> Consequently, *Grutter* and *Parents Involved* make it possible for a university to be a “diverse” institution without any racial or ethnic diversity at all.<sup>149</sup>

### B. Diversity Encourages Tokenism

The process-oriented interpretation of diversity encourages tokenism. I use “tokenism” here in the sense that Martha Fineman does in speaking about the uneven advances that women have made in the legal profession.<sup>150</sup> She describes tokenism thusly: “Traditional definitions of tokenism refer to a manner of adaptation whereby societally powerful institutions seem to concede to pressure by outsiders by including one or two ‘representatives’ of that group. The accommodations typically are small, often merely formal concessions, and nothing really changes.”<sup>151</sup>

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142. See Henry Ossawa Tanner Online, ARTCYCLOPEDIA.COM, [http://www.artcyclopedia.com/artists/tanner\\_henry\\_ossawa.html](http://www.artcyclopedia.com/artists/tanner_henry_ossawa.html).

143. See Jacob Lawrence Online, ARTCYCLOPEDIA.COM, [http://www.artcyclopedia.com/artists/lawrence\\_jacob.html](http://www.artcyclopedia.com/artists/lawrence_jacob.html).

144. See, e.g., *id.* at 2757.

145. In *Parents Involved*, the Court objected to the schools’ enrollment strategies because “[t]he plans are tied to each district’s specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits.” *Id.* at 2755.

146. See *id.* at 2753.

147. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

148. *Parents Involved*, 127 S. Ct. at 2753.

149. *Id.* (noting that *Grutter* identified racial and ethnic background as only one factor among many in attempting to achieve diversity).

150. Martha Albert Fineman, *Symposium: Women Making Waves: A Celebration of 25 Years of Women at Vermont Law School: The New “Tokenism,”* 23 VT. L. REV. 289 (1998).

151. *Id.* at 290.

As long as some people of color show up in the applicant pool and some—but not too many—are granted admission, then a university can claim that it is diverse.<sup>152</sup> It matters not that this is token representation at best.

“But doesn’t the *Grutter* case recognize the concept of ‘critical mass’ precisely to avoid admitting a small token number of racial minorities?,” you may ask.<sup>153</sup> Although, the Supreme Court endorsed the concept of “critical mass” in *Grutter*, it is the educational institution that determines what a “critical mass” is and when the standard for it is met.<sup>154</sup> Minority communities have no entitlement to claim that a critical mass is not met when they feel they do not have “meaningful numbers” or “meaningful representation” at the institution,<sup>155</sup> or when they do not feel encouraged “to participate in the classroom and not feel isolated.”<sup>156</sup> These factors are controlled by the educational institution and are outside the influence of the minority communities within them.

### C. *Diversity Stigmatizes People of Color*

The diversity regime endorsed by the Supreme Court allows people of color to be used for the purposes of the educational institution and ultimately for the benefit of white students and their educational needs.<sup>157</sup> Here are some of the rationales expressed in *Grutter* that the Court took as grounds for determining that diversity was a compelling state interest:

[S]tudent body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.

. . . [M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures,

152. *See id.*

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

154. *See id.* at 329-30.

155. *See id.* (describing the University of Michigan’s definition of “critical mass” as “meaningful numbers” or “meaningful representation”).

156. *Id.* (describing the University of Michigan’s definition of “critical mass” as meaning “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated”).

157. *See id.* at 330-33.

ideas, and viewpoints . . . . To fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.”<sup>158</sup>

Apparently, the reason the Supreme Court found a compelling state interest in *Grutter* was that people of color could be used as a means to white ends. In this sense, the rationale for diversity endorsed by the Supreme Court places a stigma on members of minority communities. It is no less stigmatizing than to place a stamp on their heads saying, “I am here to serve you.” The claims that communities of color might have against majority institutions—their complicity in the discriminatory policies of the past as detailed with regard to the school districts in *Parents Involved* by Justice Breyer in his dissent,<sup>159</sup> or their failure to address current needs and priorities of minority group members—are not recognized. As group members, people of color have no status before the Supreme Court. But the group interests of the white majority *are* recognized, as they are expressed through institutions that the white majority controls.

