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THE DIVERSITY DICHOTOMY: THE SUPREME COURT'S RETICENCE TO GIVE RACE A CAPITAL "R"

Tanya Washington*

I. INTRODUCTION

This past term the United States Supreme Court gave a nod to the use of race-conscious admissions programs in its twin decisions *Grutter v. Bollinger*¹ and *Gratz v. Bollinger*.² Despite the favorable result reached by the majority in *Grutter*, which upheld the constitutionality of the University of Michigan Law School's admissions practices, its poorly reasoned opinion glossed over the compelling interest prong of the strict scrutiny analysis, dictating the opposite result in *Gratz*, in which the Court invalidated the University of Michigan's undergraduate admissions policy. Proponents of racial diversity may criticize the *Gratz* decision as inconsistent with *Grutter*'s holding that the educational benefits derived from racial diversity constitute a compelling interest, and may characterize *Gratz* as enigmatic; however, it is the majority's opinion in *Grutter* that provides the more appropriate target for criticism.

The majority's reluctance to articulate the exogeneic aspect of the race concept, which informs the central thesis of the diversity rationale, coupled with its refusal to specifically describe the interest served by racial heterogeneity, distorted the application of both prongs of the constitutional test.³ The *Grutter* majority's acknowledgment of the compelling interest at issue was so abstruse that it was easy for the Court in *Gratz* to reject the undergraduate admissions policy as incongruent and disproportionate to that ill-defined end. The *Grutter* majority's vacuous examination of the racial diversity rationale casts a shadow of skepticism over its announcement that racial heterogeneity serves a

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1. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

2. *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

3. Because the University of Michigan's admissions practice involves race-conscious determinations, strict scrutiny applies. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion of Powell, J.). This exacting constitutional test requires that the state action at issue is geared toward achieving a compelling interest and is narrowly tailored to that end. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

compelling state interest and rendered the *Gratz* decision the first casualty of *Grutter*'s flawed reasoning.

Though the majority's opinion in *Grutter* resolved the battle waged against race-conscious admissions policies in favor of the University of Michigan Law School, it ultimately foreshadows defeat for diversity advocates in the war being waged against the consideration of race to achieve educational prerogatives. The majority's qualified endorsement of racial diversity as an educational imperative weakened its recognition that racial diversity's educational yield is a compelling interest. By reaching the right result for the wrong reasons, the majority may have frustrated advocates' ability to present the racial diversity rationale as a constitutionally viable justification for race conscious admissions policies, and ultimately may have done more harm than good.

This Article addresses three critical errors committed by the *Grutter* majority in determining that racial heterogeneity is an educational essential. First, the majority failed to effectively distinguish racial diversity from remedial affirmative action, which reinforces the prevailing view that the racial diversity argument is a pretensed justification for race-conscious state action. This error was exacerbated by the majority's mischaracterization of student body diversity as the constitutionally compelling aspiration rather than as the means by which the Law School endeavored to achieve the educational yield of student body heterogeneity. Second, the majority neglected to articulate the racial diversity justification's distinct conception of race. This failure compelled the majority to seize upon a twenty-five-year sunset provision that is both arbitrary and incongruent with a reasoned consideration of the constituent aspects of the race concept. Third, the majority dispensed with a searching examination of the appreciable nexus between racial heterogeneity and an enhanced learning environment, opting instead for the convenience of blind deference to the Law School, which deprived the school's assertion of much of the credibility to which it is legitimately entitled.

The success of the racial diversity argument, despite its unifying aspiration to enrich the learning environment for every student in the classroom, depends on an acknowledgment of the existence and significance of the "color-line" discerned by W.E.B. DuBois one hundred years ago,⁴ and recognition of the reality this racial demarcation continues to create. This contingency poses the greatest challenge to racial diversity as a constitutional justification for race-conscious admissions

4. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 10 (1903). It is somewhat intriguing that the *Grutter* majority's refusal to acknowledge the color line occurred exactly one hundred years after W.E.B. DuBois's observation of the racial delineation.

policies. The argument insists upon an unequivocal acknowledgment of the difference in the political, social, and economic realities experienced by those on either side of the color line, yet the establishing hand of this disparity is reluctant to acknowledge its truth.

II. DISTINGUISHING RACIAL DIVERSITY FROM REMEDIAL AFFIRMATIVE ACTION

Because remedial affirmative action has enjoyed notable status as the chief, though, as the *Grutter* majority emphasizes,⁵ not the sole constitutional justification for race-conscious state action, the key to racial diversity's success as an alternative and equally legitimate justification lies in articulating its distinctive aspirations, motivations, and character. From its inception, racial diversity⁶ has been portrayed by both opponents and advocates as a default justification for remedial affirmative action policy. Proponents of affirmative action, seeking to ameliorate the inequity caused by generations of government-enforced racial segregation and discrimination in the education context, advocated for increased admission of students of color into American institutions of higher learning on the grounds that it would serve to remedy past and present injustices by affording the historically excluded access to educational opportunities.⁷ As the political climate became less accommodat-

5. The majority opines,

We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke*. It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

Grutter, 123 S. Ct. at 2338-39 (citations omitted). Notably absent from this passage is a reference to racial diversity and notably present is the mischaracterization of the means (racial diversity) as the end (the educational yield of racial diversity). This Article addresses the significance and consequence of this error.

6. In this Article diversity refers to racial diversity. I enthusiastically acknowledge that socio-economic diversity, religious diversity, ethnic diversity, and other characteristics that contribute to experiential diversity can also be considered by institutions of higher learning making admissions determinations. I distinguish racial diversity from these other forms of diversity based on this nation's long and rich relationship with race. The fact that race was at the center of the only civil war in this nation's history and has been the subject of three constitutional amendments are testimonies to its unique significance.

7. "Affirmative action focuses on the group or groups that an entity . . . would like to benefit. The rationale for its use may include such things as prior discrimination or underrepresentation. It is generally conceived as a stopgap measure designed to ameliorate the effects of past discrimination." Arnold Loewy, *Taking Bakke Seriously: Distinguishing Diversity From Affirmative Action in the Law School Admissions Process*, 77 N.C. L. REV. 1479, 1479 (1999).

ing of these aims,⁸ affirmative action advocates presented racial diversity as a more politically palatable justification that would serve the same end.⁹ Thus diversity, like an ill-prepared understudy, was thrust into a spotlight of constitutional scrutiny and mixed reviews from an anxious audience.

The *Grutter* majority's refusal to present racial diversity as distinct and independent from remedial affirmative action furthered the fallacy that racial diversity is merely a counterfeit remedial affirmative action argument.¹⁰ Though the majority emphasized that the Law School's consideration of race in its admissions determinations served the constitutionally permissible goal of "obtaining the educational benefits that flow from a diverse student body,"¹¹ the Court failed to establish racial diversity as philosophically and characteristically distinguishable from remedial affirmative action. Clarifying the distinct aspects of racial diversity would have preserved it as a legitimate justification for race-conscious admissions policies and programs. The majority's failure to distinguish diversity cast it in the traditional garb of affirmative action and presented it as a quasi-remedial rationalization for remedying past and present racial discrimination, rather than as an appropriate and effective means of enhancing the quality of the educational experience at this nation's institutions of higher learning.

In presenting the rationale in its most persuasive posture, racial diversity as the means of achieving a constitutionally compelling interest must be distinguished from racial diversity as *the* compelling interest. This distinction is not merely a matter of semantics. The characterization of racial diversity as a means or an end determines whether it is a

8. "A political backlash against affirmative action dates back at least to the shift of working-class white Democrats to the Republican Party in the first Reagan election." Kathleen M. Sullivan, *The Future of Affirmative Action: After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1040 (1998). See Paul Gaston, *Honor to the Class of '69: Reflections on Affirmative Action: Its Origins, Virtues, Enemies, Champions, and Prospects* (1999), available at <http://www.virginia.edu/topnews/releases/aa.html>, for an interesting discussion of the demise of affirmative action policy.

