

FROM EQUALITY TO DIVERSITY: THE DETOUR FROM *BROWN* TO *GRUTTER*[†]

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In this article, the author discusses the Supreme Court's recent decisions in Gratz v. Bollinger and Grutter v. Bollinger, in light of their relationship to Brown v. Board of Education, decided nearly fifty years earlier. Surveying decisions leading from Brown to Grutter, the author documents the evolution in the Court's affirmative action cases from a remedial rationale to a diversity rationale. Testing the diversity justification against the Court's strict scrutiny standard, however, the author finds that the diversity rationale is insufficient to meet the requirements of that test and urges the Court to return to the remedial logic of Brown.

First, noting persistent questions about the basis for and scope of the diversity rationale, the author submits that diversity arguments fail to meet the Court's requirement that racial preferences be narrowly tailored to serve a compelling state interest. Second, he suggests that continuing gaps in performance between black and white students show that the task Brown began is still incomplete, firmly establishing a continuing need to remedy past discrimination in education. Rather than restrict remediation to those institutions guilty of past racial discrimination, however, remediation should be more broadly interpreted to permit educators to give racial preferences, but only to the extent that they can show a link between the current gaps in student performance and past discrimination. The author argues that such a broadened remedial rationale, with its resulting heightened burden of proof on educators, would provide both a persuasive reason for giving racial preferences in admissions and a natural end to such racial preferences when the burden of proof can no longer be met. This article concludes by stating that the remedial rationale for considering

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race in admissions would keep such consideration visible and disciplined, while best fitting the spirit and result in Brown.

This year we celebrate the fiftieth anniversary of *Brown v. Board of Education*,¹ at once one of the most important² and enigmatic³ documents in our constitutional history. As if to mark that anniversary, in June 2003 the Supreme Court decided a pair of cases dealing with one of the most contentious issues of the post-*Brown* era—namely, the legality of so-called reverse discrimination or affirmative action. In *Grutter v. Bollinger*⁴ and *Gratz v. Bollinger*,⁵ the Court revisited, for the first time since its 1978 decision in *Regents of the University of California v. Bakke*,⁶ the issue of whether the use of race as a criterion for admitting students to an institution of higher education violates the Equal Protection Clause of the U.S. Constitution⁷ and Title VI of the Civil Rights Act of 1964.⁸

In *Grutter*, the Court, by a narrow five-to-four majority, upheld the University of Michigan's race-conscious⁹ admissions program. The Court held that the law school's asserted goal of attaining "student body diversity" was a "compelling state interest" sufficient to justify its practice of giving favorable weight to an applicant's self-identified status as an African American, Latino, or Native American.¹⁰ Further, the Court found that the law school's "holistic" method of considering each applicant's

1. 347 U.S. 483 (1954).

2. Examples from the voluminous literature on the history and impact of *Brown* include DAVID J. ARMOUR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995); LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976); JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); and RAYMOND WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION* (1984).

3. For a sampling of the debate over the proper interpretation of the *Brown* decision, see Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); and Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

4. 539 U.S. 306 (2003).

5. 539 U.S. 244 (2003).

6. 438 U.S. 265 (1978).

7. U.S. CONST. amend. XIV, § 1.

8. 42 U.S.C. § 2000d. Title VI prohibits recipients of federal grants from engaging in discrimination on the basis of race and other characteristics. The Supreme Court has consistently held that the prohibition against racial discrimination in Title VI is coextensive with the prohibition against racial discrimination derivable from the Equal Protection Clause, a position explicitly reaffirmed by the Court in *Grutter*. 539 U.S. at 342. For this reason, *Grutter* and *Gratz* apply to most private, as well as all public, institutions of higher education.

9. I use the terms "race" and "racial" primarily for reasons of expository convenience, well aware of the fact that most of the groups benefited by affirmative action are not, in a classical sense, a race, and also aware of current doubts that the classical concept of race has any biological, genetic, or even genealogical coherence.

10. *Grutter*, 539 U.S. at 330.

race along with other academic and nonacademic¹¹ variables satisfied the Equal Protection Clause's requirement of "narrow tailoring."¹² By contrast, in *Gratz*, six members of the Court ruled against a much more formulaic system used to rank applicants to the university's undergraduate college. This system assigned an automatic twenty points—out of a possible 150 and roughly 100 needed for admission¹³—to members of those same minority groups. Although the formula also awarded points for a number of other academic and nonacademic characteristics, such as athletic ability, socioeconomic disadvantage, Michigan residence, service, and alumni relations, the Court found that the undergraduate policy failed to accord applicants a sufficiently individualistic appraisal.¹⁴ Race, it concluded, received decisive weight in too many cases.

Grutter and *Gratz* were decided just forty-nine years after the Term in which *Brown* was decided—and almost fifty years to the day after the Supreme Court ordered reargument in the case.¹⁵ Curiously, *Brown* is cited only three times in the thirteen opinions filed in the two cases. Justice O'Connor cites *Brown* in her opinion for the Court in *Grutter* for the rather mundane point that "education . . . is the very foundation of good citizenship."¹⁶ Justice Ginsburg cites *Brown* twice: once in her *Grutter* concurrence, to remind readers of the relatively short period of time that has transpired since the outlawing of de jure segregation;¹⁷ and once in her *Gratz* dissent, to support her argument that there is a moral and constitutional difference between using race for inclusive and exclusive purposes.¹⁸ On the one hand, the scant explicit attention paid to *Brown* in *Grutter* and *Gratz* is not surprising, given the different contexts in which the cases arose and the jurisprudential developments over the past fifty years. On the other hand, it is remarkable that these decisions pay so little homage to *Brown*, given its iconic, monumental status in the law and politics of U.S. race relations.

11. By "nonacademic" I mean other than scores on applicable aptitude tests (the LSAT, in the case of the law school, the SAT or ACT in the case of the college), and evidence of academic performance (usually grade point average or rank in class) in previous academic work.

12. *Grutter*, 539 U.S. at 336–38.

13. *Gratz v. Bollinger*, 539 U.S. 244, 286 (2003) (O'Connor, J., concurring). Indeed, the admissions policy suggests that most applicants with a score of 90 were admitted. *See id.*

14. *Id.* at 284.

15. *Brown* was argued on December 9, 1952. On June 8, 1953, a deeply hesitant and divided Court ordered briefing and reargument of several questions related to the historical understanding of the meaning of the Equal Protection Clause and the possible remedial consequences of a declaration of unconstitutionality. *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953). Reargument was held on December 8, 1953, and the case was decided on May 17, 1954. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *Grutter* and *Gratz* were decided on June 23, 2003. *Grutter*, 539 U.S. at 306; *Gratz*, 539 U.S. at 244.

16. 539 U.S. at 334 (quoting *Brown*, 347 U.S. at 493).

17. 539 U.S. at 343 (Ginsburg, J., concurring) (responding to the Court's rather odd exhortation that the use of race in admissions should end in twenty-five years, by noting how brief a time had elapsed since de jure segregation was finally struck down in *Brown*).

18. 539 U.S. at 301 (Ginsburg, J., dissenting) (rejecting the notion that there is a moral equivalency between the issues presented in *Bakke* and in *Brown*).

The temporal coincidence naturally invites one to speculate on the relationship between *Grutter*¹⁹ and *Brown*. On the one hand, one can view *Grutter* as honoring the spirit of *Brown*. In this view, the affirmative action policies upheld in *Grutter* are part of pervasive social practices designed to carry out the remedial mission launched by *Brown II*²⁰ and its progeny to remove the noxious growth of racial segregation “root and branch.”²¹ On the other hand, one might view *Grutter*, with its legitimization of state-sponsored racial discrimination, as deeply at war with the spirit of *Brown*. Where *Brown* was universalistic, *Grutter* is particularistic. Where *Brown* was color-blind, *Grutter* is color-conscious, even color-preoccupied.

Which of these two views is correct? My argument is that both views contain elements of truth. Judged by its reasoning, *Grutter* is indeed in tension with the spirit of *Brown*; however, judged by its result, *Grutter* can be viewed as compatible with *Brown*. The key to unraveling my argument is the distinction drawn in the cases, and in the voluminous literature on affirmative action, between the concepts of diversity and remediation. Adopting more or less whole cloth the reasoning of Justice Powell in *Bakke*, the *Grutter* majority upholds the use of race-conscious admissions criteria as a means of promoting the goal of educational diversity, while rejecting its use as a means of remedying past societal discrimination. As I will attempt to demonstrate, diversity is the weaker of the two arguments, and its adoption in *Grutter* completes an unfortunate detour, begun in *Bakke*, from the remedial logic of *Brown*. Shorn of any remedial connotations, diversity cannot provide a sufficiently persuasive justification for the particular practices at issue.²² We would be better off by giving up the diversity rationalization and forthrightly adopting a suitably constrained remedial justification.

I. AFFIRMATIVE ACTION IN COLLEGIATE ADMISSIONS: THE EVOLUTION FROM REMEDY TO DIVERSITY

The history of affirmative action in higher education demonstrates the tension between the remedial and diversity rationales for race-

19. For ease of exposition, I will henceforth refer only to *Grutter*, since it is the first and more important of the two decisions, and will mention *Gratz* only when referring to its specific holdings or opinions.

20. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955).