Thus, although the Supreme Court has demonstrated why diversity might be good for white people, it fails to speak to why diversity might be good for people of color. I am not one to argue that educational diversity serves no benefit to minority communities. People of color are sure to profit from some of the same educational benefits that white students gain “when the students have the greatest possible variety of backgrounds.”<sup>160</sup> In addition, exposure to white majority institutions may enhance job prospects, enable people of color to enlist white support for minority community projects, or form broad-based political coalitions by drawing on friends and contacts from college. The point is that only particular benefits—non-minority benefits—were recognized by the Supreme Court as meaningful enough to support its finding that student body diversity is a compelling state interest.

This means, of course, that educational institutions are precluded from seeking a diverse student body, on the rationale that doing so would benefit minority communities or communities of color. So the benefit of diversity, as articulated by the Supreme Court, is entirely one-way. Through the Supreme Court’s diversity jurisprudence, people of color are reduced to serving as means to an end for white people. Consequently, old stigmas

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158. *Id.* at 330-31 (citations omitted).

159. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2800 (2007) (Breyer, J., dissenting).

160. *Grutter*, 539 U.S. at 330 (citations omitted).

about supportive and servile roles being the only appropriate roles for people of color to play in American society are reprised and resurrected.<sup>161</sup>

#### D. Diversity Cannot Address Ongoing Racial Inequity

From the foregoing analysis, it should be obvious that the token importation of a relatively few, powerless, people of color into a predominantly white institution can do little to change the existing power or cultural dynamics in that institution. The most concrete example of this problem is the refusal of the Supreme Court to allow diversity to be used to seek racial balance.<sup>162</sup> So if an educational institution lacks African-Americans, Latinos, or Asians, it cannot use its admissions process to actively seek more students from these communities.<sup>163</sup> This is flat wrong. Of course, the racial balance of an institution matters. It affects the politics, culture, and atmosphere of an institution in ways as profound as whether there is a Native American Studies Department on campus and as mundane as which card game, bid whist or tonk, is played in dorm rooms at night.<sup>164</sup> Why should diversity not be used as a means to change attitudes and challenge perspectives about race, not in some diffused, watered-down way, but directly?

Under *Grutter's* reasoning, a university could not determine that due to racial incidents on its campus, it needed to increase the number of people of color among its student population using the diversity rationale—even if it could show that such a policy would result in greater racial understanding. This is because *Grutter* does not allow university admissions personnel to explicitly consider race in the admissions process, except as a “‘plus’ in a particular applicant’s file, without insulat[ing] the individual from comparison with all other candidates for the available seats.”<sup>165</sup> According to the Court in *Grutter*, “a university’s admissions program must remain

161. See JAN NEDERVEEN PIETERSE, *WHITE ON BLACK: IMAGES OF AFRICA AND BLACKS IN WESTERN POPULAR CULTURE* 124-31 (1992) (examining the stereotypical depiction of Blacks as servants).

162. *Parents Involved*, 127 S.Ct. at 2752.

163. For an institution “simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin . . . would amount to outright racial balancing, which is patently unconstitutional.” *Grutter*, 539 U.S. at 329-30 (citations omitted).

164. See generally Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993) (arguing that the Supreme Court’s integration jurisprudence ignores the importance of African-American cultural transmission through education).

165. *Id.* at 334 (emphasis added, citations omitted).

flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."<sup>166</sup> This means that the university must give consideration to white applicants as well as people of color and, although diversity can be an important goal, it cannot be so important that it "makes an applicant's race or ethnicity the defining feature of his or her application."<sup>167</sup> If an institution were consciously seeking to increase the diversity of its student body through the use of its available admissions slots, then it *would* be making "an applicant's race or ethnicity the defining feature of his or her application."<sup>168</sup>

Consequently, under *Grutter*, *Gratz*, and *Parents Involved*, minority numbers at majority institutions need not rise and the diversity rationale need serve no social justice function like assisting communities of color, on or off campus, in material ways. Consequently, preexisting racial inequities, whether on a college campus or in society at large, cannot be remedied through use of the diversity rationale.