9. "[B]ecause of Justice Powell's emphasis on the almost unique legitimacy of 'diversity' as a constitutional value, it has become the favorite catchword—indeed, it would not be an exaggeration to say 'mantra'—of those defending the use of racial or ethnic preferences . . . 'Diversity' is thus a ubiquitous topic of contemporary discourse." Sanford Levinson, 1999 Owen J. Roberts Memorial Diversity Lecture, 2 U. PA. J. CONST. L. 573, 578 (2000); see also Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 ANN. SURV. AM. L. 515, 536 (1996) ("Although affirmative action was created specifically for remedial purposes, today the primary, and perhaps only, justification for the retention of affirmative action programs is educational diversity.").

10. Justice Kennedy observed in his dissent, "Many academics at other law schools who are affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds." *Grutter*, 123 S. Ct. at 2373 (Kennedy, J., dissenting) (internal quotation and citation omitted).

11. *Id.* at 2347.

constitutional consideration or an unconstitutional aim. Supreme Court precedent has rejected racial diversity or racial balancing as unconstitutional.¹² Justice Powell's opinion in *Bakke* emphasizes that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional.¹³ The constitutional issue should be securing the educational benefits racial diversity produces, not achieving heterogeneity.¹⁴

The mischaracterization of racial diversity as an end rather than as a means invites confusion because both remedial affirmative action and racial diversity produce the same result: increased enrollment of racial minorities.¹⁵ The *Grutter* majority properly rejected racial balancing as the aim or motivating impulse of the racial diversity justification, but failed to distinguish clearly between a characterization of racial diversity as the means of achieving a compelling interest and racial diversity as the desired end.¹⁶

In paraphrasing the Law School's articulated justification for its race-conscious admissions program, "[to obtain] 'the educational benefits that flow from a diverse student body,'" the majority mangled the means-ends analysis and stated, "the Law School asks us to recognize, in the context of higher education, a compelling state interest in *student body diversity*."¹⁷ Therefore the majority identified student body diversity

12. *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

13. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (Justice Powell emphasizes, "It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups.").

14. *Id.* at 312-15.

15. Like the Law School, the University of Texas Law School defended its race-conscious admissions program as necessary to obtain the educational benefits that flow from a racially and ethnically diverse student body. In its *Hopwood* decision, the Fifth Circuit determined that the University of Texas's race-conscious admissions program, which the court considered to be a racial preference, was not operating in pursuit of a constitutionally compelling aim. The court rejected the university's assertion that racial heterogeneity yields educational benefits and contended that "the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection." *Hopwood v. Texas*, 78 F.3d. 932, 944 (5th Cir. 1996). The reasoning underlying the Fifth Circuit's decision evidenced the Court's adherence to the common misconception that racial diversity and remedial affirmative action are indistinguishable in that they both pursue the same "wholesome purpose of correcting perceived racial imbalance in the student body." *Id.* at 934. Rather than considering the legitimacy of the university's asserted interest in enhancing the educational experience and environment it provides to its students, the Fifth Circuit mangled the compelling interest inquiry by attributing to racial diversity an unconstitutional trajectory—the consideration of race to increase the number of racial minorities enrolled at the university.

16. *Grutter*, 123 S. Ct. at 2339.

17. *Id.* at 2338. The majority's holding explicitly identified student body diversity as the compelling state interest. It said, "[W]e endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 2337.

as the compelling state interest. Conversely, later in the opinion, when the majority identified the interest to which the Law School's admissions practices must be closely calibrated, it observed that "the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce."¹⁸ This statement implicitly identified the educational benefits to which racial diversity contributes as the compelling interest. The majority's inconsistency in this regard was not lost on Justice Thomas, who criticized the majority opinion, observing,

Unlike the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it wishes to obtain "educational benefits that flow from student body diversity." This statement must be evaluated carefully, because it implies that both "diversity" and "educational benefits" are components of the Law School's compelling state interest Attaining "diversity," whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself.¹⁹

The majority's confusion over whether to define racial diversity as a means or an end derives from Justice Powell's ambiguous labeling of the relevant means and end. His decision in *Bakke* reflects a certain measure of inconsistency; at one point in his opinion he stated, "Ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."²⁰ This statement characterized heterogeneity as the end to be achieved. However, Justice Powell later opined, "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element,"²¹ thus characterizing racial diversity as the means of achieving constitutionally important educational imperatives.

Whatever the origins of the confusion, the *Grutter* majority's failure to clearly and consistently consider racial diversity as an instrument designed to achieve educational imperatives invited attacks on racial diversity as constitutionally illegitimate.²² It also cast as equivocal the

18. *Id.* at 2339.

19. *Id.* at 2352-53 (Thomas, J., dissenting) (citation omitted).

20. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312-15 (1978) (italics added).

21. *Id.* (italics added).

22. Justice Thomas criticized the majority's reluctance to clearly define the compelling interest at issue, stating, "The Law School[] apparently believes that only a racially mixed student body can lead to educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational 'benefits' not simply the forbidden interest in 'racial balancing,' that the majority expressly rejects?" *Grutter*, 123 S. Ct. at 2353 (Thomas, J., dissenting).

majority's assessment of the proportionality and congruence of the Law School race-conscious admissions program to the educational yield of racial heterogeneity. The ambiguity raised the question as to how you can measure the fit of the means to the end when you fail to adequately distinguish between and properly label the two? In short, the majority's mischaracterization of racial diversity deprived the rationale of a significant amount of credibility.

The majority's means-end mix up was compounded by its failure to enumerate and distinguish the character, motivations, and aspirations of the diversity rationale from those of remedial affirmative action. Distinguishing affirmative action from diversity does not diminish the persuasiveness of the former rationale, which remains a necessary instrument for achieving the legitimate aim of addressing past and continuing racial discrimination. Consideration of the differences between the two theories justifying race-conscious determinations does, however, inform the constitutionality of diversity. The polestar consideration of remedial affirmative action is redressing the injury resulting from *de jure* and *de facto* discrimination against persons on the basis of their race by creating and implementing practices that allow members of previously excluded racial groups access to higher education in the United States.²³ Remedial affirmative action is largely characterized and motivated by the politics of inclusion²⁴ and considerations of equity.²⁵ Its orientation is retrospective; it is preoccupied with curing past harms, though it also acknowledges and utilizes present day discriminatory practices to justify race-conscious admissions policies.²⁶ The targeted class of beneficiaries of remedial affirmative action is comprised principally of those racial

23. Samuel Issacharoff, *Law and Misdirection in the Debate of Affirmative Action*, 2002 U. CHI. LEGAL F. 11 (2002); Melissa Cole, *The Color Blind Constitution, Civil Rights Talk, and Multicultural Discourse for a Post-Reparations World*, 25 N.Y.U. REV. L. & SOC. CHANGE 127 (1999).

24. It is interesting to note that the *Grutter* majority offers in support of the racial diversity rationale an argument that refers to one of the most distinguishing characteristics of remedial affirmative action. It opined, "Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of race and ethnicity," highlighting the chief aspiration of remedial affirmative action—inclusion. *Grutter*, 123 S. Ct. at 2341.

25. Affirmative action in college admissions dates back at least to the 1960s. Though the term "affirmative action" first appeared in President Kennedy's Executive Order No. 10925 in 1961, *see* Exec. Order No. 10,925, 3 C.F.R. § 448 (1959-1964), *reprinted in* 5 U.S.C. § 3301 (1994), it did not receive widespread implementation until President Lyndon Johnson's Executive Order 11246, issued in 1965, requiring public and private institutions contracting with the federal government to affirmatively seek out and employ qualified and underrepresented minorities. *See* DEBORAH J. CARTER & REGINALD WILSON, AMERICAN COUNCIL ON EDUCATION, MINORITIES IN HIGHER EDUCATION 7 (1996).

26. Corrine E. Anderson, Comment, *The Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181 (1999).

assignees historically subject to state sanctioned and enforced racism.²⁷ The remedial affirmative action rationale does not stand in opposition to the assertion that racial diversity is of educational value, yet the educational yield of heterogeneity is neither among its chief aspirations nor essential to its character.