21. *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

22. Several commentators, writing before the decisions in *Grutter* and *Gratz*, have expressed similar doubts about the persuasiveness of the diversity rationale. See, e.g., WALTER FEINBERG, ON HIGHER GROUND: EDUCATION AND THE CASE FOR AFFIRMATIVE ACTION 77 (1998); Paul Gewirtz, *The Triumph and Transformation of Antidiscrimination Law*, in RACE, LAW AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* 110 (Austin Sarat ed., 1997); Sanford Levinson, *1999 Owen J. Roberts Memorial Lecture: Diversity*, 2 U. PA. J. CONST. L. 573 (2000); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2002).

conscious admission programs.²³ Affirmative action programs in higher education began by recognizing that the era of legally enforced racial isolation attacked in *Brown* had consigned most black children to schools that did not provide adequate preparation for entry into higher education. This isolation left black students in neighborhoods and social settings that did not provide incentive, direction, support, and reward for academic effort. Colleges and universities began to engage in differential patterns of recruitment in order to attract black applicants who would not have surfaced through the usual channels of communication and recruitment employed by admissions officers. Educators quickly realized that they often needed to apply different standards to the applicants yielded by these efforts, precisely because of the educational disadvantages under which they had labored as children and adolescents. Admissions officers employed the criterion of race, to the advantage of these applicants, precisely because race had been employed, to their disadvantage, by the legal regimes under which they grew into maturity and by the institutions to which their educational development had been entrusted. For the victims of those regimes, specific remedial orders to dismantle those practices—if they came at all—came far too late.

The goal of those early affirmative action programs was thus frankly remedial.²⁴ Educators had several motivations for undertaking such remedial programs. In some cases, educators were seeking to reverse the effects, or perceived effects, of a history of de jure, or at least de facto, discrimination against blacks practiced by their own institutions²⁵ or by the systems of higher education of which their institutions were a part.²⁶ More generally, however, many educators undertook such measures out of a belief that the mission of higher education is centrally and fundamentally remedial. That is, higher education is one of the primary vehicles in this society for helping each generation realize its potential and prepare for full participation in civic life. When a group of people has been denied, on account of their race, opportunities widely deemed necessary for educational development, it is natural for educators to give special attention to members of that race in carrying out their mission. For many educators, a sense of moral obligation or ideological commit-

23. On the origins and history of affirmative action, see JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE AND JUSTICE IN AMERICA* (1996).

24. See FEINBERG, *supra* note 22, at 7–8.

25. A particularly ironic example is the University of Texas, whose racially separate law school system was found to violate the Equal Protection Clause, *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950), and whose law school's subsequently adopted race-conscious affirmative action plan was found to violate the Equal Protection Clause, *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

26. For an argument that the University of California system of higher education was guilty of discriminatory practices that could justify adoption of a specific remedial affirmative action policy, see Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 *UCLA L. REV.* 1521 (2000).

ment must have contributed to the willingness to incur the costs of affirmative action programs as well.

Beginning in the late 1970s, however, the smooth road that led from *Brown* to race-conscious affirmative action programs in higher education became increasingly bumpy and circuitous. The explanation lies in several more or less simultaneous and mutually reinforcing developments.

First, the achievement gap between blacks and whites did not close quickly, as had been anticipated, but persisted despite massive attempts to both desegregate previously segregated elementary and secondary schools and raise the academic quality of those schools most disadvantaged.²⁷ Roughly two generations since *Brown*, the academic achievement and aptitude of blacks, as measured by grades and test scores, continue to lag noticeably behind those of non-blacks.²⁸ Most troubling, and puzzling, is the fact that this gap persists even to the extent that one holds constant socioeconomic differences between the two groups.²⁹ On average, middle-class and upper middle-class blacks perform at a significant deficit behind their white peers. As a consequence, preferential recruiting and selection practices, adopted as transitional correctives, became enduring features of higher education admissions. Further, preferential practices designed initially to be applied primarily to minorities from educationally and socially disadvantaged backgrounds began to be applied widely to minorities from the middle and upper-middle classes as well.³⁰

Second, pressures mounted to expand affirmative action practices in education (as in other walks of life) to other racial and ethnic groups, which had been, to varying degrees, subject to either de jure or de facto discrimination, or to other forms of social disadvantage. The expansion of benefited groups diminished the remedial focus and, to some extent, the moral clarity of the original affirmative action programs.

Third, competitive pressures caused a gradual increase in the extent and intensity with which preferential standards were applied. Once schools at the top of the academic pecking order—i.e. Harvard, Yale, and Princeton—adopted relatively ambitious race-conscious preferences,

27. See THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998).

28. For example, over the past ten years, the average combined SAT score of African Americans has improved from 850 to 857. However, the average score of whites has increased from 1037 to 1063, and the average score of Asian Americans has increased from 1042 to 1083, thus increasing the gap. See June Kronholz, *SAT Scores Are Highest Since 1974: Test Gap Between Whites, Most Minorities Widens Among College Freshmen*, WALL ST. J., Aug. 27, 2003, at D2.

29. See Michael Winerip, *In the Affluent Suburbs, an Invisible Race Gap*, N.Y. TIMES, June 4, 2003, at B8.

30. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 47–49 (1998). Bowen and Bok report that, of the black students enrolling in their sample of selective colleges and universities in 1989, most of whom benefited from those colleges' affirmative action programs, eighty-six percent came from either middle-income or upper-income families.

schools at the next lower competitive rungs found that they had to follow suit in order to achieve any reasonable degree of racial diversity in their student bodies. Thus, the so-called phenomenon of academic “mismatch” became very nearly universal, at least in the selective tier of higher education.³¹

Finally, and most significantly for our current purposes, the rationale for affirmative action shifted from remediation to diversity. One reason for this rhetorical shift was the expansion in the range of racial and ethnic groups receiving preferences. The primary reason, however, was the growing hostility toward remedial justifications for affirmative action programs expressed by an increasingly conservative Supreme Court. The watershed event in this evolution was the *Bakke* decision, in which a deeply divided Court had ruled that the medical school of the University of California at Davis could not set aside sixteen of the one hundred seats in its entering class for members of minority groups.³² The decision produced six opinions, none of which commanded a majority of the Court. The decisive opinion was Justice Powell’s, in which he spoke only for himself. Powell began by asserting that because the Equal Protection Clause protects individuals and not groups as such, its protections extend equally to members of every race, not simply “minority” or “disadvantaged” races.³³ Race is therefore an inherently “suspect” classification, whose use can be justified only if “narrowly tailored” to serve a “compelling state interest.”³⁴ The use of race to remedy general societal discrimination, he said, is not a compelling state interest—at least in the absence of any finding that the particular defendant itself had discriminated in the past or that a competent legislative body had determined that its race-conscious admission policy was necessary to remedy past discrimination.³⁵ In contrast, the attainment of student diversity is a compelling state interest—but only if pursued in a highly individualized fashion in which race is treated as only one among many diversity-promoting factors.³⁶ The Davis set-aside system, he concluded, was not narrowly tailored to serve that goal. In filling the medical school’s quota for minorities, the school focused only on the racial dimension of diversity.³⁷

In a series of cases striking down affirmative action programs in employment and government contracting,³⁸ the Supreme Court soon adopted Justice Powell’s position that societal remediation could not serve as a justification for race-based classifications, no matter how as-

31. See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 386–422 (1997).

32. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978).

33. *Id.* at 291–97.

34. *Id.* at 299, 305.

35. *Id.* at 307–10.

36. *Id.* at 311–15.

37. *Id.* at 315–20.

38. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

sertedly benign. Nor, said the Court in *Wygant v. Jackson Board of Education*, could the so-called role model theory provide a justification for minority hiring preferences.³⁹ Educators intent on granting race-based admissions preferences were left with Powell's diversity rationale. Although its status as doctrinal authority was weak to begin with, and further weakened by the Court's later pronouncements, Powell's diversity rationale seemed to be the only game in town for educators intent on defending their practices against mounting legal attacks. Educators across the country began to shift their rhetorical posture from remedy to diversity. Admissions programs were rewritten and restructured to emphasize the educational virtues of multiracial, and indeed multidimensional, diversity. The arguments advanced by the University of Michigan in *Grutter* and *Gratz* are typical expressions of this rhetorical shift.

Grutter's most important doctrinal accomplishment was to affirm Powell's diversity rationale. Six members of the Court—the five Justices joining the majority opinion⁴⁰ plus Justice Kennedy⁴¹—explicitly endorsed that principle. Thus, *Grutter* can be viewed as completing the transformation in justificatory practice from remediation to diversity. As such, it provides both an occasion and a vehicle for assessing the wisdom of this transformation. As I will attempt to demonstrate, the diversity rationale the Court advanced does not hold up to “strict scrutiny.” In failing that test, it reminds us of the wrong turn made by the Court in 1978.

II. DIVERSITY

As interpreted by the Supreme Court, the Equal Protection Clause is a doctrine about the relation of ends and means.⁴² Whenever the government uses a classifying criterion to allocate burdens or distribute benefits, that criterion must fit reasonably tightly with the goal of the governmental program at issue. And whenever the government uses a so-called suspect classification—such as race—its goal must be particularly important (“compelling”) and the means chosen must be particularly tightly fitted (“narrowly tailored”) to achieve that compelling goal. Applying this test is excruciatingly difficult in practice because human beings and human institutions rarely define ends without referring to the means chosen to effectuate them. Not surprisingly, those whose practices are attacked for violating the Equal Protection Clause try to couch

39. 476 U.S. at 274–76.

40. “[T]oday we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.” *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). Justice O’Connor’s opinion was joined by Justices Breyer, Ginsburg, Souter, and Stevens.

41. “The opinion by Justice Powell, in my view, states the correct rule for resolving this case. . . . Our precedents provide a basis for the Court’s acceptance of a university’s considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence.” *Id.* at 387–88 (Kennedy, J., dissenting).

42. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 111 (1976).

the interests being pursued in a way that makes the selection of the method they have chosen to attain those interests seem virtually inevitable. The job of the attacker, conversely, is to formulate the ends in a sufficiently general way to suggest that the actor could just as well have chosen a variety of alternative methods.