Daria Roithmayr makes a compelling case that many of the social and economic problems found in communities of color are the result of "locked-in racial inequality"—that is, racial discrimination from an earlier era that has given whites economic and political advantages that have been perpetually reinforced over time.<sup>169</sup> According to Roithmayr, racist white school boards and parents' groups acted as monopoly cartels for years, driving Blacks and other minorities out of the education market as efficient competitors.<sup>170</sup> As a consequence:

[T]he white monopoly advantage in education produced by these cartels may have become institutionally self-reinforcing over time. Historical segregation produced geographic pockets of people with better tax bases. Neighborhoods with more educational resources have produced neighbors with more wealth. In turn, neighbors with

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166. *Id.* at 337.

167. *Id.* This is not to say that astute university officials could not construct an argument, within the parameters set out in *Grutter*, that would allow them to increase their minority student population. My problem with the Supreme Court's reasoning is that they cannot do so directly and openly. See *Gratz*, 539 U.S. at 297 (Souter, J., dissenting) ("[I]t seems especially unfair to treat the candor of the admissions plan as an Achilles' heel.").

168. *Id.* at 337. The institution would be using race or ethnicity as the defining feature of admission because, all other things being equal, this factor would determine which applicants were admitted. This is not to say that all applicants admitted for diversity purposes would be admitted solely because of their race or ethnicity, or that such applicants would otherwise not be qualified for admission.

169. See Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000).

170. Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 198-200 (2004).

more wealth have produced neighborhoods with more educational resources. In this way, white advantages in education reproduce themselves over time.<sup>171</sup>

Roithmayr contends that small-scale diversity programs of the kind approved in *Grutter* do nothing to address the deeper, locked-in educational disadvantage that people of color experience.<sup>172</sup> What is needed is “large-scale affirmative action and redistribution of wealth (perhaps via reparations).”<sup>173</sup> However these forms of remedial relief are virtually impossible under equal protection law as it is currently interpreted. As I have already noted, *Grutter* only allows affirmative action in admission for limited diversity purposes.<sup>174</sup> More importantly, *Wygant*,<sup>175</sup> which prohibits affirmative action to correct “societal discrimination,” would forbid governmental actors from engaging in affirmative action to correct preexisting racial inequities.<sup>176</sup> Consequently, the value of the kind of affirmative action approved in *Grutter* is limited indeed.

#### E. Diversity Ignores Existing Racism

The ghetto parties referenced in the introduction to this article are but the tip of the iceberg when it comes to on-campus racism. Recently, at the University of Maryland, a noose was found hanging in a tree near the Nyumburu Cultural Center, a building that houses several Black campus groups.<sup>177</sup> While the incident is being investigated as a hate crime, it provoked outrage and protests on the College Park, Maryland campus.<sup>178</sup>

A noose also figured prominently in an incident at Columbia University in New York City.<sup>179</sup> There, a noose was found outside of the office of Madonna Constantine, a professor at Columbia’s Teachers College who studies the impact of race and racial prejudice on clinical and educational settings.<sup>180</sup> Like the noose incident at the University of Maryland, the attack

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171. *Id.* at 201.

172. *Id.* at 209.

173. *Id.*

174. *See supra* Part II.

175. 476 U.S. 267 (1986); *see supra* Part II.

176. *Wygant*, 476 U.S. at 274.

177. *University Investigates Possible Hate Crime*, CHI. TRIB., Sept. 11, 2007, at 10.