While, concededly, racial diversity shares with remedial affirmative action a consequential increase in racial heterogeneity in classrooms across the nation, the focus of the diversity rationale is neither retributive nor restorative.²⁸ As distinguished from affirmative action programs and policies, diversity's underlying rationale is pedagogical and its orientation is prospective;²⁹ it seeks to achieve an educationally relevant end. The racial diversity rationale is education policy that contemplates as its chief aspiration the provision of a learning environment enriched by the admission of a student body with multifarious experiences.³⁰ Within the scope of its importance as a legitimate educational aspiration, diversity distinguishes itself from affirmative action and finds its independent constitutional footing.³¹

27. David J. Trevino, Comment, *The Currency of Reparations: Affirmative Action in College Admission*, 4 SCHOLAR 439 (2002).

28. See Gaston, *supra* note 8 ("The university is a better place because of both diversity and affirmative action, but they are not the same thing. They are entwined in a symbiotic relationship, but positive actions to recruit and enroll black students, although they result in a racially diverse student body, stem from unique origins and their continuation is justified because of ongoing special circumstances.").

29. Race-conscious policies that are prospective in nature have enjoyed the oft-repeated support of Justice Stevens. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 601 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511-513 (Stevens, J., concurring in part and concurring in judgment); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313-15 (Stevens, J., dissenting). I endorse this focus on the future benefit, rather than the remedial justification, of such decisions. As Professor Levinson observes,

Someone . . . genuinely committed to the positive values of diversity should be far less interested in the historical explanation for its lack and more committed to assuring a desirable mix in the future . . . "[D]iversity" should not be viewed as a penalty we pay to rectify our past sins, but, rather, a policy warmly embraced because of its service to the present and future interests of the relevant institutions.

Levinson, *supra* note 9, at 602 (citing Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986)).

30. "[A]s a purely practical matter, relying on diversity rather than discrimination places affirmative action programs on more solid legal and perhaps political grounds." Michael Selmi, *The Book Review: The Facts of Affirmative Action*, 85 VA. L. REV. 697, 729 (1999). See also Michelle M. Inouye, Note, *The Diversity Justification for Affirmative Action in Higher Education: Is Hopwood v. Texas Right?*, 11 NOTRE DAME J.L. ETHICS & PUBLIC POL'Y 385, 388 (1997) ("Diversity has an intrinsic value in the context of higher education not only for the minority student but for the whole of the student body, and therefore diversity should constitute a valid justification for a race-based admissions process in the context of higher education.").

31. Comparing diversity to affirmative action, one commentator notes that the former is concerned with institutions while the latter focuses on certain racial and ethnic groups. He provides the following example to illustrate the distinction:

The governor of a state that has never had an African-American on its supreme court, and currently has a supreme court vacancy, is discussing with his advisors the desirability of placing an African-American on the court:

The constitutional salience of diversity depends upon presenting it as independent of affirmative action programs and policies and in furtherance of legitimate educational objectives.³² Justice Powell's opinion in support of the diversity rationale conditioned its constitutionality on the extent to which it served educational prerogatives. Justice Powell made clear that "educational diversity"³³ falls within the scope of the First Amendment freedoms and protections afforded institutions of higher education. He rejected remedial and social equity based justifications—inherent to remedial affirmative action—and made the constitutionality of racial diversity-oriented admissions practices entirely dependent upon their educational relevance.³⁴

One of the most distinguishing features of the diversity rationale is that its targeted beneficiaries include every student in the classroom, not merely those students who are members of a racial minority group. The goal of race-conscious admissions practices premised on the diversity justification is to enrich the learning experience and the educational environment for all students, not just students of color. Justice Thomas's reference to the racial assignees as the beneficiaries of racial diversity throughout his dissent in *Grutter*³⁵ reflects the widely held assumption that policies and programs promoting racial heterogeneity only serve to improve the educational experience of students historically excluded

Affirmative Action [Rationale]: "There has never been an African-American on our supreme court, and no wonder. For years, they have been subjected to inferior schooling, housing and everything else. It's time that we level the playing field. I am appointing John Jones as our first African-American supreme court justice."

Diversity [Rationale]: "Different perspectives are vital to a meaningful collaborative process on our supreme court. Although not all African-Americans have had identical backgrounds, there are, in this country, certain experiences that seem to be common to them and not experienced by Caucasians. Consequently, I believe that the institution of the judiciary will be better served with an African-American on the court to share his views with those of the five Caucasians and one Asian-American currently sitting on the court.. Thus, I am appointing John Jones as our first African-American supreme court justice."

Loewy, *supra* note 7, at 1480-81 (citation omitted). This illustration poignantly depicts the difference between affirmative action and diversity motivations, despite the fact that in this example and most cases, the result is the same.

32. "It is important to separate the role of diversity in contributing to the enhancement of the educational experience from the various other goals that institutions have pursued through racial preferences in their admissions policies." John Friedl, *Making a Compelling Case for Diversity in College Admissions*, 61 U. PITT. L. REV. 1, 24 (1999).

33. The more accurate phrasing would be "educationally relevant diversity," which is the type of diversity (including racial diversity) that would serve educational interests.

34. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) ("[T]he purpose of helping certain groups whom the faculty . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.").

35. *E.g.*, *Grutter v. Bollinger*, 123 S. Ct. 2325, 2361 (2003) (Thomas, J., dissenting).

from the education system. At best, such programs are perceived to serve a social good, but the assertion that they serve educational imperatives is viewed with a jaundiced eye.³⁶ Inherent in this skepticism is the belief that members of racial minority groups would have little to contribute to educational processes and the intellectual environment that would be of value, and that the only purpose (though not a constitutionally legitimate purpose) for including these students would be in compensation for past discrimination. The Supreme Court's reasoning in *Brown v. Board of Education* supports this assumption.³⁷

The issue presented to the Supreme Court in *Brown v. Board of Education*,³⁸ the landmark Supreme Court case in which the Court held that "separate . . . [is] inherently unequal,"³⁹ was whether the segregation of children in public schools on the basis of race deprived minority children of equal educational opportunities.⁴⁰ Notably, the Court did not consider whether segregation adversely impacted the educational experience of white children. In resolving the issue presented by *Brown*, the Court only considered the adverse effect of segregation on black children and determined that their educational experience was indeed detrimentally impacted by segregation.⁴¹ The Court's reasoning in *Brown* makes quite clear that it is the excluded students of color who suffer segregation's harms. However, implicit in the Court's determination that separate schools are inherently unequal is the possibility that white students are harmed by segregation and that their learning experience and educational environment are enhanced by integration and, by logical extension, racial heterogeneity.⁴² It is within

36. See generally L. Darnell Weedon, *Yo, Hopwood, Saying No to Race-Based Affirmative Action is the Right Thing to Do From an Afrocentric Perspective*, 27 CUMB. L. REV. 533 (1997).

37. "It must be remembered that it is not the educational benefit to the minority applicants admitted under a system of preferences that counts To justify minority preferences, the institution must be able to demonstrate an educational benefit to majority and minority students alike." See Friedl, *supra* note 32, at 26; see also J. Clifton Fleming, Jr., *Thoughts About Pursuing Diversity in Legal Education for Pedagogical Rather than Political or Compensatory Reasons: A Review Essay on Stephen L. Carter's "Reflection of an Affirmative Action Baby"*, 36 HOW. L.J. 291, 302 (1993) ("[T]he recruitment of persons from different backgrounds is appropriate, not for overarching political ends, but for achieving the more modest, but still important objectives of enriching legal education and making the learning experience more vibrant for both majority and minority participants.").

38. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

39. *Id.* at 495.

40. *Id.* at 493.

41. *Id.* at 495.

42. Similarly, Sanford Levinson describes the recognition of the harm that would accrue to white law students by virtue of the University of Texas's refusal to admit black students, implicit in the Supreme Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), observing,

[L]egal education, practically speaking, demands that students be exposed to the *diversity* of groups within the state if they are to be effectively prepared for the various tasks of the practicing lawyer. Although Vinson[, author of the opinion in *Sweatt*,] made no argument

the context of these possibilities that racial diversity finds its constitutional value.