A. *Diversity as a Goal*

The problem is well illustrated in the context of trying to decide whether a diversity interest can be used to justify racial selection in admissions. In her opinion for the *Grutter* majority, Justice O'Connor variably characterizes the state's interests as: "obtaining 'the educational benefits that flow from a diverse student body';"⁴³ "attaining a diverse student body";⁴⁴ and "assembling a class that is both exceptionally academically qualified and broadly diverse."⁴⁵ In two of these formulations, she quotes from the University's brief. It is, of course, in the University's interest to keep the word diversity in the definition of the goal or interest to be served. Such a formulation makes the use of race in the selection process more readily justifiable than if the interest to be achieved were characterized as the attainment of some set of general educational outcomes, such as transmitting some body of knowledge or improving some set of cognitive skills.

But what does it mean to have an interest in, or goal of, attaining diversity, as in the expression "a diverse student body"? In purely descriptive terms, the unadorned term diversity conveys nothing other than a vague sense of variety.⁴⁶ One might say that human beings are unique, so in that sense every group of people is equally and maximally diverse. One might equally say that human beings are all different from, say, trees or ostriches, so in that sense all groups of people are equally nondiverse. Between those two tautological extremes, one cannot even begin to decide whether a given group of people is diverse, without solving a number of problems.

First, one must specify the dimensions or characteristics that are relevant to the inquiry at hand. Imagine a group of three people with combined scores on the SAT of 400, 1000, and 1600, respectively. Is the group diverse? Arguably yes in the context of college admission; probably not in the context of a neighborhood touch football game. Second, one must specify what differences matter. Is a group of students with

43. 539 U.S. at 332 (quoting Respondents' Brief at i).

44. *Id.*

45. *Id.* at 333 (quoting Respondents' Brief at 13).

46. See Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 815 (1998) ("Everybody talks about diversity, but no one knows what it means."). For suggested taxonomies of "diversity," see Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 332 n.34 (2002). See generally Levinson, *supra* note 22, at 573-608 (discussing the ambiguity of the word "diversity" and the differing notions of "diversity").

SAT scores of 1400, 1410, and 1420 diverse? Probably not. Third, for discontinuous variables like ethnicity or legacy status, one must specify which characteristics count and which do not. Imagine a group consisting of one Arab American, one Slavic American, and one Polynesian American. Is the group ethnically diverse? Yes, if one has a Western European baseline in mind; no if one is looking only for African Americans, Latinos, or Native Americans. Fourth, one cannot compare people across multiple dimensions without creating a composite scale that combines the multiple dimensions into a single metric. Assume a group consisting of one black, one flute player, and one farm boy. Is it a diverse group? The question is meaningless, because each person has been classified according to a different dimension. All one can say is that the members of the group are different (diverse) along each implicit dimension. But if they all have SAT scores of 1400, or are all neo-conservative, does that enhance or diminish their collective diversity?

Beyond the descriptive problems, there is the normative problem. One cannot say that one values diversity, or has a goal of seeking diversity, without having a reason why it is better to have greater, rather than lesser, variation along or among the relevant dimensions. With regard to many of the criteria conventionally used to rank college applicants, it is hardly obvious that diversity is a virtue. Consider academic ability, as traditionally measured by grade point averages and aptitude test scores, which are widely acknowledged to be the most important criteria for determining eligibility for admission to selective colleges and universities.⁴⁷ Elite institutions of higher education seek to enroll an entering class whose academic credentials are not only high, but also uniformly high. This preference for homogeneity reflects a view, widely espoused by instructional faculty, that it is harder to teach a class with widely divergent academic skills than a class with uniform academic skills. For many other commonly applied admissions criteria, such as athletic prowess or legacy status, notions of diversity seem thoroughly beside the point. A school with a strong intercollegiate football program, for example, seeks to attract enough talented players to field a winning team. Beyond that, the school is unlikely to care about the football-playing abilities of its matriculants. Schools that give favorable weight to legacy status do so in the interest of keeping the alumni happy, not to achieve any particular mix of alumni children and nonalumni children.

An educational institution cannot, therefore, coherently justify race-based discrimination (or, for that matter, discrimination based on any criterion) simply by invoking an interest in diversity per se. It must specify what kinds of criteria are important to it, how it measures or identifies variability within those criteria, and why greater variability along those

47. See Michael T. Nettles et al., *Race and Testing in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 97, 98 (Gary Orfield & Edward Miller eds., 1998).

dimensions is better than lesser variability. Michigan's solution to this challenge, and the one evidently embraced by the Court in *Grutter*, is to say, in effect: We value those forms of diversity that produce better educational outcomes. This strategy has obvious appeal. First, it invokes the understood and accepted mission of the university, which is, after all, to educate (whatever that may mean), not simply to collect people of divergent characteristics, the way a zoo seeks to collect examples of many species. Second, it appeals to our intuition—indeed our conviction—that the quality of an educational experience is enhanced when one receives a wide variety of cognitive inputs into the learning process, and perhaps a wide variety of affective inputs into the developmental process. Finally, this strategy invokes a quasi-constitutional interest—academic freedom—that can receive special weight in the legal calculus.

B. *Multidimensional Diversity*

So far so good. But the defender of academic diversity needs to answer at least two more questions: What are those forms of diversity that provide educational benefits, and in particular what does race—or more precisely, what do particular racial or ethnic groups—have to do with that diversity? The answer Powell gave in *Bakke* was to adopt a very catholic definition of educational diversity factors, and to claim that race was merely one factor among many—just another “plus” factor. “Ethnic diversity,” he said, “is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”⁴⁸

Several passages in Justice O'Connor's *Grutter* opinion suggest that she is invoking a similarly multidimensional definition of diversity. For example, she specifically approves much of Justice Powell's *Bakke* argument, including his approving citation of the multifactorial Harvard plan.⁴⁹ Similarly, O'Connor applauds the law school's plan for “adequately ensur[ing] that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions,”⁵⁰ and then cites approvingly the list of nonracial diversity factors the law school considered.⁵¹

48. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978). Another illustration of the catholicity of Powell's conception is his quotation from William Bowen, then President of Princeton, on the wide range of student characteristics that contribute to “informal learning,” stating: “[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives.” *Id.* at 313 n.48. See also Justice Powell's quotation from the Harvard plan, describing the wide range of factors that count toward student “diversity” at that university. *Id.* at 316–17.

49. 539 U.S. at 338, 339.

50. *Id.* at 338.

51. *Id.* (“[T]he 1992 policy . . . provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.”).

This catholic definition of educational diversity appeals to what Owen Fiss calls the “individualistic ideal”⁵² in equality jurisprudence. But, despite its surface appeal, the multidimensional definition of diversity simply cannot solve the conceptual problem. As indicated above, multidimensional diversity is conceptually meaningless without an overarching criterion for comparing people along different dimensions. To use the University of Michigan Law School’s policy, suppose we have a group with one person each who: lived abroad; was fluent in a non-English language; overcame adversity; did extensive community service; and had a successful pre-law career. Is the group meaningfully diverse? If one adds to the group a person who is African American, does that enhance the diversity of the group, in an educationally relevant sense? One can answer those questions only one criterion at a time. It may well be, for example, that having people who speak multiple languages in the class will enhance the education of all. Likewise, a group assembled from many countries could have that effect. And so on. But the mere multiplication of examples of different backgrounds tells us little, at least without some evidence that diversity along multiple dimensions produces better educational outcomes than diversity along just one or a few.

There is a further problem with Powell’s multidimensional view of diversity. If race is constitutionally toxic as a discriminant, then why is that toxicity diminished when race is combined with other discriminants? Some poisons lose their toxicity when diluted with other ingredients; others do not. Which kind of poison is racial discrimination? As a generic matter, it seems to me to be an example of the latter. Suppose a prosecutor uses a wide range of criteria, including race, in deciding whom to prosecute. Or a welfare agency uses a wide range of criteria, including race, in deciding whom to aid. Our intuition is that these behaviors violate the equal protection norm, and, I think, properly so. The diminished toxicity theory may seem more palatable in the context of higher education admissions, where the relationship between public purpose and some notion of heterogeneity has intuitive plausibility. But, in the end, it seems to me that race cannot be hidden in a halo of other factors even in this context. If race is constitutionally toxic, then it has to be confronted on its own terms, as educationally justified or not.

C. Racial Diversity

There is much in Justice O’Connor’s opinion—unlike Justice Powell’s opinion in *Bakke*—to suggest that she acknowledges this burden. In the section of her opinion identifying the “interest” being served by the

52. Fiss describes the individualistic ideal as “the ideal of treating people as ‘individuals’—recognizing each person’s unique position in time and space, his unique combination of talent, ability and character, and his particular conduct.” Fiss, *supra* note 42, at 126–27. The attractiveness of this ideal may help to explain the Court’s hostility in *Gratz* to an admission system that reduces applicants to an arithmetic formula.

law school's use of race in admissions, she is careful to avoid attaching the adjective "racial" to the word "diversity."⁵³ But it is plain from the surrounding context that racial diversity is what she is really considering. In discussing the educational benefit of diversity, she refers almost solely to benefits flowing from *racial* forms of diversity. For example, she quotes the University's claim that diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"⁵⁴ She cites sociological studies of the impact of racial diversity on various educational and vocational outcomes. She quotes a brief submitted by military leaders that addresses quite explicitly the need for a "racially diverse" officer corps. And, perhaps most tellingly, she states that the "legitimacy" of our institutions requires that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."⁵⁵

1. *Race as Proxy for Viewpoint*

What, then, is the connection between racial diversity and educational outcomes? The "robust exchange of ideas" image invoked by Justice Powell suggests that persons of particular races are needed to contribute certain ideas to the exchange. As commentators on all sides of the affirmative action debate have noted, however, this comes dangerously close to the essentialist notion that all blacks think alike or all Latinos think alike or, for that matter, all whites think alike. Such a proposition is not only demonstrably false, but also highly offensive to our constitutional ideals. Justice O'Connor seeks to distance herself from that view by quoting the University's disclaimer that "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue."⁵⁶ But she quickly asserts that the experience of being a minority in the country is "likely" to affect one's views⁵⁷ and that minority students are "likely" to have experiences of importance to the law school.⁵⁸

As Gary Orfield, a staunch defender of affirmative action, states: "The argument about diversity is only about probabilities."⁵⁹ He goes on to recite pages of statistics showing the differential probabilities that members of various racial groups will live in poverty, be unemployed,

53. See, e.g., 539 U.S. at 324, 328. Interestingly, Justice Kennedy, in his dissenting opinion, quite explicitly recognizes a state interest in racial diversity: "In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued." *Id.* at 371 (Kennedy, J., dissenting).

