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

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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.[1] In *Wygant*, a case decided more than twenty years ago, the school board introduced a layoff system designed to maintain a racially integrated faculty.[2] The layoff plan displaced white teachers before displacing black teachers.[3] The Supreme Court invalidated the plan without supplying a majority opinion but specific Justices offered a range of positions regarding the appropriate standard of review.[4] Justice O'Connor wrote an intriguing concurrence signifying that a majority of Justices might uphold a race-conscious hiring program that was aimed at

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[1] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 801 (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.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306-307 (1978), Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) and Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

[2] NOWAK & ROTUNDA, *supra* note ___ at 801.

[3] *Id.* at 815.

[4] *Id.*

creating a racially diverse faculty.[5] This concurrence foreshadowed her opinion in *Grutter*.[6] In *Grutter*, Justice O'Connor consistent with the teaching of *Richmond v. Croson* deployed strict scrutiny analysis to assess the permissibility of the University of Michigan Law School's admissions plan.[7] 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, and represents the greatest civil rights issue of our time.[8] Since her retirement in 2005, Justice O'Connor's opinions have been praised[9] 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.[10] This rebellion is proceeding with breathtaking impatience, and it is a revolution that is inflated by its disdain for tradition and precedent.[11] Evidently, the Supreme Court's consolidated decision in two companion

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[5] *Id.*
[6] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).
[7] NOWAK & ROTUNDA, *supra* note__ at 818-819.
[8] Katherine Kersten, *Teach Character to cut Racial gap in school results*, STARTRIBUNE.COM 1 (February, 23, 2007) *available a*t http://www.startribune.com/191/v-print/story/1017275.html. ABIGAIL THERNSTROM AND STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING, 12 (2006).
[9] Admiration may be tied to O'Connor's early embrace of diversity. *See e.g., Wygant* 476 U.S. at 285 (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*, Derrick Bell's December 19, 2007 communication, stating that there is little reason to celebrate Justice O'Connor's contribution to the nation's discussion of race.(Bell's statement was emailed and remains on file with the author)
[10] Ronald Dworkin, *The Supreme Court Phalanx*, THE NEW YORK REVIEW OF BOOKS, Sept. 27, 2007 at 92.
[11] *Id.*

cases: *Parents Involved v. Seattle School District*[12] and *Meredith v. Jefferson County Board of Education,*[13] decided in 2007, has prompted Dworkin's contempt. He maintains that the Court's consolidated decision striking down race-based student assignment plans constitutes the Court's most important opinion and provides the best illustration of "the revolutionary character and poor legal quality of many of the Court's . . . decisions."[14] Neither official discrimination nor diversity rationales were adequate to justify race-based "tiebreakers" in the public school systems in Seattle, Washington and Louisville, Kentucky.[15]

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.[16] Such disputes, fastened as they are to alternative and incompatible notions of justice,[17] 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

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[12] 127 S. Ct. 2738 (2007) (Parents II), 426 F. 3d 1162 (9th Cir. 2005), *cert granted*, 126 S. Ct. 2351 (U.S. June 5, 2006) (No. 05-908).
[13]127 S. Ct. 2738 (2007) McFarland v. Jefferson County Publ. Sch., 330 F. Supp. 2d 834, (W.D. Ky. 2004), *aff'd* 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom.*, Meredith v. Jefferson County Bd. Of Educ., 126 S. Ct. 2351 (U.S. June 5, 2006) (No. 05-915).
[14] Dworkin, *supra* note ___ at 92.
[15] Samuel Estreicher, *The Non-Preferment Principle and the "Racial Tiebreaker" Ca*ses, 2006-2007 CATO SUPREME COURT REV. 239, 239 & 240 (2007).
[16] ALASDAIR MACINTYRE, AFTER VIRTUE, 226 (1981). *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).
[17] MACINTYRE, *supra* note ___ at 253.

and confirms Karl Marx's observation that "conflict and not consensus is at the heart of modern social structure."[18]

In any domain of inquiry the highway of methodology is paved with epistemological commitments.[19] In law, as in all the disciplines, method is controlled by assumptions about the aims of inquiry, the possibility of knowledge, the conditions for its attainment and the probability of indeterminacy.[20] "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.'"[21] Analysis of adjudication must 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 memories of other men, through the common sense of community, through the pages of literature, through the labors of scholars."[22] 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.[23] "[W]hat is meant is not only experienced but also somehow understood and, commonly [perhaps], also affirmed."[24]

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[18] *See, e.g., Id.*
[19] R. J. Snell, *Upon This Rock: Human Realism and Geivett's Myth* 9 PHILOSOPHIA CHRISTI 365, 365 (2007).
[20] *Id.* at 365-366.
[21] *Id.* at 368.
[22] *Id.*
[23] *Id.*
[24] *Id.*

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*, for example, the Court examined an equal protection challenge under the Fifth Amendment where Justice O'Connor noted the Court's "failure to produce a majority opinion in *Bakke*, *Fulilove* and *Wygant*, left unresolved the proper analysis for remedial race-based governmental action."[25] The repercussions of that failure go beyond what appellees or appellants experience. Instead, this failure affirms indeterminacy.

In a series of recent cases[26] 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.[27] Additional distinctions emerge regarding whether the First Amendment protects or is immaterial to a public university's use of race in admissions[28] and whether the prospect of future educational progress in minority

[25] Adarand Constructors v. Pena, 515 U.S. 200, 221 (1995).
[26] Grutter v. Bollinger, 539 U.S. 306, 328 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Parents Involved v. Seattle School District, 127 S. Ct. 2738 (2007).
[27] *Grutter* 539 U.S. at 328 ("the Law School's educational judgment that such diversity is essential to its education mission is one to which we defer."). *But see, Grutter*, 539 U.S. 364-887 (Rehnquist, C. J., dissenting) (questioning the Court's deference).
[28] *Grutter*, 539 U.S. at 329 ("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."). *But see*, *Grutter*, 539 U.S. at 361 (Thomas, J. dissenting) ("under 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.").

communities sustains contemporary justifications for race-based preferences.[29] Whether one agrees, or disagrees with *Grutter*, [30] *Gratz*,[31] or *Parents Involved*,[32] disputes surface about the presence of unlawful racial balancing.[33] 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.[34] Conflict also emerges over whether the historic deficit of traditionally disfavored minorities in certain professions is important or irrelevant [35] or whether courts should defer or decline to defer to claims of good faith by governmental units. Difficulties materialize regarding whether interpretations of the Equal Protection clause should vary with the reasons for using race as a determinant.[36] Questions surface about whether attempts to regulate the enrollment of blacks and other minorities in educational programs constitute a badge of inferiority[37] or amount to a defensible remedy aimed at eradicating the effects of the nation's history of racial segregation, white supremacy and societal

[29] *Grutter*, 539 U.S. at 346 (Ginsburg, J. concurring).
[30] 539 U.S. 306 (2003).
[31] 539 U.S. 244 (2003).
[32] 127 S. Ct. 2738 (2007).

[33] *Grutter*, 539 U.S. at 323 (endorsing Justice Powell' rejection of the interest in reducing the historic deficit of traditionally disfavored minorities in medical schools because it is unlawful racial balancing).