The *Grutter* majority determined that racial diversity served compelling educational interests without articulating its unique character and distinctive aims and without clearly identifying the composite means and ends of the justification. The majority's *ad hominem* treatment of the racial diversity rationale failed to establish it unequivocally as an independently legitimate justification and left it vulnerable to characterizations by diversity opponents as nothing more than a proxy for remedial affirmative action programs. As Justice Thomas states,

A close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a 'compelling interest in securing the educational benefits of a diverse student body.' No serious effort is made to explain how these benefits fit with the state interests the Court has recognized (or rejected) as compelling.⁴³

III. ASSAYING THE ENDOGENEIC AND EXOGENEIC ASPECTS OF THE RACE CONCEPT

The second significant error committed by the *Grutter* majority was not addressing the conception of race unique to the racial diversity rationale, which mirrored the Court's failure to adequately distinguish between racial diversity and remedial affirmative action. Instead of acknowledging, examining, and explaining racial diversity's distinct perspective of race, the majority presumed the relevance of the conception of race inherent in remedial affirmative action to be uniformly applicable. This approach reinforced the assumption that, because the race concept is a predicate for both the racial diversity rationale and the remedial affirmative action rationale, they both invoke the same conception of race.⁴⁴ *Grutter* provided the Court with the opportunity to dispel this myth and to address the legal significance of race in the particular context of racial diversity. How race is conceptualized

that white students were significantly harmed by being deprived of access to the remaining fifteen percent of the population, it seems impossible to believe that the Court then, or anyone now, would question the presence of such harm, even if it was, as a practical matter, far less damaging to white students' future effective ability to practice law than to African-American law students deprived of an integrated educational setting.

Levinson, *supra* note 9, at 575. See also Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1749 (1996) ("Integrated education . . . does not just benefit minorities—it advantages all students in a distinctive way . . .").

43. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2353 (2003) (citation omitted).

44. Book Note, *Form Over Substance*, 110 HARV. L. REV. 1643 (1997).

determines the extent to which racial heterogeneity can be said to serve educational imperatives. Unfortunately, the majority failed to articulate this specific concept of race relevant to racial heterogeneity's educational yield, and the Court's perfunctory consideration of the race concept produced an awkward, superficial ratification of racial diversity.

Articulating a relevant conception of race is not an academic exercise; rather, it is crucial to establishing the viable nexus between racial heterogeneity and educational prerogatives. Showing this connection requires discussing the race concept according to its endogenic and exogenic traits, as discussed below. Judicious consideration of the two aspects does not require a determination as to which is the predominant trait because each aspect is an innate quality of race. The two characteristics are, however, contradistinctive in orientation and derive from discrepant sources. The nature of these fundamental differences informs the utility of each in sustaining the racial diversity rationale.

The more conventional characterization of race centers on its endogenic aspect, which is concerned with the racial experience from the perspective of the racial assignee. It describes race in terms of self-identity and one's internal race consciousness. Responding to the query, "what does it feel like to be a member of a particular race?" the endogenic aspect highlights the internally derived race-consciousness of the individual. This aspect of race is chameleon-like, entirely dependent upon the internalizing processes of each member of the race; therefore, it becomes challenging to discern a collective conception of what it means to be a member of that race. A uniform consciousness inherent to a particular race, or a consensus of ideology, perspective, or identity is difficult to ascertain.⁴⁵ Compassionate critics seize upon this

45. The consciousness that defines a particular race is multifarious and difficult to define. Furthermore, the consideration of race as indicative of diverse experiences is challenged by opponents of affirmative action for want of a limiting principle. How are institutions to determine which racial and ethnic categories merit heightened solicitude? For an in-depth discussion of these challenges to the feasibility of considering race to promote educational diversity, see Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 931 (1994). In response to these challenges, I encourage that universities, in differentiating between racial and ethnic classifications which promote educational diversity and those that do so to a lesser extent, consider whether a particular race or ethnicity has an "indigenous diverse element." This concept allows the university to make its decision based on a determination of whether a racial or ethnic classification was created, recognized, or used by the government to shape the social, economic, and political realities of its membership. It is those racial and ethnic groups, whose membership has experienced a distinct reality shaped by government policies and legislation and the history and tradition of this nation, that should be recognized as having a unique experience that serves educational prerogatives.

It is important to note that,

Although the United States has become an increasingly diverse society, Americans of different racial and ethnic groups lead remarkably separate lives. They live in separate neighborhoods and attend separate schools. They are unlikely to have any sustained or serious contact with each other and rarely share either the significant events in their lives,

difficulty as the quintessential failing of the racial diversity justification, as the following *Hopwood* excerpt illustrates:

The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants The assumption is that a certain individual possesses characteristics by virtue of being a member of a certain racial group. This assumption, however, does not withstand scrutiny. "The use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." To believe that a person's race controls his point of view is to stereotype him "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think."⁴⁶

Several deficiencies are inherent to this critique of racial diversity,⁴⁷

such as weddings and funerals, or the more casual aspects of their daily routines, like shopping trips or parent-teacher nights. Race affects one's experiences—and therefore one's perspectives and beliefs.

Expert Report, *The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 241, 245 (1999).

46. *Hopwood v. Texas*, 78 F.3d 932, 943-46 (5th Cir. 1996) (citing Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 12 (1974); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (O'Connor, J., dissenting)). O'Connor's statement in *Metro Broadcasting*, where the issue presented to the Court was whether there was a constitutionally compelling need to create and promote diversity in the media context, was entirely concerned with the nature of viewpoints expressed by broadcasters. Diversity of viewpoint is neither the primary concern nor the chief aim of educational diversity; rather, it is the experience that racially diverse students contribute to the analysis of ideas, regardless of their viewpoint, that is of importance. Hence, the rejection of the diversity argument in Justice O'Connor's dissent should not be interpreted as a prohibition of the consideration of race in the education context.

47. Consider the Court's treatment of the essentialist argument in *Metro Broadcasting* where it stated, "The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discreet 'minority viewpoint' on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled 'minority programming' or that programming that might be described as 'minority' does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group. The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in *Bakke* that greater admission of minorities would contribute, on average, 'to the robust exchange of ideas.'"

but its chief oversight is that it makes no distinction between perspective and experience.⁴⁸ An appreciation for the differences between the two parallels the critical difference between the endogeneic and exogeneic aspects of race. Perspective, which is intrinsically subjective, is the predominant characteristic of the endogeneic aspect of the race concept, whereas experience, which is intrinsically objective, is the predominant characteristic of the exogeneic aspect.⁴⁹ Hence, one's racial classification may not determine one's behavior or thoughts and may negligibly inform a person's perspective or viewpoint. But to say that one's racial classification does not determine one's experience ignores this nation's long and impassioned relationship with race and how an individual's racial classification continues to define one's social, political, and economic reality.

While it is true that every Black American may not have the same perspective of their blackness and may not hold viewpoints that differ in perspective from White Americans, they have, undoubtedly, had the experience of being Black in America, which affords a distinct reality, that White Americans can neither approximate nor experience.⁵⁰ The racialized experience is meaningful not because it is informed by one's consciousness of it; rather, it is meaningful because it is shaped by extrinsic forces that result in a constructed political, social, and economic reality.⁵¹ This anti-existentialist conception of race reveals that

Metro Broadcasting, 497 U.S. at 579 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).

48. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (emphasizing, "[the] danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics"); Selmi, *supra* note 28, at 730 n.157 ("This is not to suggest that increasing racial diversity in a student body will not have the effect of introducing different views and perspectives; it often will. But the policies are not structured in a way to ensure that kind of diversity, as race is generally used as a broad proxy that will not necessarily produce diverse viewpoints."); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (rejecting racial redistricting on the basis that it "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls"); see also Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of Diversity*, 1993 WIS. L. REV. 105 (1993).