178. *Id.*

179. Elissa Gootman, *Noose Case Puts Focus on Scholar of Race*, N.Y. TIMES, Oct. 12, 2007, at B1.

180. Elissa Gootman & Al Baker, *Noose on Door at Columbia Prompts Campus Protest*, N.Y.



against Professor Constantine sparked outrage, protests, and calls for solidarity in the face of racism.<sup>181</sup> A similar noose-related incident occurred at the U.S. Coast Guard Academy in early 2007.<sup>182</sup> Some researchers say racial incidents of this sort have always occurred on college campuses; others say the number of incidents is growing.<sup>183</sup>

According to three sociologists who have studied the occurrence of racial incidents on college campuses, “U.S. colleges and universities are frequently permeated with much subtle, covert, and blatant racism.”<sup>184</sup> Surveying racial events that occurred during the 1990s, Feagin, Vera, and Imani found conflicts over Confederate memorials at the University of Texas,<sup>185</sup> racist graffiti or flyers (typically involving use of the “N” word) at over fifteen universities (including Ivy League campuses such as Harvard and Yale),<sup>186</sup> racist effigies at the University of Minnesota,<sup>187</sup> racist cartoons in the Princeton campus newspaper,<sup>188</sup> and anti-Black threats at several universities, including the University of Pennsylvania and Michigan State.<sup>189</sup> Between 1986 and 1990, the National Institute Against Prejudice and Violence collected “published reports of at least 250 racial incidents involving physical violence or serious psychological assault on college campuses” in the United States.<sup>190</sup>

More recently, other researchers have found evidence that on-campus racial conflicts continue to be a serious problem for the nation’s colleges and universities.<sup>191</sup> According to Tolerance.org, a web project of the Southern Poverty Law Center, “[e]very day, between three and five hate crimes occur on college campuses in the United States.”<sup>192</sup> Howard J. Ehrlich, director of the Prejudice Institute in Baltimore, which tracks on-campus racial incidents, “estimates that between 850,000 and 1 million students—fully 25% of the

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TIMES, Oct. 12, 2007 at B3.

181. *Id.*

182. John Christoffersen, *Coast Guard Commandant Speaks About Noose Incidents*, BOSTON GLOBE, Oct. 4, 2007.

183. Susan Kinzie, *Colleges See Flare in Racial Incidents: Campuses Struggle to Explain, Cope*, WASH. POST, Sept. 26, 2007, at B1.

184. JOE R. FEAGIN, HERNÁN VERA & NIKITAH IMANI, *THE AGONY OF EDUCATION: BLACK STUDENTS AT WHITE COLLEGES AND UNIVERSITIES* x (1996).

185. *Id.* at 24.

186. *Id.* at 61.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 60-61.

191. See Kinzie, *supra* note 183, at B1.

192. Brian Willoughby, *Hate on Campus*, TOLERANCE.ORG, June 13, 2003, [http://www.tolerance.org/news/article\\_tol.jsp?id=780](http://www.tolerance.org/news/article_tol.jsp?id=780).

minority community and up to 5% of the white community—are targets of ethno-violence in any given year on the nation’s college campuses.”<sup>193</sup>

While racial incidents continue on college campuses, certainly the character of white attitudes toward Blacks and other racial minorities has changed since the Supreme Court decided *Brown v. Board of Education*<sup>194</sup> over fifty years ago. While consciously racist actors may have been easy to find in 1956, they are relatively hard to find now. Through the laudable work of the civil rights movement, society has been transformed to the extent that the nondiscrimination ethic has become relatively well established. Few today would openly engage in consciously racist or discriminatory acts.<sup>195</sup> The question remains, however, whether racist behavior has disappeared as a result of this social transformation, or has instead simply been driven underground.