54. *Id.* at 333 (brackets in original).

55. *Id.* at 335.

56. *Id.* (quoting Brief for Respondents Bollinger et al., at 30).

57. *Id.*

58. *Id.* at 338.

59. Gary Orfield, *Introduction*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 1*, 16 (Gary Orfield & Michal Kurlaender eds., 2001).

rent rather than own their home, have little wealth, attend low-achieving schools, be victims of crime, and so forth—all for the purpose of establishing the proposition that whites, blacks, Latinos, and others are likely, but hardly certain, to have differing views on a wide variety of educationally relevant matters.⁶⁰

If race were not a suspect classification, this probabilistic strategy would be unexceptionable—just like the famous example of the farm boy from Idaho in the Harvard admissions blurb quoted by Justice Powell in *Bakke*.⁶¹ To the guardians at Harvard's gates, the category farm boy from Idaho conveyed enough information to suggest an educationally relevant distinction from the category of, say, northeastern suburbanite. So the category black, by itself, suggests an educationally relevant distinction from the category white. The problem is that black and white are constitutionally suspect classifications, and thus bear a higher burden of justification than farm boy or Idaho—or, for that matter, farm boy from Idaho.⁶² If blacks are, say, more likely to live in poverty or live in one-parent families, then why can't Michigan achieve its desired diversity by giving preferences for those characteristics? If blacks are more likely to be suspicious of the police, then why can't Michigan test for that viewpoint directly, through personal statements, or indirectly by looking for persons who have certain kinds of experiences with the criminal justice system? Michigan might, of course, respond by invoking administrative convenience. At some point, it becomes easier, and more reliable, to use race as a proxy for these other—and educationally more relevant—forms of diversity. The problem with this answer, however, is that administrative convenience, even at its strongest, seems a weak reed with which to combat the moral and constitutional presumption against using racial classifications. Even if it were probabilistically true that blacks were less qualified than whites for certain classes of jobs, we would not permit employers to discriminate against blacks for that reason.⁶³

A further weakness in the “race-as-proxy-for-viewpoint” argument is the inconsistent and incomplete way in which Michigan—and its counterparts virtually everywhere—pursues diversity of viewpoint. If Michigan were genuinely interested in maximizing diversity of educationally relevant viewpoints, then one would expect it to grant preferences to—or at least keep systematic track of—many characteristics other than race.

60. See also Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 879 (2000) (arguing that different races have different experiences that “shape attitudes, producing characteristically different beliefs and judgments about society as a whole, and contrasting impressions of the relation between the two races”).

61. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978).

62. I've never been sure whether it's the “farm” or the “Idaho” that is doing the work in that example, or whether there is something special about farms in Idaho.

63. There is an extensive literature speculating on whether racial discrimination is economically efficient as a form of “statistical discrimination.” See, e.g., Stewart Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228 (1986). Even if it is, the moral intuition of most people is that it should be prohibited.

As Peter Schuck has pointed out, for example, one would surely expect diversity-seeking educators to pay attention to the religious beliefs or religious associations of its students in the admissions process.⁶⁴ Likewise, one might expect admissions officers to look more actively for ways to assure a dispersion of political viewpoints, especially given the strong preponderance of liberal views at many elite educational institutions. Further, one would expect colleges and universities to give considerably greater weight to various measures of socioeconomic disadvantage or cultural isolation than they typically do. As if to answer this objection, in *Grutter*, Justice O'Connor lists nonracial diversity factors considered by the Michigan Law School but never tells us the relative number of cases in which those factors actually influence admissions decisions or, more importantly, the relative weight that those factors receive, as compared to the extremely heavy weight given to race.⁶⁵

2. *Race for Its Own Sake*

An alternative strategy for justifying the educational benefit of racial diversity is to argue that race is an educationally relevant variable in its own right rather than as a proxy for something else, such as viewpoint. The argument here is that, like it or not, race is a hugely important social fact of our contemporary society. Because of deeply embedded vestiges of our shameful racial history, our society is deeply divided and categorized by race. Members of minority races view themselves, and believe themselves to be viewed by others, first and foremost as members of their race. Whites, even if they do not see themselves as members of a distinct race, see minorities as different because of their race. Race permeates interpersonal interactions, social patterns, and institutional structures. Race is one of the principal categories by which government agencies, private researchers, and the media try to make sense of social phenomena.

All of this is true, if somewhat overstated. But what does it have to do with the legitimate goals of higher education? One possible argument is that the best way to learn to cross these racial divides in our society is by interacting with people of other races in school. Thus, Justice O'Connor talks about the value of Michigan's program in promoting "cross-racial understanding" and helping to "break down racial stereo-

64. Schuck, *supra* note 22, at 37-38.

65. Justice O'Connor tells us: "The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). But this tells us very little about the true impact of these factors. The reality at most schools is that they receive very little weight as compared to the weight given to race. The primary exceptions, at undergraduate institutions, are athletic ability and legacy status, neither of which are intended to promote viewpoint diversity.

types” and enabling students to “better understand persons of different races.”⁶⁶

Organizations in our economy conduct workshops on promoting “cross-racial understanding.” These organizations often use role-playing and other forms of experiential exercises to achieve their purposes. Such organizations can argue convincingly that they need to have a minimal number of participants drawn from each of the races on opposite sides of the divides they seek to bridge. A division of the University of Michigan that ran such programs could thus plausibly argue for race-conscious selection procedures for its workshops.

There are, however, several problems with using this analogy to justify affirmative action as it is conventionally practiced in the admissions programs of undergraduate and professional schools. First, these institutions are not exclusively or even primarily engaged in promoting cross-racial understanding. One need not adopt the derisive tone of Justice Scalia’s opinion in *Grutter*⁶⁷ to question how much importance the law school really attaches to this goal, given the lack of evidence that it attempts to mandate any instruction that fosters cross-racial understanding or measure the extent to which students develop such understanding. Ironically, it was at the undergraduate level—whose race-conscious admission program was struck down—that the University of Michigan appears to have made a greater curricular and extracurricular investment in promoting cross-racial understanding.⁶⁸ The fact that the law school felt a need to promote cross-racial understanding suggests that efforts to do so at the undergraduate institutions from which it draws its students (including Michigan’s undergraduate college) have not had a notably high rate of success. Indeed, there is reason to believe that many affirmative action programs do more to retard than to promote cross-racial understanding. Studies of race-conscious affirmative action programs have consistently found that they perpetuate or even exacerbate negative racial stereotypes among majority group members.⁶⁹ This may explain the somewhat surprising finding of Stanley Rothman and his coauthors that an increase in a school’s racial diversity correlated with a *decrease* in the quality of its educational program, as evaluated by that school’s faculty and students.⁷⁰

A second problem with the analogy to a racial-understanding workshop is that it does not tell us which racial divides need to be bridged,

66. *Id.* at 333.

67. “This [promotion of cross-racial understanding] is not, of course, an ‘educational benefit’ on which students will be graded on their Law School transcript (Works and Plays Well with Others: B+) or tested by bar examiners (Q: Describe in 500 words or less your cross-racial understanding).” *Id.* at 344 (Scalia, J., concurring in part and dissenting in part).

68. The programs are described in Gurin et al., *supra* note 46, at 343–46.

69. See Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1331–32 (1998).

70. Stanley Rothman et al., *Racial Diversity Reconsidered*, THE PUBLIC INTEREST, Spring 2003, at 25.

and therefore which racial mixes need to be engineered. Why does Michigan explicitly favor the admission only of blacks, Latinos, and Native Americans, but not, say, Arabs or Slavs or Pacific Islanders? Why does it lump Latinos together, or Native Americans together, when in fact those labels embrace a very wide variety of disparate subgroups?⁷¹ And why does Michigan consistently admit such different numbers and percentages of blacks, Latinos, and Native Americans?⁷² An antiseptic—that is, remedially blind—diversity rationale provides no basis for an answer to these questions.

One basis for an answer suggested by the literature is that white students are much more likely to have grown up and gone to school in environments in which there are few, if any, blacks, Latinos, or Native Americans. Whites, more than members of these groups, live segregated lives before college and therefore are the primary beneficiaries of multi-racial experiences in college.⁷³ I have always found this argument to be deeply troubling. It says, in effect, that minorities are being recruited to these schools for the educational benefit of whites.⁷⁴ That asymmetry would be troubling enough on its own, but it seems to me especially disturbing when one considers that the minority students recruited for this purpose are typically admitted with academic credentials substantially lower, on average, than those of the white students.⁷⁵ Not surprisingly, the academic performance of these minority students typically lags far behind that of their white peers.⁷⁶ Worse yet, there is evidence that minority students at these schools underperform academically—that is,

71. Numerous commentators have noted the arbitrariness and selectivity of racial and ethnic distinctions drawn in most affirmative action programs. *E.g.*, Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994); Levinson, *supra* note 22, at 597; Schuck, *supra* note 22, at 14–17, 39.