[34] *Grutter*, 539 U.S. at 330 (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." *Bakke, 438 U.S., at 307* . . . (opinion of Powell, J.). This would amount to outright racial balancing, which is patently unconstitutional. *Ibid.; Freeman v. Pitts, 503 U.S. 467, 494, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992)).*
[35]*Bakke*, 438 U.S. at 306-307 (1978) (Powell, J., opinion) (rejecting an interest in reducing the historic deficit of traditionally disfavored minorities in medical schools as unlawful racial balancing).
[36] *Grutter*, 539 U.S. at 365 (Rehnquist, C. J., dissenting) ("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' . . .").
[37] *Grutter*, 539 U.S. at 373 (Thomas, J. dissenting).

discrimination.[38] Such discussions are often tinged with paradox. An additional paradox issues forth because black students attending historically black colleges (HBC's) experience superior cognitive development in environments that are not integrated[39] and report higher academic achievement than those attending predominantly white colleges.[40]

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

The Milton, Massachusetts case is instructive. During the spring of 2007, the "town officials in this 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

[38] *Bakke,* 438 U.S. at 310 (Powell, J., opinion) (rejecting an interest in remedying societal discrimination).
[39] *See e.g.,* Flowers & Pascarella, *Cognitive effects of College Racial Composition on African American Students After 3 Years of College,* 40 J. OF COLLEGE STUDENT DEVELOPMENT 669, 674 (finding that black students experience superior cognitive development at HBC's).
[40] *Grutter,* 539 U.S. at 365 (Thomas, J., dissenting).
[41] *See e.g.,* Michelle Adams, *Radical Integration,* 94 CAL., L. REV. 261, 267 (2006).
[42] ROY L. BROOKS, INTEGRATION OR SEPARATION? 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.").
[43] *See e.g.,* Joseph Pereira, *Supreme Court Ruling Sways Milton battle; Off to Private School,* THE WALL STREET JOURNAL, October 11, 2007, page A1.

which has historically had Milton's lowest test scores."[44] Imagining minority schools are inherently bad[45] and presuming race is a proxy for educational proficiency, one white parent remarked that he did not feel good about putting his son in an inferior school.[46] 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.[47]

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.[48] While this move perpetuates racial isolation and promotes what Dworkin labels, a "national disgrace,"[49] 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 distinguishes them from other groups.[50] 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,[51] constitute segregation that should alarm us? Attempts to calculate the

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[44] *Id.*
[45] *See e.g.*, Wendy Parker, *Valuing Integration: Lessons from Teachers*, Wake Forest University Legal Studies Research Series, 4 (2007) *available at* http://ssrn.com/abstract=1013366.
[46] Pereira, *supra* note __ at Page A1.
[47] *Id.*
[48] Adams, *supra* note __ at 266-267.
[49] Dworkin, *supra* note ___ at 92.
[50] Adams, *supra* note ___ at 266-67.
[51] Lisa W. Foderaro, *Hasidic Public School Loses Again Before U.S. Supreme Court, but Supporters Persist*, THE NEW YORK TIMES, October 13, 1999, *available at* http://quiry.nytimes.com/gst/fullpage.html?res=904E0DC1530F9 ... (accessed, November 13, 2007) (discussing the attempt by Hasidic Jews to carve out a separate public school district).

benefits of separation weighed against risk of integration bring to mind the dilemma faced by the educated Jews of Breslau during Prussian-era, Germany who were aware 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: 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 herself less of a German.[52]

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 the number of minority teachers is inadequate to staff fully minority schools, [and] student segregation has had a negative effect on the experience level of teachers for minority students."[53] Here Parker argues, that educational research reveals that teachers' experience has an impact on student success.[54] She assumes student integration is necessary to ensure an increase in the number of experienced teachers who teach minority students.[55] She argues this development is needed to improve the academic performance of such students.[56] This claim is problematic.

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[52] ALASDAIR MACINTYRE, EDITH STEIN: A PHILOSOPHICAL PROLOGUE: 1913-1922, 12 (2006) [hereinafter, MACINTYRE, EDITH STEIN].
[53] Parker, *supra* note __ at 35.
[54] *Id.*
[55] *Id.*
[56] *Id.*

Professor Greene shows that while it is true that teachers become a little more effective in their first few years of teaching as they learn how to cope in the classroom,[57] after those first few years, teachers do not tend to become more effective, with additional years of experience.[58] "Indeed, some evidence shows that teachers become *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."[59] 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 *more* racially integrated than public schools.[60] Although it is true that the share of white students attending private schools is double that of Hispanic and black students, those statistics fail to show first, that having more minority students is not the same as more integration as the Brown v. Board of Education decisions show; second, that racially diverse students are not necessarily evenly distributed throughout the public school system;[61] and third, that parents have greater confidence that integration will be managed successfully in private schools.[62] When families are able to choose "private schools, either with their own funds or with vouchers, they are more likely to enroll their children in racially

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[57] JAY P. GREENE (WITH GREG FORSTER & MARCUS A. WINTERS), EDUCATION MYTHS: WHAT SPECIAL INTEREST GROUPS WANT YOU TO BELIEVE ABOUT OUR SCHOOLS—AND WHY IT ISN'T SO, 60 (2005).
[58] *Id*. at 60.
[59] *Id*. at 60 & 66 (finding no relationship at all between teacher experience and student achievement). Among other myths that Professor Greene uncovers is the money myth. Over the past 30 years spending per pupil has doubled but student performance as measured by the National Assessment of Educational Progress has remained unchanged. GREENE, *supra* note___ at 9 &10.
[60] *Id*. at 201. But see Id. at 201-202 (showing that the American Federation of Teachers and the NAACP assert private schools are less diverse than public schools and constitute an attempt to escape integration).
[61] *Id*. at 204.
[62] *Id*. at 216 (showing that that there are fewer racial conflicts in private schools).

mixed schools."[63] Taken together, such data suggests that opposition to school choice, often led by proponents of integration, may intensify the re-segregation trends that they criticize.[64]

At the same time, many "schools are failing. Achievement is down, violence is up, and no amount of money seems to insulate schools from these trends."[65] "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."[66] Educational malpractice occurs despite a rise in public education expenditure by more than 700 percent, in inflation adjusted dollars, over the past 50 years.[67] The dire educational and economic circumstances facing many minorities and African-Americans in particular[68] have produced uncertainty about the efficacy of progressive and liberal educational approaches which reify the common public school paradigm.[69] Doubt and dire educational circumstance combine to legitimate school choice initiatives.

Evidence accumulates demonstrating that when educators succeed in educating poor minority students by bringing them up to national

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[63] *Id.* at 216.
[64] *See e.g.,* Harry G. Hutchison, *Liberal Hegemony? School Vouchers and the Future of the Race,* Vol. 68 MISSOURI 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).
[65] Suzanna Sherry, *Responsible Republicanism, Education for Citizenship*, 62 U. CHI. L. REV. 131, 156 (1995).
[66] Adam Meyerson, *Forward* to SAMUEL CASEY CARTER, NO EXCUSES: LESSONS FROM 21 HIGH-PERFORMING, HIGH-POVERTY SCHOOLS 1 (2000).
[67] GREENE, *supra* note __ at 7.
[68] THERNSTROM AND THERNSTROM, *supra* note ___ at 12 (By the twelfth grade, on average, black students are four years behind those who are white and Asian while Hispanics don't do much better.).
[69] Hutchison, *Liberal Hegemony? supra* note ___ at 562.

standards of proficiency, they invariably use methods that are radically different and more intensive than those employed in most American public schools.[70] It is, of course, no accident that revolutionary schools often operate outside the traditional public school system.[71] 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[72] as well as the exclusionary present of America's system of higher education.[73] This process combines to suppress the interest of *outsiders*.[74]

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

[70] Kersten, *supra* note __ at 2 (explaining how low-income minority kids can reach or exceed national averages in educational proficiency through longer school days, weeks and years, focusing on the basics of reading and math, granting principals significant autonomy in hiring teachers setting goals and budgets and most importantly, emphasizing character education including the habits and value of punctuality, patience and diligence).
[71] THERNSTROM & THERNSTROM, *supra* note __ at 7.
[72] *See generally*, Hutchison, *Liberal Hegemony*, *supra* note __ at 582-600 (describing how public schools embraced the ideology of racial and religious subordination).
[73] *See infra* Part III.
[74] As defined herein, *outsiders* include African-Americans and members of other disadvantaged groups.