Much social science research since the commencement of widespread affirmative action policies in the 1960s suggests that racist attitudes persist and have in fact simply been driven underground. John Dovidio, a Yale psychology professor and a former Colgate University researcher, has found that nearly half of all whites demonstrate what he calls “modern racism,” defined as “a surface belief in racial equality that masks latent although unconscious prejudicial feelings.”<sup>196</sup> Dovidio’s studies show that “modern racists subconsciously find ways to rationalize their biases on the basis of factors that seem on the surface to be unrelated to race.”<sup>197</sup>

Dovidio is not alone in his assertions. Other researchers have identified covert forms of racism using concepts such as subtle racism,<sup>198</sup> aversive racism,<sup>199</sup> modern racism,<sup>200</sup> and symbolic racism.<sup>201</sup> Using different terms

193. *Id.*

194. 349 U.S. 294 (1955).

195. Although, as Charles Lawrence and others have pointed out, actors do engage in racist conduct as a result of unconscious motivations. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Unfortunately, the perpetrator perspective of antidiscrimination law fails to address these causes of racial discrimination. *Id.*

196. Tori DeAngelis, *Thwarting Modern Prejudice*, 32 MONITOR ON PSYCHOLOGY, NO. 4 (2001), available at <http://www.apa.org/monitor/apr01/prejudice.html>.

197. *Id.*

198. See, e.g., Frank Biasco, Elizabeth A. Goodwin & Kevin L. Vitale, *College Students’ Attitudes Toward Racial Discrimination*, 35 COLLEGE STUDENT J. 523 (2001) (arguing that “subtle racism” is expressed by behaviors of avoidance).

199. See, e.g., Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism, in PREJUDICE, DISCRIMINATION, AND RACISM* 62 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (explaining that “aversive racists” have ambivalent racial attitudes with aversion to toward Blacks expressed in “subtle, rationalizable ways”).

but similar concepts, these theories describe racist attitudes that are hidden, sometimes unconsciously, and sometimes because the holder of the attitudes wants to comport to current socially acceptable views.<sup>202</sup>

These theoretical models can help explain white student participation in activities such as ghetto parties. Each of the theories described above would predict that white students who attend such parties would most likely describe themselves as nonracist. According to the theories, they would only participate in a party invoking racist stereotypes if they felt it was safe to do so, because the party involved whites only and was “off the record.” As one author explains in aversive-racism terms:

Because part of her discomfort stems from a desire to act appropriately and not appear prejudiced, the aversive racist will “strictly adhere to established rules and codes of behavior” in interracial settings. In such environments, the normative structure within the situation will be “clear and unambiguous.” Onlookers will thus scrutinize questionable racial actions more skeptically and charges of racism will be more difficult to deny. Thus, the aversive racist will likely assert that she is “color-blind” and therefore unable to act or think in discriminatory ways. Conversely, when the “normative structure within the situation is weak, ambiguous, or conflicting” (e.g., in *intra-racial* environments), the subject will feel more comfortable expressing racial comments because she can more easily dismiss charges of racism.<sup>203</sup>

Justice O’Connor’s opinion in *Grutter* mentions nothing about ongoing campus racism.<sup>204</sup> There is nothing about ghetto parties, nothing about resilient, morphing forms of racist oppression. In Sandra Day O’Connor’s world, everything is just fine. In fact, in Justice O’Connor’s view of the world, things are going so well that in another twenty-five years we will be able to dispense with affirmative action all together.<sup>205</sup> The Court’s

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200. See, e.g., John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 199, at 92-93 (arguing that “modern racists” are opposed to civil rights advances for Blacks and other minorities but would reject blatant discrimination).

201. See, e.g., David O. Sears, *Racism and Politics in the United States*, in RACISM: THE PROBLEM AND THE RESPONSE 83-89 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (describing how “symbolic racism” can be determined through political values and personal ideology).

202. Audrey J. Murrell et al., *Aversive Racism and Resistance to Affirmative Action: Perceptions of Justice Are Not Necessarily Color Blind*, 15 BASIC & APPLIED SOC. PSYCHOL. 72 (1994) (citations omitted).

203. Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2270 (1998) (citations omitted) (emphasis added).