72. See Tables 1–3 in Chief Justice Rehnquist's opinion. 539 U.S. at 368.

73. *See, e.g.*, Orfield, *supra* note 59, at 15 (“Whites are by far the most segregated group of students in American public schools and thus are likely to have the least knowledge of effective intergroup skills.”); *see also* Gurin et al., *supra* note 46, at 352 (claiming that in the University of Michigan cohort the “most consistent” educational effects of diversity were experienced by the white students).

74. *See* K. Edward Renner, *Racial Equity and Higher Education*, 89 ACADEME, Jan.–Feb. 2003, available at <http://www.aaup.org/publications/Academe/2003/03jf/03jfnart.htm> (“[T]he main value of ‘diversity’ is for white students to learn from minorities. This uses blacks and Hispanics for white ends.”).

75. The literature contains numerous reported estimates of the gaps in SAT scores and high school GPAs among racial groups at most elite colleges and universities. Most estimates of the SAT gap range from 100 to 300 points in the combined SAT scale. Most estimates of the GPA gap range up to a full grade-point average (1.0 point on a 4-point scale). *See, e.g.*, Gail Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 HARV. J. ON LEGIS. 217, 229–32 (2003); Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES, *supra* note 47, at 19–20; Schuck, *supra* note 22, at 18–19.

76. *See* STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 101–04 (2003); Heriot, *supra* note 75, at 230; *cf.* Beth Dawson et al., *Performance on the National Board of Medical Examiners Part I Examination by Men and Women of Different Race and Ethnicity*, 272 JAMA 674 (1994) (discussing racial differential in rate of failure on NBME Part I examination).

their academic performance is lower than the performance of whites with comparable entry credentials.⁷⁷

The fact that race-conscious affirmative action programs have produced a systematic mismatch between the levels of ability and preparation of minority students and the institutions that they attend is not necessarily a basis for scrapping such programs. But the mismatch is certainly a high price to pay for whatever racial sensitivity training is being given to the white students. If minority students with lower academic credentials are to be recruited for the education of a group of academically better-prepared whites, then the colleges at least ought to give full disclosure to the minority students, and arguably should pay them for their services.

3. *Race and "Legitimacy"*

Justice O'Connor makes another argument in *Grutter* to explain why race might be seen as a primary educational variable, and not simply a proxy for other educational benefits. This is her legitimacy argument. She discusses, with apparent endorsement, the assertion made in the military leaders' amicus brief that a racially diverse officer corps is necessary to maintaining morale. The corporate leaders' brief makes a somewhat similar point about the need for a diverse workforce to deal with a diverse customer and client base. These statements imply that the legitimacy of institutions, in the eyes of those who work for them or who deal with them, is a function of the racial composition of their leadership or their membership. If this is not a legitimization of racism, then it is surely a legitimization of racialism.⁷⁸ Arguments of exactly this sort were made to defend the Jim Crow regime torn down by *Brown* and its progeny.⁷⁹ Whites, it was said repeatedly, will not work for blacks; whites will not patronize establishments occupied by blacks; whites will not do business with blacks. These statements were, as sociological propositions, true enough. But as constitutional arguments, they were brusquely—and quite correctly—rejected by the courts. Can similar arguments now be used to defend the use of race in another context? Perhaps so, but not, it seems to me, on the grounds of diversity for diversity's sake.

Justice O'Connor tries to explain her legitimacy argument by saying "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."⁸⁰ The word "visibly" bears a great deal of weight in that sentence. Without it, the sentence would seem to require only that schools like Michigan refrain from discriminating against historically disfavored races, not that they affirma-

77. See BOWEN & BOK, *supra* note 30, at 72–77; COLE & BARBER, *supra* note 76, at 121–38.

78. The distinction is discussed in Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 433–39 (1988).

79. See Gewirtz, *supra* note 22, at 127; Levinson, *supra* note 22, at 588–90.

80. *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003).

tively favor them. The addition of the word “visibly” implies that the credibility of the antidiscrimination policy depends on whether members of those races are actually—and, for that matter, “visibly”—hired. This claim comes perilously close to adopting the role model theory firmly rejected by the Court—and by Justice O’Connor—in *Wygant*.⁸¹ If a school board may not use racially selective criteria for hiring black teachers to serve as role models for black students, then can law schools justify the use of racially selective admissions criteria to help law firms and corporations demonstrate the sincerity of their antidiscrimination policies? A further weakness in O’Connor’s visibility argument is that the persons visibly hired must be “talented and qualified.”⁸² One of the most damning arguments against affirmative action is that it casts a suspicion of lesser competence over all members of the benefited races.⁸³ O’Connor never even acknowledges, much less responds, to either that common argument or the argument that minorities would perform better—even visibly better—if they attended schools at which their academic skills better matched those of their nonminority counterparts.⁸⁴ There are answers to these arguments, indeed persuasive ones, but the legitimacy defense of race-conscious admissions surely cannot rest simply on O’Connor’s *ipse dixit*.

D. Academic Freedom

Finally, a word must be said about the burden of proof borne by the proponent of the proposition that educational diversity justifies race-conscious admissions programs. If that proposition is to be judged by the rational relation test—applied by the courts to resolve equal protection challenges to nonsuspect classifications—then it must surely be upheld. Both sociological studies and personal experience of most educators indicate that racial diversity can produce educational benefits.⁸⁵ An educa-

81. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–75 (1986) (plurality opinion); *id.* at 288 (O’Connor, J., concurring). In *Wygant*, Justice O’Connor did distinguish between the “role model” theory and the goal of “promoting racial diversity among the faculty,” an interest she said had not been pressed upon the Court in that case. *Id.* at 288 n.*. A majority of Justices appeared to have approved the rejection of “role model” theory. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989).

82. *Grutter*, 539 U.S. at 335.

83. Justice Thomas is the most vocal spokesman for this view on the current Court. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring). Justice Powell made a similar point in *Bakke*. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978). The point has been made repeatedly in the secondary literature. See, e.g., STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 47–69 (1991); SHELBY STEELE, *DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA* (1998); Krieger, *supra* note 69, at 1259–63.

84. There is evidence that this has in fact happened in the University of California system following adoption of Proposition 209. See Heriot, *supra* note 75, at 230–32; Schuck, *supra* note 22, at 75–78; Stephan Thernstrom & Abigail Thernstrom, *The Consequences of Colorblindness*, WALL ST. J., Apr. 7, 1998, at A18.

85. For examples of the sociological evidence, see the essays collected in *DIVERSITY CHALLENGED*, *supra* note 59 (especially Mitchell J. Chang, *The Positive Educational Effects of Racial Diver-*

tional institution would be free, under the rational relation test, to pursue this particular kind of diversity even if it does not systematically pursue other kinds of diversity. If, on the other hand, the test to be applied is the strict scrutiny standard—at least as it has been traditionally understood⁸⁶—then it seems to me that the proposition fails. The diversity interest is too vaguely formulated and too weakly supported in the educational programs of most schools to comprise a truly compelling state interest. Also, the particular criteria used in most race-conscious admissions programs are too indiscriminant, selective, and heavily weighted to satisfy the narrow tailoring requirement.

Seeming to recognize this, Justice O'Connor, like Justice Powell before her, invokes academic freedom as a basis for lowering the heavy burden of proof that race-based classifications customarily bear. The quasi-constitutional value of promoting the “robust exchange of ideas”⁸⁷ and other claimed educational benefits of racial diversity, confers on educational institutions a protective mantle of deference. If educators claim educational benefits, then the Court is apparently disposed to believe them. This is not implausible. We educators like to think we know what we are doing. And we like to think that we are capable of surmounting tendencies toward self-interest, biased judgment, preoccupation with appearances, herd behavior, and the countless other characteristics that often distort human and organizational decision making.⁸⁸ Further, we take solace in the fact that race-conscious admissions policies have stood the test of time. They have been practiced widely for about thirty years, fine-tuned and adjusted along the way. They seem to work. They have met the market test.

But should the Court defer to educators on a matter like racial discrimination? In the four cases consolidated under *Brown*, the defendant school districts, invoking the opinions of “leading sociologists and educa-

ity on Campus, at 175; and Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, at 187). See also Gurin et al., *supra* note 46. But see Rothman et al., *supra* note 70 (reporting that student and faculty satisfaction with the quality of a college's educational program is inversely correlated with the degree of its racial diversity).

86. See, e.g., Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8–10 (1972). But see Jed Rubinfeld, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997) (arguing that the Supreme Court has distorted the strict scrutiny test, from its original (and proper) function to “smoke out” illegitimate motives for using race as a discriminant, to a more recent (and improper) cost-benefit test analysis of the consequences of using race as a discriminant). Most affirmative action programs, Rubinfeld argues, would easily satisfy the “smoking out” test. *Id.* at 465–67.

87. *Grutter v. Bollinger*, 539 U.S. at 306, 333 (quoting *Bakke*, 438 U.S. at 313).