> nothing is innately good, that nothing is lasting—nothing, that is, other than the perpetual danger of abused power.[75]

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 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 ("CRT").

This approach is fortified by classical-liberal reformist views of disparate impact as well as public choice analysis. When examining allegedly neutral areas of law, CRT is able to find "concepts of 'race' and racism always already there."[76] CRT concludes that "America's cultural identity, values, and meanings cannot be separated from its past and present social relations of domination and power."[77] Equally important, classical-liberal reformists contend that policy-makers should be held responsible for the discriminatory effects of their programs, regardless of a lack of evidence of purposeful discriminatory intent.[78] Public choice theory, suggests that "Modern democratic states have themselves

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[75] STANLEY CROUCH, THE ALL-AMERICAN SKIN GAME, OR, THE DECOY OF THE RACE: THE LONG AND THE SHORT OF IT, 1990-1994, 10 (1995).
[76] Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 750 (1994).
[77] 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).
[78] Harry Hutchison, *Toward A Critical-Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy and Hierarchy*, 34 HARVARD J. ON LEGIS. 93, 94 (1997) [hereinafter, Hutchison, *Toward a Critical Race Reformist Conception*].

becomes 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."[79] 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. The centripetal tendency of this abusive process indicates that many policies, "if evaluated honestly and realistically, would be found to lack any true basis in the public interest."[80]

Merging CRT, 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.[81] Since public schools, universities and American democratic institutions are constituted by elites who are charged with policy deliberation,[82] since the predominant opinions in society reflect the views of the social and intellectual elites who have the greatest access to public modes of expression,[83] both Critical Race Theory proponents and classical-liberal reformists offer a corrective. They believe that laws should be examined from an *outsider-focused* fairness perspective.[84] Fairness to *outsiders* means fairness to those groups such as

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[79] JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 11(1993, 1996).
[80] RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 382(1981, 1983).
[81] 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 (1996).
[82] LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 169 (2002).
[83] Yack, *supra* note___at 8-9.
[84] Hutchison, *Toward A Critical-Race Reformist Conception*, *supra* note ___ at 94.

African Americans whose perspective and concerns "have not been traditionally part of legal scholarship."[85] 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 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[86] has apparently attained new potency, but this move has not occurred in a vacuum. Diversity as a goal operates as a component of the new cosmopolitanism[87] that presumes that deep differences whether racial, religious or ideological are unimportant. Larry Alexander shows how "cosmopolitanism . . . tends to homogenize and shallow out the various ways of life [because if] there are many paths to truth or salvation, then little is at stake in finding a path."[88] Appreciating 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[89] appears lost in the pursuit of the superficial. For some, this move has been exacerbated by the

[85] Mary I. Coombs, *Outsider Scholarship: The Law Review Stories,* 63 U. COLO. L. REV. 683, 683-84 (1992).
[86] *Grutter*, 539 U.S. at 337.
[87] *See e.g.,* LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 169 (2005).
[88] *Id.*
[89] *See e.g.,* Adams, *supra* note ___ at 263-64.

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 uncommitted, 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."[90] Diversity as cosmopolitanism appears to be consistent with several possibilities including the possibility that some individuals might be captivated by Nietzchean self-mastery and the will to power.[91] Others may be consumed by the pursuit of postmodern identity construction or in a purely suburban move, the body.[92] This contemporary obsession with the body may crumple into an enduring fascination with cookbooks, health foods and aromatherapy.[93]

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.[94] Today, some argue that integration is synonymous with a process whereby members of minority groups adopt the customs and attitudes of the prevailing culture.[95] Adams insists the present-day integrationist vision oversimplifies the emotional discomfort and identity

[90] OS GUINNESS, THE CALL: FINDING AND FULFILLING THE CENTRAL PURPOSE OF YOUR LIFE, 10 (2003).
[91] *Id*. at 22.
[92] *Id*.
[93] *Id*.
[94] Adams, *supra* note ___ at 263-264.
[95] *Id*. at 264.

sacrifice that are occasioned by integration.[96] Integration no longer captures the progressive imagination as a device for eliminating racial inequality.[97] Professor Michael Selmi's intuition suggests that only a few desolate 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.[98] He also suggests the move to discount integration may reinvigorate de facto segregation.[99] 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."[100] This move may validate Professor Cedric Powell's intuition that Justice O'Connor and the Supreme Court have advanced a modified conception of the anti-discrimination principle that overemphasizes a forward-looking approach that guarantees that systemic inequalities will remain in place for many years to come.[101] Diversity can thus be seen as a form of rhetorical neutrality that delivers some benefits to society as a whole but delivers *few* benefits to the truly disadvantaged among us.[102]

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?"[103] has been asked and answered on

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[96] *Id.*
[97] *Id.*
[98] Selmi, *supra* note ___ at 75.
[99] *Id.*
[100] *Id.*
[101] Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederic Douglass, and Inverted Critical Race Theory, available* at ssrn.com/abstract=1088713 at pages 5-6 (2008).
[102] *See generally id.*
[103] H.L.A. HART, THE CONCEPT OF LAW 1 (2nd ed., 1994).

many occasions without a sound resolution. The ancient world did not think that diversity was a positive ideal.[104] Indeed, it can be shown that this ideal now so familiar to Americans, has no real antecedent in all of human history.[105] Thus public law's pursuit of it is truly unprecedented.[106] The question becomes: Does the move to both reify diversity and diminish integration as a serious goal allow policy makers to ignore society's central role in entrenching racial inequality?[107]

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*[108] and *Parent Involved*[109] requires an examination of America's Equal Protection clause platform. Professors David Bernstein and Ilya Somin maintain, "No 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."[110] Before achieving iconic status, *Brown* "was criticized by some prominent liberal legal scholars for overruling the democratic process."[111] Today, *Brown* has come under

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[104] Peter H. Schuck, *The Diversity Ideal: History and Values*, Yale Law School, Public Law & Legal Theory Research paper Series, Research Paper No. 20, 3 (2002), *available at* http://ssrn.com/abstract_id=305800 (accessed on November 13, 2007).
[105] *Id*. at 3.
[106] *Id*.
[107] *See*, Adams, *supra* note __ at 274 ("My vision of integration is radical . . . because it 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.").
[108] 539 U.S. 306 (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).
[109] 127 S. Ct. 2738 (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).
[110] David E. Bernstein and Ilya Somin, *Judicial Power and Civil rights Reconsidered*, Vol. 114 YALE L. J. 591, 593.
[111] *Id*.