49. To be sure, the endogeneic and exogeneic aspects of race do not function independently of one another. The internal apperception of one's racial identity is often informed and constructed by the correlating exogeneic racial experience. Those having experienced a distinct reality discernibly different from that encountered by the racial majority develop a particularized self-awareness, which is substantially informed by their racialized experiences. This is not to say that absent the unique experience created by a racialized reality one would have no consciousness of one's membership in a particular race; however, it is likely that such associations would have significantly diminished political, social, and economic importance and would therefore be of minimal educational import.

50. "[W]hatever one's opinions and beliefs may be, they are affected by one's experience—including the experience, for example, of being black, or of being white." Expert Report, *supra* note 45, at 248.

51. As Michelle M. Inouye notes, "[Diversity] assume[s] the reality—no less a reality because it is socially constructed—that people of different races and ethnicities often have different life experiences." Inouye, *supra* note 30, at 413–14; see also THE CORRESPONDENTS OF THE NEW YORK TIMES, HOW RACE IS LIVED IN AMERICA: PULLING TOGETHER, PULLING APART (2001); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862 (1995).

racial heterogeneity contributes to the education environment a racial experience different from the reality experienced by the majority, regardless of the extent to which the racial experience yields viewpoints that differ from those of the majority. It is the distinctive character of the racial experience, which enhances the learning environment for every student at the university.⁵² The Law School was not, as essentialists allege, concerned with the diversity of views expressed; they were concerned with diversity among the experiences of those expressing views.⁵³

The essentialist objection to affirmative action is preoccupied with the endogenic aspect of race. This approach relegates race to a purely descriptive designation, without regard for its attendant exposures and experiences. The consignment of race to a mere phenotypical-based demographic prompted Justice Thomas in his dissent in *Grutter* to treat race as an "aesthetic"⁵⁴ or a visceral sensitivity rather than as representative of an objectively discernible experiential reality. It is the latter construction of race, featuring its exogenic component, upon which the racial diversity rationale is premised.

The exogenic characteristic of race—or race as social, political, and economic construct—is premised upon an acknowledgement of an objectively discernible and verifiable experience that results from assigned membership in a racial group, independent of and notwithstanding perspective, viewpoint, or opinion about racial identity. According to the exogenic aspect of race, the character of the race concept is defined principally by an external and objectively measurable set of realities imposed according to societal assignment of racial identity.⁵⁵ Before one can accurately ascertain the educational relevance

52. "[I]f scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and . . . the quality of the educational experience offered to all students would suffer." Appendix to Opinion of Powell, *Bakke*, 438 U.S. at 321 (No. 76-811).

53. "In deciding whom to include in an affirmative action program, a law school might appropriately consider the *salience* of the group in contemporary American society or in the geographic region in which its graduates tend to practice. Among the determinants of a group's salience are its numerical size and the extent to which its culture differs from the dominant culture of students attending the school." Brest & Oshige, *supra* note 51, at 873.

54. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2353 (2003) (Thomas, J., dissenting) ("A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic—so much so that the majority uses them interchangeably.").

55. Neil Gotanda provides an eloquent explanation of how this exogenous conception of race comes into conflict with the concept of colorblindness. He says,

To use color-blind nonrecognition effectively in the private sphere, we would have to fail to recognize race in our everyday lives. This is impossible. One cannot literally follow a color-blind standard of conduct in ordinary social life. Moreover, the technique of nonrecognition ultimately supports the supremacy of white interests.

In everyday American life, nonrecognition is self-contradictory because it is impossible

of racial heterogeneity and the extent to which it serves a compelling interest, it is imperative to understand the race concept according to its exogeneic trait. The recognition of the discernible set of racialized social, economic, and political exposures, in turn, creates a distinct reality demonstrably different from that experienced by the racial majority. The dissimilarity between the experiences of members of the racial majority and the experiences of members of the racial minority (not the internal musings of racial assignees) generates the intellectual synergy essential to higher-order thinking and analytic learning. The invocation of the racial experience as a valuable construct requires a shift in consciousness from regarding it as something to be reconciled to an appreciation of the racial experience as representative of distinct experiences that have educational relevance.

The value that the exogeneic characteristic of race assigns to the experience of racial minorities is not premised upon a characterization of the racialized experience as good or bad or something to be atoned for; rather, it pertains only to the extent to which the experience of racial minorities differs from that of members of the racial majority. The racial diversity rationale does not attempt to use past and present racial discrimination to justify measures to expiate the resulting harm; rather, race-based discrimination is paradigmatic of race as a social, political, and economic construction. The educationally relevant aspect of the exogeneic character of race lies in the existence of a different experience and not how individuals internally respond to differential treatment on the basis of their racial caste. To the extent that race derives its significance from the realities that define it, racial discrimination reflects and confirms the breadth, depth, and distinctive quality of the racial experience.⁵⁶

to not think about a subject without having first thought about it at least a little. Nonrecognition differs from nonperception. Compare color-blind nonrecognition with medical color-blindness. A medically color-blind person is someone who cannot see what others can. It is a partial nonperception of what is "really" there. To be racially color-blind, on the other hand, is to ignore what one has already noticed. The medically color-blind individual never perceives color in the first place; the racially color-blind individual perceives race and then ignores it. This is not just a semantic distinction. The characteristics of race that are noticed (before being ignored) are situated within an already existing understanding of race. That is, race carries with it a complex social meaning. The proponents of color-blind nonrecognition do not acknowledge this aspect of racial consciousness when they describe their "neutral" decisionmaking processes.

Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 18-19 (1991).

56. "The limits of the diversity rationale also explain why it is impossible to avoid bringing discrimination into the affirmative action equation. The primary reason why race can be distinguished from a host of other diversity enhancing programs is our legacy of discrimination and governmentally sanctioned animus toward African-Americans." Selmi, *supra* note 30, at 732.

The *Grutter* majority's relative silence on the issue of race spoke volumes. The dearth of analysis on the topic that lay at the heart of the rationale that the majority ultimately deemed constitutional can best be characterized as a schizophrenic vacillation between an endogeneic-oriented and an exogeneic-oriented formulation of the race concept. On one hand, the majority emphasized, "The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'"⁵⁷ Then the Court contradicted that point, observing, "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."⁵⁸ The majority's latter statement on race fails to distinguish between viewpoint (an endogeneic characteristic) and experience (an exogeneic characteristic). Despite the majority's weak acknowledgement of the significance of race, which was qualified by equating race, geographic origins, and professional affiliations, it failed to make plain that the salience of race derives from the existence of the color line that still operates to create divergent experiences for those on both sides of it.⁵⁹

The exogeneic aspect insists upon an acknowledgment of the existence of the color line, which W.E.B. DuBois described as presenting

57. *Grutter*, 123 S. Ct. at 2341.

58. *Id.* The majority also observed, "By virtue of our Nation's struggle with racial inequality, such students are . . . likely to have experiences of particular importance to the Law School's mission." *Id.* at 2344. "In light of our history and the persistence of racial separation, it is not surprising that race remains a defining characteristic of American life. Even in a world of racial equality, the educational imperative that Justice Powell identified in *Bakke* would exist as long as one's race was so prominent a part of one's experience. This is not to say, of course, that members of any racial group are somehow preordained to hold some particular set of opinions or beliefs." Expert Report, *supra* note 45, at 248.

"[W]hatever one's opinions and beliefs may be, they are affected by one's experience—including the experience, for example, of being black, or of being white." *Id.*

59. As Justice Ginsburg insightfully observed in her dissent in *Adarand*,

[Discriminatory] effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resume, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 273-274 (1995) (Ginsburg, J., dissenting) (citations omitted).

the definitive challenge of the twentieth century.⁶⁰ The color line is not the chimerical conception of those that the line was drawn to exclude. This racial demarcation owes its genesis to slavery and its entrenchment to the slave codes, post-emancipation Jim Crow laws, government mandated and enforced segregation, and to the invisible but efficacious hand of de facto discrimination. And yet, unlike the remedial affirmative action rationale, the diversity justification seeks neither to erase the color line nor to compensate for its existence. The diversity approach merely acknowledges the color line as emblematic of significantly divergent, educationally relevant, social, political, and economic realities, and seeks to utilize the disparity created by the color line to greatly improve the educational experience for every student in the classroom.