88. For speculations on some of the less-than-noble motivations that might sustain race-conscious admissions programs, see Schuck, *supra* note 22, at 36, 58, 71; Shelby Steele, *Affirmative Action Must Go*, N.Y. TIMES, Mar. 1, 1995, at A19. In his opinion in *Grutter*, Justice Thomas variously ascribes affirmative action programs to elitism, faddishness, aesthetics, and image-consciousness. See 539 U.S. at 346, 349–50 (Thomas, J., concurring in part). He even hints that, because race-conscious admission practices disadvantage minorities academically, the practices might be motivated by a kind of subconscious racism. *Id.* at 359–61.

tors,”⁸⁹ argued forcefully that segregation produced the best educational outcomes. The Supreme Court did not deign even to dignify those arguments with a rebuttal. And much more recently, when the Court declared unconstitutional the exclusion of women from Virginia Military Institute (VMI), it did not defer to VMI’s invocation of the educational benefits of separate-sex military education.⁹⁰

One might argue, with Justice Ginsburg, that deference to academic judgment is more warranted when a school is using a suspect classification for inclusive, rather than exclusive, reasons.⁹¹ But Justice Ginsburg’s justification is explicitly remedial for race-based criteria—one in which the concepts of inclusion and exclusion have at least the possibility of deriving some coherence from history.⁹² Those concepts get virtually no traction in an argument for diversity. Diversity is all about heterogeneity, which implies engaging in both inclusion and exclusion simultaneously, so as to achieve a desired mix. Admitting more blacks and Hispanics necessarily means admitting fewer whites and Asian Americans. Whether such a policy deserves deference depends utterly on the context. The purported educational benefits of achieving a certain desired mix was the basis for the infamous Jewish quotas at Ivy League universities early in the past century,⁹³ and, allegedly, is the basis for concerns at some California schools that the number of Asian Americans admitted is too large. Educators who attempted to argue today that quotas on Jews or Asian Americans are necessary to achieve desirable educational outcomes would receive very little, if any, deference—and deservedly so. Conversely, we seem quite willing to grant deference to other educators who offer educational justifications for concededly exclusive institutions, such as all-women’s or predominantly black colleges.⁹⁴ Yet an educator who tried to demonstrate the educational benefits of an all-white or even an all-male institution would probably be hooted off the stage.⁹⁵ My point is neither to defend nor attack any of these arrangements, but sim-

89. Brief for Appellee, *Briggs v. Elliott*, 349 U.S. 294 (1955); see also Brief for Appellee, *Davis v. County School Bd.*, 349 U.S. 294 (1955).

90. *United States v. Virginia*, 518 U.S. 515 (1996).

91. See *Gratz v. Bollinger*, 539 U.S. 244, 301 (Ginsburg, J., dissenting).

92. *Id.* The Court has explicitly instructed district courts to grant deference, at the remedial stage, to administrators of higher educational institutions undergoing court-ordered desegregation. *E.g.*, *United States v. Fordice*, 505 U.S. 717 (1992). In this context, academic “judgment” is confined by a clear directive to remove previous racial barriers.

93. See, e.g., HEYWOOD BROUN & GEORGE BRITT, *CHRISTIANS ONLY: A STUDY IN PREJUDICE* (1931).

94. There is an extensive literature touting the educational advantages of attending predominantly black institutions of higher education. See, e.g., Walter R. Allen, *African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26 (1992); Lamont Flowers & Ernest T. Passcarella, *Cognitive Effects of College Racial Composition on African American Students After 3 Years of College*, 40 J.C. STUDENT DEV. 671 (1999).

95. Justice Stevens’s concession that the “faculty-diversity” rationale used to justify race-conscious hiring in the *Wygant* case could be turned on its head by those who would argue that segregated classes lead to better achievement. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 316 (1986).

ply to express skepticism that the concept of inclusiveness can help us pick out the contexts in which we ought to defer or not defer to the supposed expertise of educators.

III. REMEDIATION OF RACE-BASED DISCRIMINATION

We are left, I believe, with the conclusion that diversity, *by itself*, is an inadequate basis with which to satisfy the very heavy burden for justifying racially discriminatory admissions programs. Does that mean that affirmative action in higher education admission should be disbanded in favor of a purely colorblind system? In an ideal world, I believe that the answer is yes. Given our cultural history of racial divisiveness, and perhaps our genetic predisposition to tribalism,⁹⁶ race should be viewed as inherently suspect as a criterion for distributing social benefits and burdens, and it should be expunged from public life, even private life, insofar as possible. But this is not an ideal world. We still live in a post-*Brown* world. Only fifty years have passed since the American legal establishment began to take serious steps to declare the system of racial segregation illegal and to dismantle it. Many legally sanctioned forms of racial segregation or discrimination persist to this day. Most of us who lived through the Civil Rights era look back with a mixture of gratification at what has been accomplished to expunge racial discrimination from public institutions and public discourse, and heartsick disappointment at the huge gaps and barriers that persist between the African American population of this country and the non-black population.⁹⁷

This means that the remedial task triggered by *Brown* is still incomplete. Not only are blacks more likely than non-blacks to suffer from various educational, economic, social, health-related, and political disadvantages, but they continue to live, go to school, worship, play, and even work in highly segregated settings. Surely not all of these conditions are fairly and directly traceable to the systems of legally imposed or legally sanctioned disadvantage condemned by *Brown* and its progeny. In my opinion, the Supreme Court was right in *Bakke* (and its progeny) to reject the argument that societal remediation can be deployed as a constitutional justification for every form of race-conscious affirmative action practiced in post-Jim Crow America. But the Court was wrong, in my view, in restricting the domain of remedial race-consciousness so narrowly: namely, to those specific institutions that had themselves been adjudicated to have engaged in racially discriminatory practices.

96. See RICHARD DAWKINS, *THE SELFISH GENE* 100 (1989) ("Conceivably, racial prejudice could be interpreted as an irrational generalization of a kin-selected tendency to identify with individuals physically resembling oneself, and to be nasty to individuals different in appearance.")

97. I focus primarily on the situation of African Americans because they were the object of the segregationist regime whose dismantling was initiated by *Brown*. In so doing, I do not mean to suggest that other racial and ethnic groups have not been subjected to legalized discrimination that can trigger legitimate remedial claims.

The vestiges of legally mandated and sanctioned discrimination against blacks persist to this day in ways that make defensible some degree of race consciousness in higher education admissions. Perhaps the clearest example is the persistence of educationally deprived, predominantly minority urban school systems. Another example is the high concentration of minorities in economically and socially bankrupt rural and inner-city neighborhoods, where crime, drug abuse, and social disintegration destroy incentives for academic achievement far more effectively than beleaguered schools can hope to create them. Another possible vestige is the growing body of evidence suggesting that teachers of all races tend to demand less of black students because of lowered expectations of their academic capabilities.⁹⁸ The persistence of these phenomena strongly suggests that race-consciousness may still be justified as one component of a strategy designed to address these deficits.

A. *Fashioning a Remedial Rationale for Race-Conscious Admissions*

The strongest argument made by the Supreme Court against using societal remedy as a justification for reverse discrimination is that it is “too amorphous”⁹⁹ to be subject to judicial control or limitation. As the Court famously said in *Wygant*: “In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.”¹⁰⁰ There are, it seems to me, two responses to this argument.

First, the diversity rationale embraced by the Court in *Grutter* is even more amorphous. As I have attempted to demonstrate above, the diversity argument is too conceptually muddled and inconsistently applied to sustain the demanding burden of proof applied to explicit racial classifications. Further, the diversity rationale is even more timeless than the remedial justification. The latter, at least, affords a theoretical basis upon which to terminate a race-conscious program—namely, when the structural vestiges of previous legalized discrimination have been dismantled and the remaining interracial disparities are primarily attributable to other factors. If diversity is the rationale, then there is no inherent theoretical time limit on a race-conscious admissions program. So long as educators believe that racial mixing of students produces educational benefits, the use of race to achieve the desired mix continues to be justified. The goal of diversity per se tells us nothing about whether there is any logical ending point. As I explain later,¹⁰¹ Justice O’Connor’s forlorn attempt, at the end of her *Grutter* opinion, to impose a time limit

98. The sociological evidence is surveyed in Ronald F. Ferguson, *Teachers’ Perceptions and Expectations and the Black-White Test Score Gap*, 38 URB. EDUC. 460 (2003).

99. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986).

100. *Id.*

101. See *infra* text accompanying note 131.

on Michigan's program,¹⁰² demonstrates that she must really have remedial objectives in mind.

Second, the Court has never really tried to construct a set of standards that might discipline the use of a more targeted social remediation rationale. Without having done so, how can it know that such a rationale is ungovernable? In fact, if the Court had sanctioned its use in 1978, when *Bakke* was decided, then by now we would have a well-developed jurisprudence of remediation in the context of higher education admissions. That jurisprudence would be driven by the fact that educators would have a heavy burden of justifying the use of race to remedy societal discrimination. Intent, as educators obviously are, to admit racially diverse student bodies, and commanding, as they do, vast investigative resources,¹⁰³ I have little doubt that the higher education establishment would have risen to the challenge with theoretical arguments and sociological studies of considerable sophistication.¹⁰⁴

Applying the high burden of proof implicit in the compelling state interest standard, and the lessons learned from institution-specific remedial orders, the courts could have fashioned a set of presumptions that would discipline such offers of proof. Thus, for example, racial preferences afforded in the admission process would need to be conditioned on a showing that the applicant comes from an educational background or social context still substantially shaped by a regime of legally mandated or legally sanctioned discrimination. An example might be a black student from a school district that had been found to engage in discriminatory practices aimed at blacks, and in which the educational performance of black students continues to lag significantly behind that of similarly situated majority students in that district or similarly situated black students in other districts. Another example might be a black student from a school or district in which the adverse educational effects of lowered expectation discrimination had been credibly demonstrated.

Beyond demonstrating some plausible link between past patterns of race-based discrimination and current educational deficit, practitioners of racial preferences would also be required to justify the weight given to race and explain what they are doing to mitigate the adverse consequences of academic mismatch, such as problems of academic underperformance. This requirement would impose on educators a degree of can-

102. *Grutter v. Bollinger*, 539 U.S. 306, 341–42 (2003).

103. I include here the resources of not only the elite educational institutions, but also of foundations like the Mellon Foundation, which funded the Bowen and Bok study and the Cole and Barber study. See BOWEN & BOK, *supra* note 30, at xxxiii–xxxiv; COLE & BARBER, *supra* note 76.