attack by revisionist scholars associated with the political left[112] who believe that commentators have vastly exaggerated the importance of *Brown* to the African-American freedom struggle.[113] 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."[114] *Brown* led to a series of opinions culminating in a decision requiring school districts to terminate dual systems at once.[115] "It 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 1954.[116] Thus once there has been a showing of deliberate segregation, "school authorities must develop a plan which will provide immediate relief."[117] Although there is now a fundamental disagreement between the liberal and conservative wings of the Supreme Court about what *Brown* requires,[118] it can argued that courts could *only* order desegregation "if there has been a showing of purposeful segregation."[119] *Brown I, Brown II and* subsequent school-desegregation decisions of the Supreme Court do not require all public schools to be racially integrated.[120] "Rather, the decisions require that public schools not be racially segregated."[121] This calculus fortifies the distinction between de jure and de facto segregation.[122] De jure

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[112] *Id.*
[113] *Id.*
[114] Brown v. Board of Education (Brown II) 349 U.S. 294, 301 (1955).
[115] *See e.g.,* Alexander v. Holmes County, 396 U.S. 19, 20 (1969) (per curiam)
[116] *Parents Involved*, 127 S. Ct. at 2799 (Stevens, J., dissenting).
[117] NOWAK & ROTUNDA, *supra* note ___ at 764.
[118] *Parents Involved*, 127 S. Ct. at 2800 (Breyer, J., dissenting).
[119] NOWAK & ROTUNDA, *supra* note ___ at 764.
[120] *Id.* at 765.
[121] *Id.*
[122] *Id.*

segregation requires some purposeful act by government authorities[123] whereas de facto segregation depends primarily on housing and migration patterns that are not directly connected to evidence of purposeful governmental action.[124]

When attention turns to affirmative action, problems arise because it is likely that no one has ever satisfactorily defined the term.[125] "To its supporters, it has meant racial and social justice, a compensation for past and present discrimination."[126] As thus conceived, affirmative action, like integration, would eradicate the advantages that whites had accrued through segregation.[127] To its critics, affirmative action "has only perpetuated the problem of discrimination while creating a host of new problems."[128] 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 compelling governmental interest sufficient to withstand the strict scrutiny standard[129] whereas societal discrimination cannot withstand strict scrutiny analysis.[130] Nor has the Court or the nation embraced Charles Lawrence's path breaking analysis showing how persistent unconscious

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[123] *Id.*
[124] *Id.* (de facto desegregation fails to require judicial intervention).
[125] Steven Yates, *What Went Wrong with Affirmative Action (And Why it Never Could have Gone right),* page 1, *available at* http://lewrockwell.printthis.clickability.com/pt/cpt?action=cpt&titlle=What+Went+Wrong … (accessed on November 13, 2007).
[126] *Id.* at 1.
[127] Adams, *supra* note___ at 272.
[128] Yates, *supra* note ___ at 1.
[129] *See e.g.,* Freeman v. Pitts, 503 U.S. 467, 494 (1992).
[130] *Bakke*, 438 U.S. at 310 (Powell, J., opinion).

racism hinders the progress of minorities,[131] 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 the disputed prospect that current re-segregation trends threaten thirty years of progress.[132] 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. 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 effort to achieve racial justice."[133]

Given Derrick Bell's skepticism, Justice O'Connor's *Grutter* opinion should be considered warily. Reviewing the disputed racial classifications under strict scrutiny,[134] the Court had to determine whether the University of Michigan's classification scheme was narrowly tailored to further a compelling governmental interest.[135] For the first time, a

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[131] 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.").
[132] Eboni S. Nelson, *Parents Involved & Meredith: A Prediction Regarding the (Un)Constitutionality of Race-Conscious Student Assignment Plans*, 84 DENVER L. REV., 293, 297 (2006). *But see* THERNSTROM & THERNSTROM; *supra* note __ at 6 (contesting this claim).
[133] Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).
[134] *Grutter*, 539 U.S. at 326.
[135] *Grutter*, 539 U. S. at 326.

majority of the Court embraced diversity as a compelling interest that satisfies strict scrutiny.[136] Citing *Richmond v. Croson*[137] 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.[138] Evidently, the distinction between illegitimate and benign policies remains crucial[139] allowing race-based action when necessary to further a compelling governmental interest.[140] Context matters when reviewing race-based government action, and accordingly, courts must take relevant differences into account.[141]

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 1978-2003) of wrangling "concerning government policies that were designed to create racial diversity in schools."[142] 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[143]—required a review of a constellation of issues which have plagued

[136] *Grutter*, 539 U. S. at 326.
[137] Richmond v. J.A. Croson, 488 U.S. 469,493 (1989) (plurality opinion).
[138] *Grutter*, 539 U. S. at 326.
[139] Dworkin, *supra* note __ at 95.
[140] *Grutter*, 539 U. S. at 327.
[141] *Grutter*, 539 U. S. at 327.
[142] NOWAK & ROTUNDA, *supra* note ___ at 807.
[143] *Id*. at 789-90 (Justice O'Connor's opinion in *Croson* found that a strict-scrutiny compelling interest test should be applied to affirmative action classifications based on race.).

affirmative-action preference programs for some time. She endorses Justice Powell's view that student body diversity is a compelling state interest that justifies racial preferences in university admissions[144] when the university's policy does not purport to remedy past discrimination but instead endeavors to include students who may bring the law school a perspective different from that of members of groups that have not been victims of such discrimination.[145] Justice O'Connor accepts that the achievable benefits of diversity must be the product of a narrowly tailored approach. Narrow tailoring apparently requires "serious good faith consideration of workable race-neutral alternatives"[146] Though a dispute ensued about whether Michigan seriously considered race-neutral alternatives,[147] Justice O'Connor accepts the following propositions: (1) first, today's global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints;[148] (2) second, the law school's educational judgment that diversity is essential to its educational mission is one to which the Court should defer; (3) third, given the important purposes of public education and the expansive freedoms of speech and thought associated with its environment, universities occupy a special place in America's constitutional tradition; (4) fourth, "education is the very foundation of good citizenship"[149] and (5) fifth, law schools as training grounds for the nation's leaders must have legitimacy in the eyes of the citizenry purchased by providing a

[144] *Grutter*, 539 U.S. at 326.
[145] *Grutter*, 539 U.S. at 320.
[146] *Grutter*, 539 U.S. at 339.
[147] *See Grutter* 539 U.S. at 342. *But see Grutter* 539 U.S. at 394 (Kennedy, J., dissenting).
[148] *Grutter*, 539 U. S. at 330.
[149] *Grutter*, 539 U. S. at 331.

pathway that is visibly open to talented and qualified individuals of every race and ethnicity.[150]

Not everyone agrees. Justice Kennedy asserts that Justice O'Connor's decision premised on deference to the university's good faith departs from strict scrutiny in any meaningful way, and accordingly, the Court lacks authority to approve of racially based admission policies, even in a modest, limited way.[151] As we have seen, evidence exists showing that African American students thrive in racially homogenous environments provided by HBC's.[152] 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.[153] 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 that benefits are nowhere to be found. Failure to address this question coupled with data suggesting that black students thrive in a nondiverse environment as well as evidence showing public schools disfavor black students and other minority students support the inference that the interests of outsiders are irrelevant to the Court and the university's admission calculus.