A. The Constitutional Contours of the Color Line

Though racial classifications and the experiences unique to them certainly pre-date slavery, the legalized economic and political disenfranchisement of tens of thousands of U.S. born residents for more than two hundred years provides a sufficient starting point for an examination of the historic external indicators of a distinct racial experience. The enslavement of persons based on their assigned racial classification served to provide slaves with unique experiences and to amplify the disparity between their economic, social, and political reality and the reality experienced by those free from the oppressive hand of servitude. For more than two hundred years, slavery shaped the economic, social, and political experiences of the enslaved. The institution operated without regard for any internal concept of racial identity or the race consciousness of the enslaved; race was characterized only in terms of whether one was legally entitled to one's own labor and personal, economic, and political freedom.

The text of the United States Constitution provides another historical example of the controlling nature of the exogeneic aspect of race. Classifications explicitly dividing racial minorities from the racial majority appear in the original text of this nation's founding document, which excludes Native Americans⁶¹ from representational rights and tax obligations and which characterizes blacks as constituting three-fifths of a person.⁶² The inclusion and utilization of racial classifications to

60. DUBOIS, *supra* note 4.

61. Though the actual text of the Constitution refers to "Indians," the correct name for this racial classification is "Native American."

62. "Representatives and direct Taxes shall be apportioned among the several States which may be

expressly proscribe the political reality of Native Americans and Black Americans provides another striking external indicator of a unique racial experience. Critics of racial diversity, who characterize the exogeneic conception of race as a contemporary and equivocal convention, are reluctant to admit that this nation's founding document created the experiential difference between racial minorities and the racial majority. The discernible experiential differences are not the opus of the racial assignee; rather, they are by constitutional design.

The *Dred Scott* case illustrates the Supreme Court's consideration of the race concept exclusively according to its exogeneic aspect in determining the circumference of the constitutionally proscribed experience of Blacks born in America. In *Dred Scott*, the consciousness of the plaintiff in error⁶³ inspired him to pursue a claim that he was entitled to be emancipated and entitled to relief for injuries resulting from an alleged assault by a white man on his person and against his wife and children. The conception of race utilized by the Supreme Court to reject *Dred Scott* claim was premised exclusively on a consideration of the difference between the rights, privileges, and protections assigned by the Constitution to blacks in America and those accorded to members of the racial majority. The Court opined in pertinent part:

The provision in the Articles of Confederation was, "that the *free inhabitants* of each of the States, . . . should be entitled to all the privileges and immunities of free citizens in the several States" [N]otwithstanding the generality of the words "free inhabitants," it is very clear that, according to their accepted meaning in that day, they did not include the African race, whether free or not Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject; the free and the subjugated races And it cannot for a moment be supposed, that a class of persons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words "free inhabitants."⁶⁴

included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons.*" U.S. CONST. art. I, § 2, cl. 3 (emphasis added). Though this section of the Constitution has been modified by the Fifteenth Amendment, U.S. CONST. amend. XV, it is of symbolic significance that the original language creating the racial classification remains in the document.

63. *Dred Scott v. Sanford*, 60 U.S. 393 (1856), *superceded by Constitutional Amendment as stated in* *Oliver v. Duncan*, 293 F. Supp. 958 (E.D.N.Y. 1968). Mr. Scott was considered an erroneous plaintiff because the Court ultimately determined that a Black man did not have the right to invoke the jurisdiction of the U.S. courts to resolve a dispute. *Id.*

64. *Dred Scott*, 60 U.S. at 418-19.

The Court's recognition of the "line of distinction" as a constitutional invention clearly embraces the exogeneic aspect of race, without regard for its endogeneic component. The *Dred Scott* decision and underlying reasoning is premised upon a conception of race as a social, political, and economic designation, without regard for the consciousness of the racial designee. Inherent to this reasoning is an appreciation for the difference between the experiences and exposures of the racial minority and that of the racial majority.

It is axiomatic that the passage of the Civil War Amendments,⁶⁵ particularly the Equal Protection Clause, was motivated by a desire to mitigate the disparity between the political and economic realities⁶⁶ experienced by racial minorities and members of the racial majority. While the Amendments achieved this goal to some degree, they did not disestablish the race-based demarcation originating with slavery that was reinforced by the Supreme Court's decision in *Plessy v. Ferguson*,⁶⁷ where the Court affirmed that the color line was defined and diuturnal and confirmed this nation's adherence to a constructed, racialized experiential differential.

The Supreme Court in *Plessy* expressly rejected an exogeneic conception of race, while simultaneously enforcing divergent racialized realities for those on both sides of the color line. The "separate" aspect of the pre-eminent "separate but equal" apologue established categorically that the races experienced different realities.⁶⁸ The *Plessy* Court was charged with determining whether the divergent nature of those experiences produced inequality in violation of the Equal Protection Clause. By characterizing the Louisiana law at issue, which required separate railroad accommodations based on the race of the passenger,

65. U.S. CONST. amend. XIII-XV. The Thirteenth Amendment to the U.S. Constitution provides in pertinent part, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Fourteenth Amendment to the U.S. Constitution provides in pertinent part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Fifteenth Amendment to the U.S. Constitution provides in pertinent part, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

66. See *The Slaughter-House Cases*, 83 U.S. 36, 71 (1873) (chronicling the historical background of the Civil War Amendments and noting that their underlying purpose was to obtain "freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him").

67. 163 U.S. 537 (1896).

68. Emmanuel O. Ihekweumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 18 (2001).

as a social proscription and therefore beyond the reach of the Equal Protection Clause, the Court was able to dispense with any meaningful consideration of the substantive differences between the experiences of members of different races. By endorsing the controlling doctrine of fictitious equality, the Court was able to assuage its conscience (and that of the nation) and firmly fix the delineation between the experiences of racial minorities and members of the racial majority, without conceding that the differences were of political, social, or economic import.⁶⁹

The Court's response to the argument that a law relegating members of a certain race to utilize facilities offering substandard provisions, affixes to those persons a "badge of inferiority," reveals the Court's reluctance to acknowledge the exogeneic aspect of race as constitutionally relevant. It considered the depiction of the experiential differential between racial minorities and the racial majority as asymmetrical, to be a meaningless construction that racial minorities chose to assign to it.⁷⁰ By characterizing the complaint of the subjugated races as gratuitous and deeming the demarcation between the races to be benign, the Court ensured that members of the racial majority and the racial minority would continue to experience markedly different economic, political, and social realities, while divesting the divergent realities of any significance. Thus, the dissimilar nature of the two sets of racialized experiences was discounted but the color line that created them was firmly entrenched.

The nation would have to wait fifty-eight years for the Supreme Court's ruling in *Brown*,⁷¹ in which the Court acknowledged the divergent nature of the racialized realities forged by the color line and characterized the existence of the racial divide as an inequity. There were, however, several cases in the interim in which the Court was willing to acknowledge what it was reluctant to consider in *Plessy*—that there were discernible indicia reflective of a substantive difference between the realities of those falling on opposite sides of the color line.⁷² In these cases the Court focused on the exogeneic aspect of race and

69. Jen-L A. Wong, *Adarand Constructors Inc. v. Peña: A Color-blind Remedy Eliminating Racial Preferences*, 18 HAWAII L. REV. 939 (1996).

70. *Plessy*, 163 U.S. at 571 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

71. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

72. *Berea Coll. v. Kent*, 211 U.S. 45 (1908); *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631 (1938); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950).

endeavored to ascertain and approximate the amplitude of the disparity between the Black experience and the White experience.⁷³ And then there was *Brown*, which is often regarded as emblematic of the success of the Civil Rights Movement.

The most celebrated aspect of the *Brown* decision is the Court's focus on the endogeneic aspect of race. The Court's reliance on the social science evidence supporting the conclusion that separate schooling "generates [among Blacks] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" reveals the Court's concern for the race consciousness of racial assignees.⁷⁴ Another justification for the Court's decision in *Brown* was its appreciation of the race concept according to its exogeneic characteristic. Implicit in the Supreme Court's decision in *Brown*, which attempted to mute the significance of the color line, if not eliminate it, is an acknowledgement of the delineation and the experiential differential it manufactured.