104. Indeed, it was not until the “diversity” rationale came under sustained attack in the courts, beginning with the *Hopwood* litigation, that academia produced most of the growing body of sociological evidence on the educational benefits of diversity. See Douglas Lederman, *Backers of Affirmative Action Struggle to Seek Research to Bolster Cause*, CHRON. HIGHER EDUC., May 23, 1997, at A28, available at <http://chronicle.com/prm/che-data/articles.dir/art-43.dir/issue-37.dir/37a02801.htm>. A prominent example is the Gurin et al. study, which was produced precisely for the purpose of helping Michigan to defend itself in *Grutter* and *Gratz*. See Gurin et al., *supra* note 46.

dor about the costs and benefits of their programs that has been noticeably missing from the subject.¹⁰⁵ But it would also focus attention on what is really important—not the quantitative racial composition of the entering class, but the (net) educational benefits afforded to those to whom preferences have been given. The much-debated concept of “critical mass” provides an illustration. In *Grutter*, the University of Michigan Law School argued that it sought to enroll a sufficient number of black students to dispel white stereotypes that all blacks think or act alike. Given the undergraduate educational backgrounds of the white students who enroll at Michigan’s law school, and their educational exposure to the views of black jurists ranging from Thurgood Marshall to Clarence Thomas, the premise for this rationalization seems implausible on its face. Worse still, however, the law school’s argument illustrates the unattractive tendency of diversity justifications to sanction the use of minority students for the education of whites.¹⁰⁶ By contrast, remediation can provide a far more satisfying, and constitutionally compelling, rationale for the critical mass theory. Availing itself of such a rationale, an educational institution would need to show that effectively combating the adverse educational effects of social isolation requires the enrollment of a minimum number of black students.

B. Does the Choice of Rationale Make a Difference?

One might ask whether it really matters whether educational preferences are justified by reference to diversity or social remediation. The cynic might argue that, either way, the clever folks at elite educational institutions will justify doing whatever they want¹⁰⁷—or perhaps that ideologically conservative judges will find a way to strike down whatever they want. The cynic would be wrong. The rationale does make a difference, for several important reasons.

I. Moral Justification

First, because the remedial rationale rests on a stronger moral foundation, it is more likely to command the degree of public acceptance necessary to sustain affirmative action programs over time. The remedial justification invokes a widely shared notion of compensatory justice: namely, that those who have been wrongfully disadvantaged should be compensated. In his *Bakke* opinion, Justice Powell argued that the socie-

105. See *infra* text accompanying notes 117–26.

106. See *supra* text accompanying notes 73–77.

107. This is, in essence, the argument made by Jeffrey Rosen for changing his view of the appropriateness of race-conscious admissions practices like Michigan’s. Jeffrey Rosen, *How I Learned to Love Quotas*, N.Y. TIMES (Magazine), June 1, 2003, at 52. The prospect of widespread evasion and sabotage troubled members of the *Brown* Court, see *supra* note 15, but fortunately did not deter them. The extent of the subversion anticipated by Rosen is paltry by comparison to the resistance stirred by court-ordered desegregation in the wake of *Brown*.

tal remedy theory fails the compensatory justice test because it breaks the connection between the wrongdoer and the persons burdened with the obligation to remedy that wrong.¹⁰⁸ It is true that, as conventionally understood, the philosophical notion of corrective justice requires such a connection. That is, corrective justice claims are “correlative,” in the sense that the right of the unjustly harmed person to compensation is correlative with a compensatory duty of the person responsible for the unjust harm.¹⁰⁹

There are several answers to this objection. First, as a purely pragmatic matter, the connection between the persons unjustly harmed and those forced to bear the burden of compensation is attenuated or broken in many cases of institutional wrongdoing. For example, many of those who bore the burdens of school desegregation, following *Brown*, had little if anything to do with the creation and enforcement of segregation.¹¹⁰ Further, there is no necessary incompatibility between the theory of corrective justice and the notion of third-party remediation. As Richard Wright argues: “There is nothing in corrective justice which prevents that [compensatory] duty from being discharged voluntarily, on behalf of the party with the duty, by someone else—e.g., that party’s insurer or rich aunt.”¹¹¹ In a sense, institutions of higher education that practice affirmative action are placing themselves in the position of the rich aunts of the actors (for example, school districts) whose discriminatory behavior produced the primary educational injury.

It is true, of course, that the burden of remediation is borne not only by the educational institution adopting a race-conscious admission policy, but also by the nonminority students who are denied admission in order to make a place for the remedially admitted minority applicants. Many defenders of affirmative action have argued that such injuries are too indirect or statistically insignificant to exert much of a moral counterweight.¹¹² My response to this argument is based on the somewhat different rationale of unjust enrichment. An alternative account of corrective justice holds that one who benefits from a wrong inflicted on another has a moral obligation to relinquish that benefit to the person from

108. See Justice Powell’s opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (“[T]here is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.”).

109. See, e.g., Jules L. Coleman, *The Practice of Corrective Justice*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 53, 66–67 (David G. Owen ed., 1997). In this essay, Coleman recants a previous position arguing that corrective justice does not require correlativity. See Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349 (1992). The correlativity requirement is usually traced to Aristotle’s notion of equalizing gains and losses. *ARISTOTLE, NICHOMACHEAN ETHICS* bk. V, ch. iv.

110. Conversely, the remedial impact of the desegregation orders came too late to help many of the victims.

111. Richard W. Wright, *Right, Justice, and Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 109, at 159, 178.

112. E.g., Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 *MICH. L. REV.* 1045 (2002).

whom it was wrongfully denied. By this logic, one could reasonably argue that those who currently benefit from the system of racial oppression outlawed by *Brown* have no moral entitlement to exclude those who were harmed by that system. If, in the absence of racial discrimination in her elementary and secondary education, applicant *X* would have qualified on her own merits for admission to Michigan, then applicant *Y*, unburdened by discrimination, who was admitted instead, has no compelling moral claim to be admitted in place of *X*. While the University, itself innocent of past racial oppression, may not be morally *obliged* to compensate *X*, it is morally *permitted* to do so. And that moral permission is sufficient to overcome the general moral objection to using race as a classificatory device.

By contrast, the diversity argument rests on a weaker moral foundation.¹¹³ The claim that a certain racial mix enhances educational outcomes is derivative of the moral weight to be attached to the value of education. If we strip remedial considerations away, we are left with general dignity or autonomy claims, to the effect that education increases a person's capacity for self-expression, self-fulfillment, empathy, social cooperation, and the like. The moral case for diversity, then, rests on the premise that a more racially diverse education is more effective than a less racially diverse education at promoting these goals. This is not a trivial moral claim, but it pales in significance when set against the corrective justice claim on which the remedial justification rests.

Because the use of race is so freighted with negative moral energy, the strength of the moral justification for a practice like affirmative action is important in its own right, and for political reasons. Public support for affirmative action in higher education is, at best, very fragile. Respondents to public opinion surveys have typically favored such programs when the question is phrased to emphasize the remedial purpose of such programs. In contrast, however, the public has consistently expressed opposition to such programs to the extent that the question emphasizes the use of preferential standards of admission for favored minority groups.¹¹⁴ This latter fact shows that even remedially justified programs must swim against public opinion. But the removal of the remedial rationale in favor of a diversity rationale exacerbates the problem by stripping the programs of their most popularly accepted justification.

As Peter Schuck points out, educators in elite universities and colleges seem determined to pursue racially preferential programs despite popular opposition.¹¹⁵ But the lack of public acceptance can undermine race-conscious admissions practices in a variety of ways. The most obvi-

113. See FEINBERG, *supra* note 22, at 76–82; Schuck, *supra* note 22, at 34.

114. See, e.g., Peter Schmidt, *Poll Finds Wide Support for Bush's Stance on University of Michigan Case*, CHRON. HIGHER EDUC., Mar. 7, 2003, at A23. For summaries of the literature on public attitudes toward affirmative action in admissions, see Heriot, *supra* note 75, at 225–28; Rothman et al., *supra* note 70, at 32–33; Schuck, *supra* note 22, at 55–57.

115. See Schuck, *supra* note 22, at 58.

ous (and extreme) way is illustrated by legislative measures such as California's Proposition 209, which forbids public agencies, including state universities, from taking race into account for any purpose. Opponents of affirmative action have promised similar legislative or initiative measures in the wake of *Grutter*.¹¹⁶ More subtly, though pervasively, the lack of public acceptance can undermine the purposes of such programs, by exacerbating racial relations and strengthening negative racial stereotypes.¹¹⁷

2. *Candor*

A second reason for preferring the remedial justification lies in the virtue of candor. Educational affirmative action programs were developed to serve remedial purposes, and by and large that is still the motivation of most educators who implement such programs. Unfortunately, the rush to embrace the diversity rationale has exacerbated a culture of obfuscation and dissembling that has characterized race-conscious admissions programs since their inception.¹¹⁸ As if to compound the problem, the Court in *Grutter* and *Gratz* has adopted a rule that penalizes candor. Whatever else one might say about the undergraduate point system struck down in *Gratz*, it had the advantage of making clear the extent to which the University was favoring race, and for that matter other factors, in its admission calculus.¹¹⁹ By comparison, the law school's so-called holistic process upheld in *Grutter* covers that question with a shroud penetrable only by exhaustive statistical analysis based on data obtainable only by subpoena. Based on the statistics unearthed by the plaintiffs, and summarized in the dissenting opinion of Chief Justice Rehnquist,¹²⁰ it appears that the advantage conferred on minority applicants by the law school was, in relative terms, as weighty as that conferred by the undergraduate point system. But now, following the *Grutter* and *Gratz* decisions, admissions officers are scrambling to make their

116. Karen W. Arenson, *Ballot Measure Seen in Wake of Court Ruling*, N.Y. TIMES, July 10, 2003, at A17; Robert E. Pierre, *Affirmative Action Foes Seek Mich. Referendum; Initiative Would Amend State's Constitution*, WASH. POST, Mar. 5, 2004, at A3.