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[150] *Id.*
[151] *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).
[152] *See e.g.*, *Grutter*, 539 U.S. at 364 (Thomas, J., dissenting) (discussing the evidence).
[153] *Grutter*, 539 U.S. at 331.

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* including*:* (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) finally, 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 *Grutter* 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[154] with her determination that outright racial balancing is impermissible.[155] Since Justice O'Connor asserts "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals *regardless* of race or ethnicity,"[156] since Justice Powell

[154] *Grutter*, 539 U.S. at 337 (accepting the conclusion that some attention to numbers does not transform a flexible admissions system into a rigid quota particularly when race is used as a plus factor).
[155] *Id.* at 330 (accepting that outright racial balancing is patently unconstitutional).
[156] *Grutter*, 539 U. S. at 331 (emphasis added).

determined that an admissions policy with racial quotas is impermissible[157] and in view of the fact that the percentage of African American students admitted by the University of Michigan's law school *mirrors*, almost precisely, the percentage of black applicants,[158] 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 of racial balancing so long as the admissions policy does not obviously focus on race.[159] 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 heterogeneous student body.[160] The necessity of enrolling a critical mass of minorities through a form of individualized treatment supplies constitutional cover, but as Professors Nowak and Rotunda suggest, is not without risk for members of minority groups. When the government allocates 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[161] or otherwise represent impermissible racial balancing.[162]

(2). Remedying societal discrimination in the mirror of strict scrutiny?

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[157] *Bakke*, 438 U.S. at 315.
[158] *Id.* at 383-384 (Rehnquist, C. J. dissenting) (discussing the precise correlation between the percentage of the law school's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups)
[159] Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, Vol. 113 HARV. L. REV. 1 (2007*) available at* http://ssrn.com/abstract=1015918.
[160] *See e.g., Grutter*, 539 U.S. at 324-325 (citing Justice Powell in *Bakke*).
[161] NOWAK & ROTUNDA, *supra* note ____791.
[162] *See Gratz*, 539 U.S. at 276, 280 (2003) (O'Connor, J., concurring) (finding impermissible a race conscious admissions policy that lacks individualized consideration*); see also, Parents Involved*, 127 S. Ct. at 2746 (disallowing the school districts' approaches as form of balancing).

The second paradox is connected with Justice O'Connor's acceptance of the Court's long-held conclusion that remedying the legacy of societal discrimination does not comply with the mandates of strict scrutiny[163] because it is simply too amorphous a basis for imposing a race-conscious remedy.[164] It is possible, of course, that she now disagrees but trapped by her own language in earlier cases, she finds it difficult to acknowledge the modification of her position.[165] 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.[166] This move may implicate either an alternation 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

[163] *Grutter*, 539 U.S. at 323-324 (endorsing the proposition that neither an interest in reducing the historic deficit of traditionally disfavored minorities in a professor nor remedying societal discrimination justify race conscious decision making).
[164] *Adarand*, 515 U.S. at 220 (citing Wygant v. Jackson, 476 U.S. 267, 276 (1986).
[165] *See e.g., Id*. at 220 (O'Connor, J, plurality opinion) (societal discrimination is too thin a basis for race-conscious remedies.).
[166] *Grutter*, 539 U.S. at 365 (Rehnquist, C. J., dissenting).

intergenerational effects of societal discrimination.[167] 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*[168]and *Gratz* were wrongly decided. In both cases the government dispensed with individualized treatment in some *Bakke* sense.[169] Instead, the government directly supplied or claimed to supply group-based remedies premised on membership in racial or ethnic groups[170] that have suffered from past racial disadvantages made tangible by current racial isolation. Following Justice Stevens' understanding[171] and Dworkin's imprimatur one might argue that the university and the school districts in *Gratz* and *Parents Involved* respectively, voluntarily and legitimately imposed racial balancing as a remedy for societal discrimination,[172] or as a device for eradicating the effects of public school segregation.[173]

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[167] To their credit, Justice Ginsburg and Justice Breyer state 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.").

[168] *Parents Involved*, 127 S. Ct. at 2753-54 ("like the University of Michigan undergraduate plan struck down in *Gratz*, 539 U.S. , at 275 . . . the plans here 'do not provide for a meaningful individualized review of applicants' but instead rely on racial classifications in a 'nonindividualized, mechanical' way.").

[169] *See Bakke*, 438 U.S. at 314-315 (as articulated by Justice Powell, diversity as a justification cannot sustain a selection system in which members of particular ethnic groups are guaranteed places on the basis of race). *See also, Parents Involved*, 127 S. Ct. at 2754.

[170] *See e.g., Parents Involved*, 127 S. Ct. at 2753 (In *Grutter* 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 part of a highly individualized holistic review.)

[171] *See e.g., Parents Involved*, 127 S. Ct. at 2799 (citing the Court's approval of a state statute mandating racial integration in that State's schools system).

[172] *See, e.g., Gratz* 539 at 298 (Ginsburg, J., dissenting) (discussing America's discriminatory past).

[173] *Parents Involved*, 127 S. Ct. at 2823 (Stevens, J., dissenting).

Advocates of the use of race-conscious remedies might conclude that such a move could operate consistently with Justice Ginsburg's intuition and if explained adequately, might facilitate Professor Lawrence's understanding of unconscious racism, which diminishes the necessity of proving intent.[174]

Conceivably, this approach would support either of two remedial avenues: First, court imposed remedies that are 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 units' 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 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 and largely to nonminority student beneficiaries who did not come from disfavored backgrounds. If this inspection is correct, *Grutter* would likely fail lenient scrutiny analysis because the law school's

[174] *See generally*, Lawrence, *supra* note ___ at 317-87.

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 derives content by an interpretive process of inclusion and exclusion 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, other *outsiders*[175] and appears to provide few benefits to the citizens of Michigan.[176] Here we should recall Edmund Husserl's claim that when someone uses some particular linguistic expression we have to distinguish between what the use of the expression, intimates and what the expression itself means.[177] Although the Law School's expert witness *intimated* "that race is not the predominant factor in the Law School's admissions calculus,"[178] 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% but for the challenged race-preference policy.[179] Stated another way, (*this means*) more than two-thirds of the students from underrepresented

[175] *Grutter*, 539 U.S. at 320.
[176] *Grutter*, 539 U.S. at 359 (Thomas, J., dissenting) ("In 2002, graduates of the University of Michigan Law School made up less than 6% of applicants to the Michigan bar.").
[177] MACINTYRE, EDITH STEIN, *supra* note __ at 42.
[178] *Grutter*, 539 U.S. at 359 (Thomas, J., dissenting).
[179] *Id*. at 320.

minority groups,[180] ultimately admitted, were in fact, *initially* excluded. 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 preserves (perhaps) legacy preferences or other devices favored by elites.[181] Coextensively, evidence accumulates that the racial diversity, which the University of Michigan prefers, may impair learning among black students.[182] Nevertheless, contrary to the skepticism toward governmental racial classifications that she exhibited in *Adarand*,[183] Justice O'Connor deferred to the good faith educational judgment of the very university that created the exclusionary admissions policy in the first place.

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[184] while impairing enrolled students' educational performance and cognitive

[180] *Id*. ("underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent").
[181] *Grutter*, 539 U.S. at 368 (Thomas, J. dissenting).
[182] *Grutter*, 539 U.S. at 364 (Thomas, J., dissenting) (providing evidence).
[183] *Adarand*, 515 U.S. at 223.
[184] *See infra*, Part III C.