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

205. *Id.* at 343.

diversity rationale not only ignores existing racism on campus and in the broader society, it makes matters worse by perpetuating the myth that our “unfortunate history of race discrimination . . . is largely behind us.”<sup>206</sup>

#### F. Diversity Is Victor's Justice

Part II of this article details a shift from limited but effective remedial programs to the watered-down form of diversity set forth in *Bakke* and affirmed in *Grutter*.<sup>207</sup> This shift coincides with the culture wars over affirmative action that raged across the American societal landscape.<sup>208</sup> In those battles, there were clearly winners and clearly losers. The winners wrote and interpreted the nation's equal protection laws.

The Court's attention to the interests of “innocent white victims”<sup>209</sup> in its diversity jurisprudence indicates that above all else, it desires to preserve the status quo. Social change through attending to societal discrimination would be too much. In reading *Grutter*, it is clear that the Court is shaping a diversity remedy that does not do too much; that not only does not trammel on white interests, but in fact is in service to them.

Diversity's only allowable purposes are those that assist whites in their quest for education,<sup>210</sup> to compete in a competitive international business environment,<sup>211</sup> and to achieve military superiority over other nations.<sup>212</sup> This smacks of victor's justice—justice that is biased in favor of the winner and that is only possible because the victor won.<sup>213</sup> All the professions of high moral principles in the Supreme Court's rationales fall apart under the cutting examination of Justice Stevens in his *Parents Involved* dissent.

Justice Steven skewers Chief Justice Roberts' sanctimonious majority opinion in *Parents Involved*; first for refusing to acknowledge the reality of

206. Barbara J. Flagg, “Was Blind, But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 988 (1993).

207. See *supra* notes 26–76 and accompanying text.

208. See *supra* notes 69–72 and accompanying text.

209. See discussion of *Wygant*, *supra* notes 47–55 and accompanying text.

210. *Grutter*, 539 U.S. at 329–330.

211. *Id.* at 330.

212. *Id.* at 332. The Court did endorse “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation,” *id.* at 332, as a justification for diversity in higher education, but it is clear from the rest of the Court's opinion that effective consideration does not mean challenging the white majority for social or political leadership.

213. See Jeremy Sarkin, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 661, 677 (2004) (describing “victor's justice” as something the losing party would not accept unless it was “beaten into the dust”).

racial oppression, and then for hiding behind “the citation of a few recent opinions—none of which even approached unanimity—grandly proclaiming that all racial classifications must be analyzed under ‘strict scrutiny.’”<sup>214</sup> As Justice Stevens points out, “The Chief Justice fails to note that it was only black schoolchildren who were so ordered [to attend inferior schools based on the color of their skin]; indeed, the history books do not tell stories of white children struggling to attend black schools.”<sup>215</sup>

## V. CONCLUSION

Between 1979 and 1985, the Supreme Court succeeded in making remedial-based affirmative action more difficult to sustain by requiring it to meet strict scrutiny. At the same time, the Court opened another basis for affirmative action—diversity. As a consequence, racial justice activists, civil rights litigators, and educational institutions have moved away from the remedial path and chose the way of diversity. But diversity ultimately will prove to be a dead end for reasons I have detailed in this essay. If court-based relief is to provide any benefit to communities of color, it will be through the remedial branch of antidiscrimination law. Because most of the Court’s opposition to remedial affirmative action appears to be ideological in nature, social justice advocates must either work to emulate the success of the civil rights movement in changing the political culture, or accept the reality of American racism<sup>216</sup> and return to reliance on collective activity for education and economic advancement.<sup>217</sup>

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214. *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2798 (Stevens, J., dissenting).

215. *Id.*

216. See DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* ix-xii, 197-200 (1992) (expressing Bell’s belief that racism is a permanent feature of American society and discussing what can be done about it).

217. See, e.g., Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 *YALE L.J.* 1285 (1992) (endorsing African-centered schools as a means of improving the education and life chances of African-American children).