117. See, e.g., Krieger, *supra* note 69, at 1331.

118. See Gewirtz, *supra* note 22, at 127 (Diversity discourse "can obscure the degree of some of the real trade-offs regarding other qualifications that affirmative action sometimes does require."); Schuck, *supra* note 22, at 71 (lamenting the "pervasive dissimulation and deformation of thought on all sides due to the felt need to deny or ignore the fact that racial preferences play a large, often decisive role in many admissions decisions"); cf. George Kateb, *Brown and the Harm of Legal Separation*, in RACE, LAW AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* 91, 106 (Austin Sarat ed., 1997) (noting how the Jim Crow regime forced Southern whites to "live the lie" that a segregated society is politically legitimate.).

119. This concern was also noted by Justice Blackmun, dissenting in *Bakke*: "The cynical, of course, may say that under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 406 (1978).

120. *Grutter v. Bollinger*, 539 U.S. 306, 365-67 (2003) (Rehnquist, C.J., dissenting).

formulas less quantitative and more holistic.¹²¹ Whatever the Court means by holistic, one thing is certain: admissions criteria will be more, not less, obscure. A lack of candor may be justifiable, even beneficial in some contexts.¹²² In the early years of educational affirmative action, many educators believed that lack of candor was appropriate, in the interest of avoiding stigmatization of the minority students benefited by preferential admissions programs.¹²³ That culture bred a whole lexicon of euphemisms about the weight given to race.¹²⁴ But it is now—thanks largely to the spate of litigation culminating in *Grutter* and *Gratz*—long past the point that one can continue pretending that most elite institutions treat race simply as a tie-breaker or a gentle boost afforded in a handful of cases.¹²⁵ Even if it were possible to maintain what Meir Dan-Cohen calls “acoustic separation”¹²⁶ between those who practice affirmative action admissions and those whom it affects, dissimulation is particularly inappropriate—and demoralizing—in a social institution like higher education, whose function is, supposedly, the unbiased transmission of knowledge and the relentless pursuit of truth.

3. *Disciplining Racial Preferences*

The remedial justification provides a better basis for disciplining the practice of race-conscious admissions in higher education. As discussed earlier,¹²⁷ however morally attractive its purposes or educationally beneficial its effects, affirmative action is no less susceptible than other institutional practices to distortion through “capture” by those who administer and benefit from it. The diversity rationale, especially as articulated in *Grutter*, is too confused, imprecise, and deferential to facilitate effective judicial discipline. The Court has, in effect, given higher education a virtual blank slate to practice discrimination in favor of nonmajoritarian races in the name of educational philosophy.¹²⁸

121. Robert E. Pierre, *U-Michigan Reveals New Policy; Provost Says Diversity Will Remain a Priority*, WASH. POST, Aug. 29, 2003, at A2; Greg Winter, *U. of Michigan Alters Admissions Use of Race*, N.Y. TIMES, Aug. 29, 2003, at A12.

122. See, e.g., GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978); Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988).

123. See, e.g., BOWEN & BOK, *supra* note 30, at 265.

124. See, e.g., Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. REV. 1583, 1591–92 (1999) (reviewing WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998)) (noting the euphemisms used by Bowen and Bok to describe racial preferences).

125. See Heriot, *supra* note 75; Kane, *supra* note 75; Schuck, *supra* note 22.

126. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

127. See *supra* text accompanying note 88.

128. Justice Scalia virtually invites critics to challenge universities and colleges that “talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses.” *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Scalia, J., concurring in part and dissenting in part). But, once having expunged anything that smacks of point systems and quotas,

The remedial justification, by contrast, cuts through the mantle of academic freedom in which the Court has wrapped educational diversity and insists that every practitioner of racial classifications—educator or otherwise—tie its practices to the social imperative of dismantling an immoral social system. Correctly formulated and implemented, the remedial principle obliges those practitioners to formulate and defend theories of social causation that can convincingly connect current racial disparities to that discredited system. Further, the remedial justification would require educators to be much more explicit about the way in which, and the weight with which, it deploys racial characteristics than does the diversity justification. If, as Justice Brandeis famously asserted, “sunlight is the greatest disinfectant,”¹²⁹ clear articulation should itself serve as a valuable restraint against excess.

The requirement of explicitness should also place pressure on educators to diminish the educational costs that beneficiaries of affirmative action programs often bear in the interest of so-called diversity. Schools that give racial groups substantial preferences in terms of academic predictors would be obliged to measure the academic performance—and particularly the extent of academic underperformance—of the recipients of those preferences. To the extent that such studies document troubling differentials in performance, those schools would be obligated to undertake remedial programs or to discontinue the granting of such preferences.

A further advantage of the remedial justification is that it forces higher education to examine the cultural and racial biases in the criteria it now uses to allocate positions in its entering classes. The diversity rationale permits higher education simply to ignore the notorious racial disparities in standard aptitude tests and grade-point averages by, in effect, setting different parameters for different racial groups. The remedial strategy requires that the racial differentials in the measures most widely used by higher education be examined and explained. To the extent that those measures reflect social or cultural differences fairly traceable to the segregationist regime, they should be either adjusted in particular cases, or rejected wholesale in favor of cleaner measures.

4. *Compatibility with Brown*

Finally, the remedial justification, unlike the diversity justification, is faithful to the spirit of *Brown*. *Brown* is unquestionably the greatest judicial document on the meaning of equality in post-slavery America. As such, the decision—and, indeed, the aura that has grown around the

educators should have little trouble rationalizing most of their current practices and even the use of more widespread or aggressive racial preferences in the future.

129. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (Nat'l Home Library Found. ed. 1933).

decision over time—stands as a beacon through the treacherous shoals of tribalism. We need such a beacon precisely because we, as a nation—and probably as a species—are continuously pulled back toward tribalism. *Brown* can serve that function only to the extent that it remains a symbol of moral clarity, or, in Richard Kluger's words, an embodiment of "simple justice."¹³⁰ The moral clarity of *Brown* stems from its universalism—its denial that people may be separated, or treated separately, simply because of their birthright. The remedial justification keeps our eyes on that principle, even as we use birthright preferences to overcome birthright disadvantages. The diversity rationale now adopted into law by a majority of the Supreme Court severs that connection; it announces a different ideal world, one in which the path to justice, or at least a good career, lies not in separating, but in mixing by birthright. That rhetorical move, it seems to me, is the tragedy of *Grutter*.

IV. CONCLUSION

I have criticized the opinion of the Court in *Grutter* as if it were the product of a single intelligent actor, unencumbered by the constraint of precedent and the need to cobble together a consensus. By that standard, in my judgment, it fails to satisfy the very test—strict scrutiny—that the Court applies to racial classifications. The diversity rationale is ambiguous in concept and unconvincingly executed in practice; it sanctions the use of race for instrumental reasons nominally divorced from the historical conditions that made race so toxic a criterion for allocating governmental benefits and burdens. In fact, however, the majority opinion in *Grutter* is the product of compromise among five Justices with differing views on the subject. Some—surely Justices Ginsburg, Stevens, and Souter—would adopt a frankly remedial strategy if they felt that they could garner the necessary votes. Others—most notably Justice O'Connor, and probably Justices Breyer and Kennedy¹³¹—resist the general remedial objective, consistently rejected by the Court over the past twenty-five years. But they are prepared to embrace the use of race for some nonremedial purposes, at least (and perhaps only) in the educational context.

A careful reading of the *Grutter* majority opinion, however, suggests that Justice O'Connor and her colleagues are really embracing a remedial notion. Without some underlying remedial conception, most of what the majority opinion says would be incomplete at best or incoherent at worst. The highly selective way in which the University of Michigan Law

130. KLUGER, *supra* note 2.

131. Justices Breyer and Kennedy voted with the majority in *Gratz*, suggesting that they do not embrace the societal remediation position, at least in the broad form espoused by the Court's liberal wing. Justices Breyer (by his vote with the *Grutter* majority) and Kennedy (in his *Grutter* dissent) both acknowledge, however, that racial diversity can justify the use of racial preferences, so long as they are sufficiently narrowly tailored.

School sought to achieve educational diversity cannot satisfy a narrow tailoring test, at least as conventionally understood and previously applied. Only as an effort to correct for the vestiges of de jure racial discrimination does the law school's particular set of choices and methods even begin to make sense. Likewise, the Court's legitimacy argument must be predicated on some notion that—regardless of what people think—institutions, like the military, corporations, law firms, and universities, cannot be truly legitimate so long as their composition is still bleached by the racist regime struck down in *Brown* and its progeny. Similarly, the Court's dictum¹³² at the end of the opinion regarding time limits can only be reconciled with a remedial perspective.

So we have, at the time of *Brown*'s fiftieth anniversary, yet another reminder of how deeply the issue of affirmative action divides the contemporary Supreme Court. As a sociological fact, we should hardly be surprised. This is a Court deeply divided on many issues. And there are few issues in America today that are as divisive as the use of racial preferences. *Grutter*, by its strained logic, reminds us of the path not taken back in 1978, when the Court, sensing a choice between the extremes of racial favoritism and colorblindness, opted for the latter. In so doing, it failed to seek out a middle path, one that would have left open the possibility of developing a forthright rationale for more targeted remedial measures. The diversity justification can be viewed as a fumbling effort to rediscover that pathway. One might have wanted a cleaner justification for the use of racial preferences in educational admissions. But in this imperfect world, an imperfect justification is perhaps the best we can realistically hope for.

132. I use the term "dictum" advisedly. Justice Thomas, joined by Justice Scalia, does his best to characterize the twenty-five-year time limit as a "holding," in the obvious hope that a future Court will interpret it as such. See *Grutter* 539 U.S. at 346–47 (Thomas, J., concurring in part and dissenting in part). Still, it is hard to read the majority's statement that it "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary," as anything more than just that, an expectation.