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 together 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.[185]

From a Critical Race perspective, deference to law school administrators, like deference to the university's co-conspirator, the state's 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 intent, find that disparate impact lurks in the background of the law school's admission policy. Here the case is much stronger because "no modern law school could claim ignorance of the poor performance of blacks, relatively speaking on the Law School Admissions Test (LSAT). Nevertheless, law schools continue to use the test"[186] to deny 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. Coherent with this perception,

[185] Lawrence, *supra* note ___ at 340.
[186] *Grutter*, 539 U.S. at 369-370 (Thomas, J. dissenting).

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."[187] Derrick Bell has noted that the interest of blacks in achieving racial equality has 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."[188]

The interests of privileged individuals are expressed in the university's admissions policy. Adducible evidence sustains this conclusion. *Grutter* and *Gratz* came before the courts in a peculiar posture. The evidence shows that black and Hispanic students, seeking to defend affirmative action, won federal court permission to intervene in both *Gratz* and *Grutter*.[189] 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."[190] The credibility of the university's purported embrace is vitiated by noting that the students planned to offer an argument that the university itself disputed: that the university needs to have affirmative-action to remedy its own racial discrimination.[191]

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[187] Lawrence, *supra* note ___ at 387.
[188] *Id.*
[189] *6th Circuit Court Says Black and Latino Students Can join Michigan Affirmative Action Cases*, BLACK ISSUES IN HIGHER EDUCATION, August 19, 1999, available through BNET.com and *available at* http://findarticles.com/p/articles_m0DXK/is-13-16/ai-55824848/print.
[190] *Id.*
[191] Peter Schmidt, *Minority Students Win Right to Intervene in Lawsuit Attacking affirmative Action*, THE CHRONICLE OF HIGHER EDUCATION, *available at*

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.[192] Additionally, 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 are poor substitutes for a system that gives every applicant a chance to prove he can succeed in the study of law."[193] My own experience leading a program providing an alternative pathway to law school matriculation[194] persuades me that an admissions system wedded solely to tests scores and perhaps poisoned by exceptions to merit,[195] can only be defended on the basis of subordination. Thus, the law school's sustained allegiance to measures, which it knows (and hence *intends* to) produce racially skewed results that persistently disfavor black and Hispanic students should not

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http://chronicle.com/subscribe/login?url=/weekly/v46/i02/02a6802.htm (accessed, November 10, 2007) [hereinafter, Schmidt, *Minority Students Win Right to Intervene*].

[192] Kimberly Chow, *Michigan Votes to stop affirmative action in state university on Tuesday*, the YALE DAILY NEWS, November 9, 2006 available at http://www.yaledailynews.com/articles/printarticle/18868.

[193] *Grutter*, 539 U.S. at 367 (Thomas, J. dissenting).

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

[195] *Grutter*, 539 U.S. at 367 (Thomas, J. dissenting).

be entitled to deference.[196] That is, unless the Court and the nation is 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"[197] 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 disadvantaged citizens.[198] This calculus sustains the interest and superior status of privileged white students and upper-middle class white administrators.[199] The law school's preferred approach indicates that underrepresented students should not 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

[196] *Id. See also, Parents Involved*, 127 S. Ct. at 2778 (the Supreme Court does not typically defer to state entities in assessing whether a given practice complies with its compelling interest test).
[197] *Grutter*, 539 U.S. at 369 (Thomas, J. dissenting).
[198] *Grutter*, 539 U.S. at 368-69 (Thomas, J. dissenting) (discussing some alternatives).
[199] Lawrence, *supra* note ___ at 387.

privilege or otherwise make it impossible for disfavored individuals and groups to attend or succeed.[200] The U.S. News & World Report survey shows, law school rankings are enhanced by the number of individuals they exclude. Hence 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, [201] high failure rates on bar examinations[202] and high attrition rates at large corporate law firms.[203] 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. Since the State of Michigan's educational hierarchy instantiates policies that preserve educational

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[200] *See e.g.*, THE CONCISE OXFORD DICTIONARY, (6th ed., 1976).

[201] *See e.g.*, Richard H. Sander, *The Racial Paradox of the Corporate Law Firm, available at* http://ssrn.com/abstract=947606 (forthcoming N. CAR. L, REV.) at 1771-1775 (Showing significant attrition at every stage of the educational process with Hispanics dropping out of high school far more frequently than do whites, blacks, or Asians. In law school and on the bar, Hispanics have very high attrition rates. In terms, of black students, the largest sources of attrition are evident in college entrants not graduating and law school, matriculates not entering the bar. Blacks make up to 8 percent of entering law students but make up only between 5-6 percent of new lawyers.).

[202] *See e.g.*, Ilya Somin, *"Active Liberty" and Judicial Power: what Should Courts Do to Promote Democracy?*, 100 NORTHWESTERN UNIV. L. REV. 1827, 1840 (2006) (citing Ian Ayres and Richards findings that "50% of African American law students from a 1991 Law School Admissions Council sample either failed 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."). Ayres and Brooks conclude that some racial disparities emerge, because "law schools, 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*.

[203] Sander, *supra* note ___ at 1820.

malpractice in the Michigan's elementary and high schools,[204] 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[205] into cosmopolitanism. Diversity programs have shifted their focus from increasing minority access to education to serving the broader and more abstract goal of promoting campus diversity.[206] 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."[207] "Of the three white participants, one was a young man

[204] *See infra* Part III, C.
[205] Peter Schmidt, *From 'Minority' to 'Diversity,'* THE CHRONICLE OF HIGHER EDUCATION, February 3, 2006, available at http://chronicle.com/free/v52i22/22a02401.htm (accessed on October 27, 2007) [hereinafter, Schmidt, *From 'Minority' to 'Diversity'*].
[206] *Id*.
[207] *Id*. at 4.

who routinely identifies himself on applications as 'African-American' because his father was raised in Egypt."[208] Deborah Jones Merritt explains that courts and policy makers, when and if they act, are quite willing to ensure that selective 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."[209] It appears that society's elites 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 that brings to mind a late-night fit of drunken sentimentality.[210]

Critical Race scholarship indicates liberals are quite willing to interpret the Fourteenth Amendment generously to reify race conscious affirmative-action programs and policies[211] which "confer a benefit on white elite groups"[212] while "perpetuat[ing] the existing racial hierarchy."[213] At the same time, liberals have proved unwilling to

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[208] *Id*. at 4.
[209] Deborah Jones Merritt, *Brown's Legacy: The Promises and Pitfalls of Judicial Relief*, 56 NEGRO EDUC. REV. 51, 53 (2005).
[210] My debt to Steven Smith should be obvious. *See* Steven D. Smith, *Conciliating Hatred*, FIRST THINGS, June-July 2004, at 17, 18.
[211] *See, e.g.*, *Adarand*, 515 U.S. at 243 n.1.
[212] Richard Delgado, *Enormous Anomaly? Left-Right Parallels in recent Writing About Race*, 91 Colum. L. Rev. 1547, 1559 (1991) [hereinafter, Delgado, *Enormous Anomaly*?].
[213] Delgado, *Enormous Anomaly*? *supra* note ___ at 1559.

generously interpret the Constitution 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.[214] Although, members of the liberal wing of the *Zelman* Court 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,[215] Justice O'Connor, by contrast, was rightly concerned about the fate of outsiders. Coherent with James Forman's research confirming that school choice has deep roots in the civil rights movement and black nationalism,[216] Justice O'Connor's concurrence in *Zelman* commendably allowed outsiders to escape the racially discriminatory dropout factories furnished by the Cleveland school board.