While *Brown* certainly may be said to have precipitated the elimination of formal adherence to the separatist mandate of the color line in this society, that lineation continues to exist and reflect a discernible divide between the economic, social, and political realities of racial minorities and those experienced by the racial majority. Despite its enduring nature, racial discrimination remains a contemporary reality. Present-day examples confirming its existence abound. Racial-profiling,⁷⁵ redlining,⁷⁶ residential segregation,⁷⁷ segregation in education,⁷⁸ environmental racism,⁷⁹ discriminatory immigration practices,⁸⁰ employment discrimination,⁸¹ and prosecutorial and sentencing disparities⁸² all affirm that for people of color race is relevant to, if not determinative of,

73. See generally cases cited *supra* note 72.

74. *Brown*, 347 U.S. at 484.

75. Kathryn K. Russell, *Racial Profiling: A Status Report of the Legal, Legislative and Empirical Literature*, 3 RUTGERS RACE & L. REV. 61 (2001).

76. Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617 (1999).

77. Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199 (2001).

78. Barri A. Orlow, Note, *Fifty Years After Brown v. Board of Education: Resegregation of America's Public Schools*, 9 WIDENER L. SYMP. J. 183 (2002).

79. Musa Keenheel, *Lowering the Bar: The Need for New Legislation and Liberalization of Current Laws to Combat Environmental Racism*, 20 TEMP. ENVTL. L. & TECH. J. 105 (2001).

80. George A. Martinez, *Race and Immigration Law: A Paradigm Shift?*, 2000 U. ILL. L. REV. 517 (2000).

81. Robert Belton, *Mixed-Motive Cases in Employment Law Discrimination Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651 (2001).

82. Sharon L. Davies, *The New Data: Over-Representation of Minorities in the Criminal Justice System*, 66 LAW & CONTEMP. PROBS. 17 (2003).

the quality and character of their lives.⁸³ It bears reiterating that the acknowledgement of present-day racial discrimination as relevant to the diversity rationale is not antithetical to its status as a justification independent from remedial affirmation action. The key distinguishing feature between the two is that the racial diversity rationale does not seek to equalize the experiences of blacks and whites; rather, it highlights and utilizes the ways in which the experiences differ.

B. Turning a Blind Eye to the Color Line: A Limiting Principle for the Racial Diversity Rationale

The Supreme Court's decision in *Plessy* added to constitutional lore Justice Harlan's often-cited statement about the color-blind character of the Constitution.⁸⁴ In his dissent in *Grutter*, Justice Thomas invoked Justice Harlan's characterization of the Constitution and admonished the majority for "placing its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause."⁸⁵ This perspective views homogeneity as a prerequisite for equality and, by logical extension, regards heterogeneity as the antithesis of equality.⁸⁶

The color-blind interpretation of the Constitution derives from this presumed norm of racial homogeneity, and assigns to the Equal Protection Clause the role and responsibility of protecting and ensuring adherence to that norm. It also emasculates the concept of race according to its exogeneic trait, depriving it of any significance. Ultimately the color-blind delusion confuses aspiration with reality by denying the existence of the color line and deems any consideration of the differences between the racial experiences that the color line creates as contravening the Equal Protection Clause's commitment to equality.⁸⁷ In doing so, it positions the Equal Protection Clause as

83. NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA 2003* (2003).

84. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

85. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2365 (2003) (Thomas, J., dissenting).

86. Color-blind advocates' obsession with this principle is unjustifiably optimistic and undeniably premature. See Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color-Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 84 (2000) (citing Reva B. Siegel, *In the Eyes of the Law: Reflections on the Authority of Legal Discourse*, in *LAW STORIES: NARRATIVE AND RHETORIC IN THE LAW* at 225, 227 (Peter Brooks & Paul Gewirtz eds., 1996) ("The blindness trope is, as I have argued, no less a legal fiction than the doctrine of marital unity or the concept of equality in the eyes of the law.")).

87. In a society still plagued by racism, the current surge of support for legally imposed colorblindness is problematic . . . [It] ignores the ever present issues surrounding American race relations . . . In August, 1997, Brooklyn New York was witness to a horrific incident of police brutality. The incident involved white police officers, who, while yelling racial

diametrically opposed to the racial diversity rationale because the rationale values and promotes heterogeneity. The *Grutter* majority's silence on the issue of race and its failure to articulate and discuss the racial experience according to its exogeneic trait makes the diversity justification vulnerable to the color-blind tautology.

While the color-blind ideal views disregarding the existence of the color line as essential to achieving equality, the egalitarianism to which it aspires can only be achieved by first acknowledging and then eliminating the disparity created by the color line. Had the *Grutter* majority acknowledged the existence of the color line and properly defined the character and aims of the diversity rationale according to the exogeneic aspect of race, it could have utilized the natural expiration date inherent to the justification. Instead, the majority was anxious to establish a limiting principle to augment the capricious analysis it provided in support of its holding. Thus, it arbitrarily seized upon a twenty-five-year sunset provision to "assure[] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality."⁸⁸

The majority's analysis and in particular its allusion to the "goal of equality" echoes the flawed logic inherent to the color-blind ideal and reflects the majority's reluctance to distinguish between remedial affirmative action, which is concerned with equality, and the racial diversity rationale, which is decidedly not. Erroneously articulating equality as the racial diversity rationale's aspiration enabled the majority to provide at least some justification for the presage that prompted the announcement of the twenty-five-year sunset provision. If the majority had accurately described the aim of the rationale in terms of its educational relevance, it would have been unable to provide even this unconvincing justification for the sunset provision.

The majority's refusal to consider the conception of race relevant to racial diversity, despite its centrality to the case, resulted in its failure to take advantage of the rationale's natural timetable. The educational

epithets, savagely beat Haitian immigrant Abner Louima. Such an incident is only the most recent example of American society's failure to achieve the goals of Title VII and failure to move towards a truly colorblind society. Furthermore, incidents such as this point to the reality that while the concept of a colorblind American society is laudable, there is still a real need for emphasis on nurturing diversity in our neighborhoods, workplace and, most importantly, educational institutions.

Matthew S. Lerner, Comment, *When Diversity Leads to Adversity: The Principles of Promoting Diversity in Educational Institutions, Premonitions of the Taxman v. Board of Education Settlement*, 47 BUFF. L. REV. 1035, 1062-1064 (1999).

88. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2346 (2003).

relevance of the racial experience is dependent upon the existence of the divergent racial realities experienced by those falling on opposite sides of the color line. When racial assignees no longer experience disparate social, economic, and political realities, they will no longer contribute a sufficiently divergent experience to the educational environment. Thus, the rationale will no longer be educationally viable. The rationale's relevance is not contingent upon considerations of equality; rather, it is focused on the extent to which the color line continues to create disparate, racialized experiences that produce educational benefits. The majority's optimistic projection that twenty-five years from now racial discrimination will have subsided to such an extent that racial minorities will no longer have a distinct experience in America is little more than a vain hope. Given that the color line has survived as a defining characteristic of this nation for the past four hundred years, it is not likely to dissipate in the next twenty-five.⁸⁹

An additional adverse consequence of the majority's failure to define the character and contours of the aspect of race relevant to the diversity rationale is the *Gratz* majority's determination that the University of Michigan's undergraduate admissions practice was unconstitutional. The *Grutter* majority refused to acknowledge the existence of a definitive, objectively discernible racial experience with significant educational dividends. This approach enabled the *Gratz* majority to characterize the undergraduate admissions practice of according minority applicants an automatic twenty points out of a possible one hundred points as a quota, rather than as an appropriate means of achieving the educational benefits that derive from the continuing existence of a divergent racial experience in America.

The acknowledgment of race according to its exogeneic aspect is steeped in constitutional precedence. A historical survey of the Supreme Court's consideration and conception of race in its *Dred Scott*, *Plessy*, and *Brown* decisions provides sufficient support for recognition of the significance of the race concept's exogeneic trait. The majority should have conducted a thorough examination of race and an acknowledgment of the color line that creates the educationally relevant experiential differential. The majority's failure to articulate the conception of race inherent to the racial diversity rationale divested its endorsement of the justification of legal legitimacy and cast it in the light of a political concession.