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. Charles Lawrence posits a connection between unconscious racism and the existence of cultural symbols that have racial meaning.[217] The "'cultural meaning'" of an allegedly racially discriminatory act is the best available analogue for evidence of, a collective unconscious that we cannot observe directly."[218]

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[214] Hutchison, *Liberal Hegemony?, supra* note ___ at 612.
[215] *See e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639, 684-85 (Stevens, J., dissenting) (dismissing as irrelevant the educational crisis confronting African Americans in the Cleveland School District).
[216] James Forman, Jr., *Fifty Years After Bolling v. Sharpe: The Secret History of School choice: How Progressives Got There First*, 93 GEO. L.J. 1287 (2005).
[217] Lawrence, *supra* note __ at 324.
[218] *Id.*

> This test would 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 motivation of the governmental actors. [219]

This approach uncovers the motivation and significance of governmental action based on the implicit, racial message contained in the government's conduct.[220] 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.[221] These remedies preserve elite ideals, including the exclusion of the masses, which reinforce the continued economic and political dominance by elites.[222] 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

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[219] *Id.*
[220] *Id.*
[221] Richard Delgado, *Affirmative Action as a Majoritarian Device: Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222, 1222 (1991) [hereinafter, Delgado, *Affirmative Action as a Majoritarian Device*].
[222] *Id.*

evidence that the districts' plans were implemented to remedy the effects of past intentional discrimination,[223] the government's interest in diversity appeared to be the only pathway to race conscious student assignments.[224] *Grutter's* diversity rationale proved unavailing for two reasons. First, *Grutter* relied upon considerations unique to universities and second, race standing alone was determinative for purposes of assigning some students in the Seattle and Louisville school districts.[225] Contrary to O'Connor insistence on individualized treatment, the school districts used "racial classifications in a 'nonindividualized mechanical way,"[226] as opposed to utilizing race as a plus factor.[227] Second, the school districts flubbed the "narrow tailoring prong of strict-scrutiny analysis because they had not seriously considered race-neutral alternatives."[228]

Nonetheless, Dworkin, in an obvious concession to paradox, praises O'Connor's *Grutter* decision[229] despite the fact that her decision affirmed by her concurrence in *Gratz* furnished the groundwork for the *Parents Involved* holding, which he detests. 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."[230] Critical Race scholarship suggests this claim is dubious.[231] He rebukes Justice Roberts' assertion that the Court need not take a view on whether racially

[223] *Parents Involved*, 127 S. Ct. at 2752.
[224] *Id*. at 2753.
[225] Estreicher, *supra* note __ at 240.
[226] *Parents Involved* 127 S. Ct. at 2754 (quoting *Gratz*, 539 U.S at 276, 280 (O'Connor, J., concurring).
[227] *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring).
[228] Estreicher, *supra* note __ at 241.
[229] Dworkin, *supra* note __ at 95.
[230] *Id*.
[231] *See supra* Part III, B.

concentrated schools are educationally disadvantageous because it would make no difference to its decision even if it is possible that such schools harm students.[232] Here, Dworkin rightfully scolds the Court if racially concentrated schools are necessarily harmful to outsiders.[233] At the same time Dworkin overlooks the liberal wing of the Court's recent enthusiasm for dismissing the depth of the educational crisis which confronts minority parents in Cleveland, Ohio.[234] 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 integrated schools. But such is the "majestic equality of the law."[235] 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."[236]

Dworkin notes Justice Kennedy's concurrence in *Parents Involved* was more sanguine about the legitimacy of race-conscious programs in public schools[237] than Chief Justice Roberts',[238] but, it is worth documenting that Kennedy's equanimity is tempered by his dissent in *Grutter*.[239]

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[232] Dworkin, *supra* note ___ at 92.
[233] *See Parents Involved*, 127 S. Ct. 2776 (describing the mixed evidence on this question) *See infra* Part III, B & C.
[234] *See e.g.*, Hutchison, *Liberal Hegemony*, *supra* note ___ at 611 (discussing the views of dissenting Justices in *Zelman*.).
[235] LE LYS ROUGE (THE RED LILY) 95 (W. Stephens, trans. 6th ed. 1992).
[236] Hutchison, *Liberal Hegemony*, *supra* note __ at 629.
[237] Dworkin, *supra* note ___ at 95.
[238] *Id*.
[239] *See e.g.*, Estreicher, *supra* note ___ at 242.

Kennedy, perhaps O'Connor's most faithful disciple, held that the school districts could legitimately concern themselves with preventing de facto re-segregation.[240] Equally clear, he found a special infirmity in the districts plans: because they made the use of race an obvious deciding factor.[241] 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 the applicant pool to arrive at a meaningful number of minority students which were necessary to achieve a genuinely diverse student body.[242] 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[243] 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 others, or whether the programs were sufficiently flexible to elude judicial preclusion. Answering

[240] *Parents Involved* 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).
[241] Dworkin, *supra* note __ at 95-96.
[242] *Parents Involved*, 127 S. Ct. at 2757.
[243] *See e.g.*, Larry A. Alexander & Maimon, Schwarzchild, Grutter *or Otherwise: Racial Preference and Higher Education, available at* http://ssrn.com/abstract=559149 (2004).

in the affirmative in *Grutter*, O'Connor demurs in *Gratz*.[244] Race-conscious programs, characterized by an obvious use of race[245] without meaningful individualized review, and which are not narrowly tailored to the state's interest 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. To be sure both prongs of strict scrutiny—the compelling interest test and narrow tailoring—"have an 'in-the-eye-of-the-beholder' quality."[246] This is particularly true "after 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."[247] "Once that hurdle was cleared, insistence on narrow tailoring seems almost churlish."[248] "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."[249] Justice Breyer states, with commendable honesty, "that it is simply incoherent to require the state to get to a valid goal by the most circuitous route possible."[250]

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[244] 539 U.S. 244 (2003). *But see* Gratz 539 U.S. at 282 (Stevens, J., dissenting) (finding that petitioner lacks standing to seek prospective relief).
[245] The obviousness of the university's undergraduate admissions policy is verifiable. Beginning in 1998 the policy automatically distributed 20 points to every applicant who was a member of historically underrepresented racial and ethnic group including African Americans, Hispanics and Native Americans. *Gratz*, 539 U.S. at 256. 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 Gratz*, 539 U.S. at 256.
[246] Estreicher, *supra* note ___ at 243.
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.* (citing Justice Breyer).

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"[251] and animated by the non-preferment standard,[252] the Court invalidated the challenged school assignment plans. The non-preferment principle is violated when students "would be placed in preferred schools or denied placement in preferred schools because of their race."[253] Dworkin disagrees. Citing 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."[254] Apparently, both districts neglected the "distinct diversity contributed by Asian-American, Latino, and other racial groups."[255] Roberts determined that "these plans [were] aimed not at diversity but a particular racial balance which was not, on its own, a compelling state interest."[256] 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.[257]

While 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-blacks schools or schools with very few

[251] Nelson, *supra* note ___ at 326.
[252] Estreicher, *supra* note ___ at 249.
[253] *Id.*
[254] Dworkin, *supra* note ___ at 94.
[255] *Id.*
[256] *Id.*
[257] *Id.* at 92.

blacks."[258] 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,[259] but in a stunning capitulation to irony, Dworkin urges deference to educational entities when they implement his preferences despite their unanswerable complicity in the nation's educational crisis.[260] 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 than 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.

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

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[258] *Id.*
[259] *Id.*
[260] *See generally*, THERNSTROM & THERNSTROM, *supra* note __ at 12-13 (showing that by the 12 grade, both black and Hispanic students are almost four years behind their white and Asian counterparts).

reduce racial homogeneity in individual schools. For current purposes, I concentrate on the Seattle district wherein decreasing the level of racial homogeneity was achieved through racial-tiebreakers.[261] Homogeneity was determined by a base-line established by the district's racial composition. The base-line was designed to impede the ability of certain students to select entrance in the more popular schools.[262] "In the school 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."[263] 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.'"[264]

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. 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

[261] *Parents Involved*, 127 S. Ct. at 2747 (discussing the Seattle Public school plan).
[262] *Id.*
[263] *Id.*
[264] *Id.* (discussing Seattle Public school plan). If racial tiebreakers were insufficient for selection purposes, non-racial tiebreakers were used during the next step in the selection process. *Id.*

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 would not.'"[265] In the latter case, African Americans would be prevented from attending their preferred schools, while a white student would be welcomed. "It 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.'"[266] 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 straight-forward way: the purported necessity of creating racially integrated schools as a device to overcome racially segregated housing patterns.[267] If evidence sufficient to meet a high burden of proof can be adduced, which shows that the creation of racially integrated schools leads to improved cognitive achievement including higher test scores[268] 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.[269] However, the school districts themselves *declined* to either embrace the conclusion that they were guilty of intentional discrimination or present evidence (persuasive

[265] *Parents Involved*, 127 S. Ct. at 2754.
[266] *Id.*
[267] *Id.* at 2755.
[268] *See e.g.*, THERNSTROM & THERNSTROM, *supra* note ___at 4 (showing that test scores matter because they tell us what we need to know if we hope to reform education, close the racial gap in academic achievement and measure the knowledge and skills that demanding jobs and college courses require).
[269] *Parents Involved*, 127 S. Ct. at 2755 (declining to resolve this dispute).

or otherwise) that their current race conscious policy constituted a remedy for past intentional discrimination.[270] Equally clear, the district failed to show that they 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 operates a single-race academy.[271] 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 school board's judgment decline to invoke strict scrutiny.[272] 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.[273] For example, a recent study conducted by Johns Hopkins University reveals that 78 high schools in the State of Michigan with high concentrations of minority students have been labeled dropout factories.[274] 21 of the Detroit's 37 high schools made

[270] *Id.* at 2761. *See also, Id.* at 2761 (discussing the irrelevance of Justice Breyer's reliance on *McDaniel v. Barresi* because the case involved a school system that had been segregated by law).
[271] *Parents Involved*, 127 S. Ct. at 2777.
[272] *See e.g., Parents Involved*, 127 S. Ct. at 2766 (discussing Justice Breyer's proposed deference).
[273] *See supra* Part I.
[274] *Michigan Stung by study's dropout list: 78 high schools called 'dropout factories by college report; state officials reject claims*, THE DETROIT NEWS, October 30, 2007 *available at* http://www.detnews.com/apps/pbcs.dll/article?AID=/20071030/SCHOOLS/710300376/1409/METRO.

the list.[275] 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,"[276] suspicion arises over the possibility that diversity is being offered as a convenient panacea. At best, the evidence is mixed because "desegregation does not have a single effect, positive or negative, on academic achievement of African American students . . ."[277] 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 produce these desired

[275] *Id*. For a list of Detroit 37 high schools *see* Great Schools*:* A Parent Guide to K-12 Success, *available at http://www.greatschools.net/schools.page?city=Detroit&lc=h&state=MI&st=public&showall=true*
[276] *Gratz*, 539 U.S. at 298 (Ginsburg, J., dissenting).
[277] Henderson, Greenberg, Schneider, Uribe, & Verdugo, *High Quality Schooling for African American Students, in* BEYOND DESEGREGATION 166 (M. Shujaa ed. 1996) (cited in *Parents Involved*, 127 S. Ct. at 2776).

results.[278] Belying its commitment to diversity, the Seattle school board operates "a K-8 'African-American Academy,' which has a 'nonwhite' enrollment of 99%."[279] 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."[280] Consistent with that claim, Derrick Bell notes "that the economic and political realities of urban American may mean that earnest implementation of the desegregation principle can actually hurt the educational opportunities afforded black children in some cases."[281] 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.[282] Of the four, one was black and the other three were white. Yet, on standardized tests

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[278] *Parents Involved*, 127 S. Ct. at 2776.
[279] *Parents Involved*, 127 S. Ct. at 2777.
[280] *Id.* at 2776.
[281] NOWAK & ROTUNDA, *supra* note ___ at 764 (citing Derrick Bell).
[282] REPORT OF THE BOARD OF TRUSTEES OF PUBLIC SCHOOLS OF THE DISTRICT OF COLUMBIA TO THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA: 1898-1899 (Washington: Government Printing Office, 1900), at 7, 11.

given in 1899, students in the black high school averaged higher test scores than students in two of the three white high schools.[283] That same school repeatedly equaled or exceeded national educational norms on standardized test in the 1930s, 1940s and early 1950s.[284] 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.[285]

Consistent with this intuition, in November 2007, Dr. Herzog published the first study that objectively measures the effects of ethnic and racial diversity among students and faculty on the cognitive growth of undergraduate students.[286] 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 correlate positively with objective measures of cumulative academic achievement.[287] 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

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[283] Henry S. Robinson, *The M Street School*, RECORDS OF THE COLUMBIA HISTORICAL SOCIETY OF WASHINGTON, D.C., VOL. LI, 122 (1984).
[284] Thomas Sowell, *Black Excellence: The Case of Dunbar High School*, THE PUBLIC INTEREST, 8 (Spring 1974).
[285] 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." THOMAS SOWELL, BLACK REDNECKS AND WHITE LIBERALS, 204 (2005).
[286] Serge Herzog, *Diversity and Educational Benefits: Moving Beyond Self-Reported Questionnaire Data*, Education Working Paper Archive, November 19, 2007 *available at* http://www.uark.edu/ua/der/EWPA/Research/Achievement/1799.html.
[287] *Id.*

elites. While 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 have been inescapably fused with racist oppression and apartheid-like exclusion, and thus contribute to social stratification.[288] 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 to do otherwise underestimates "how the educational system in Cleveland [and America] actually functions."[289] She deserves our admiration because she was unwilling to conscript the interest of outsiders in order to reify liberal perspectives on the First Amendment.[290]

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

[288] Hutchison, *Liberal Hegemony, supra* note ___ at 629.
[289] *Zelman*, 536 U.S. at 663 (O'Connor, J., concurring).
[290] *See e.g.*, Hutchison, *Liberal Hegemony, supra* note ___ at 629-630.

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 takes in the various disputes which 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 justify Derrick Bell's charge that "the benefits of constitutional democracy in government are not adequate to protect [disfavored groups] from the coercive power that can be exercised [or authorized] by a majority."[291] 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 interest.[292] 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.

[291] DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW 234-235 (4th ed. 2000).
[292] Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1974 (1990).