89. *Id.* at 2348 ("From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.") (Ginsburg, J., concurring).

IV. A QUALIFIED ENDORSEMENT OF RACIAL HETEROGENEITY'S EDUCATIONAL DIVIDENDS

The *Grutter* majority's third significant error was its peremptory acknowledgment of racial diversity's educational yield. Despite the mountain of credible evidence presented by the Law School in defense of its assertion that there is an appreciable nexus between racial diversity and learning outcomes, the majority summarily certified racial heterogeneity's educational relevance. The majority's failure to provide a thoughtful explanation of its determination undermined the integrity of its judgment. Though the majority described the educational benefits of racial heterogeneity as "substantial,"⁹⁰ referenced the many expert reports and studies documenting racial diversity's educational yield,⁹¹ and cited the numerous *amici* who bolstered the Law School's chief assertion,⁹² it conducted no examination of its own. The majority accorded absolute deference to the Law School's opinion and concluded, "The Law School has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."⁹³

The majority's determination that this issue falls squarely within the scope of the University's authority to make academic decisions is correct, but, as Justices Rehnquist,⁹⁴ Kennedy,⁹⁵ and Thomas⁹⁶ observe, it does not relieve the majority of the responsibility of conducting an exacting inquiry into the legitimacy of the Law School's assertion. The majority did not, as several dissenting Justices allege, fail to apply strict scrutiny to the diversity rationale; however, its failure to publish the reasoning behind its holding that the rationale survived constitutional

90. *Id.* at 2339.

91. *Id.* at 2340. The *Grutter* majority recognizes the following studies: WILLIAM G. BOWEN & DAREK BOK, *THE SHAPE OF THE RIVER* (1998); *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (G. Orfield & M. Kurlaender eds., 2001); *COMPELLING INTEREST: EXAMINING EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell J. Chang et al. eds., 2003). *Grutter*, 123 S. Ct. at 2340.

92. *Grutter*, 123 S. Ct. at 2339.

93. *Id.* at 2341.

94. *Id.* at 2366 ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.") (Kennedy, J., dissenting).

95. *Id.* at 2371 ("The majority today refuses to be faithful to the settled principle of strict review . . .") (Rehnquist, C.J., dissenting).

96. *Id.* at 2356 ("The Court bases its unprecedented deference to the Law School—a deference antithetical to strict scrutiny—on an idea of 'educational autonomy' grounded in the First Amendment.") (Thomas, J., dissenting).

scrutiny invites criticism and arouses suspicion as to whether some deficiency inherent to the rationale motivated the majority to conduct its searching inquiry in secret. The majority's refusal to assert a proprietary interest over the determination that racial diversity serves a constitutionally compelling interest is disturbing and renders the precedential value of its determination equivocal.

Rather than disclose the details of the nature and findings of its examination of the racial diversity rationale, the majority proclaimed,

Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."⁹⁷

It was not enough for the majority to say, "[T]he Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"⁹⁸ Nor was it sufficient for the majority to describe the benefits of racial diversity as important because they make "'classroom discussion . . . livelier, more spirited and, simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"⁹⁹ This diaphanous description of diversity's educational yield is devoid of any acknowledgment of racial heterogeneity's intellectual attributes. The majority's failure to articulate the more substantive benefits that racial diversity affords, particularly when it was provided with a wealth of credible evidence in that regard, raises a question as to whether the majority sincerely believed that racial diversity is relevant to cognitive processes.

97. *Id.* at 2339 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-319 (1978)).

98. *Id.* at 2339-40 (citing *Grutter v. Bollinger*, 137 F. Supp. 2d 874 (E.D. Mich. 2001)).

99. *Id.* at 2340.

Educational relevance is generally determined according to the extent to which intellectual imperatives are served. Though the Law School defines its educational goals broadly to also include democratic outcomes and the benefits that relate to living and working in a diverse society, the majority's emphasis on these interests,¹⁰⁰ rather than the diversity rationale's phrenic aspirations, diminishes the force of the rationale's assertion of educational relevance.¹⁰¹ The two educational interests highlighted by the majority are much more vulnerable than learning outcomes to be characterized as remedial-based and social-equity-based justifications, which Justice Powell deemed unconstitutional in *Bakke*.¹⁰²

The majority's rationale provided no limiting principle for the deference it afforded the Law School's assertion that racial diversity was educationally relevant. Hence, there is no safeguard to prevent an educational institution from asserting that it is racial homogeneity that serves educational prerogatives. In the interests of uniformity and consistency of the law it would seem that the *Grutter* decision would dictate that absolute deference be accorded to that assertion as well. The only way that the majority could have avoided presenting academic freedom as a sword or a shield, depending upon the institution wielding it, was to recognize racial heterogeneity's educational relevance as an evidentiary matter and not as a matter of deferential consideration.

100. The majority states,

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. This Court has long recognized that "education . . . is the very foundation of good citizenship." For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.

Id. at 2340-41 (citations omitted).

101. *Id.* It is appropriate to note that Justice Thomas's argument that racial diversity does not serve its beneficiaries because students admitted pursuant to the policy do not fare as well academically as their colleagues does not deprive the diversity rationale of its legitimacy. *Id.* at 2361. The beneficiaries of the diversity rationale include every student in the classroom. Concerned as the rationale is with improving the intellectual environment for all of the admitted students, it achieves its goal by ensuring racial heterogeneity in the classroom even if diversity admits do not perform at the same level as their classmates.

102. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 263 (1978).

A. Making the Case for Racial Diversity

The majority was presented with a considerable number of studies that provided empirical support for the educational value of racial diversity.¹⁰³ It is not clear why the *Grutter* majority declined to make more than honorable mention of this evidence, particularly when it characterized it as persuasive.¹⁰⁴ Patricia Gurin, Professor of Psychology at the University of Michigan, and Interim Dean of the College of Literature, Science, and the Arts, conducted the most extensive longitudinal study of this issue using national and Michigan student databases to chart and measure the educational yield of racial diversity. The results of her extensive study reveal that racial diversity has expansive benefits for majority and minority students alike and serves to enhance the education that students receive by motivating them to think in more complex ways.¹⁰⁵ Her study establishes that the reconciliation of information obtained by virtue of exposure to different experiences with preexisting ideas requires effortful and conscious thinking and stimulates greater mental activity and growth in intellectual and academic proficiency.¹⁰⁶ Two of America's leading educators, William Bowen and Derek Bok, conducted a study that measured the educational impact of racial and ethnic diversity and published their findings in *The Shape of the River: The Long Term Consequences of Considering Race in College and University Admissions*.¹⁰⁷ The results of their study confirm that racial experiential diversity serves important educational goals.¹⁰⁸

The Law School presented three categories of educational interests furthered by racial diversity that fall within the scope of its educational mission: learning outcomes, democracy outcomes, and outcomes

103. See, e.g., DARYL G. SMITH, ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES, DIVERSITY WORKS: THE EMERGING PICTURE OF HOW STUDENTS BENEFIT (2000) (presenting an overview of the latest research and including an annotated bibliography of more than 300 different research studies from across the nation); AMERICAN COUNCIL ON EDUCATION & AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, DOES DIVERSITY MAKE A DIFFERENCE (2000); Mareen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733 (1998); Mitchell Chang & Alexander W. Astin, *Racial Diversity in Higher Education: Does a Racially Mixed Student Population Affect Education Outcomes?*, DIVERSITY DIGEST, Winter 1997 (relating the results of a 1996 study of 300 campuses, which found that racially-mixed student populations have positive effects on retention, overall college satisfaction, college grade point average and intellectual and social self-confidence, all of which fall within the scope of the educational mission of institutions of higher learning).

104. *Grutter*, 123 S. Ct. at 2340.

105. "Students learn better when the learning occurs in a setting where they are confronted with others who are unlike themselves." Expert Report, *supra* note 45, at 244.

106. *Id.* at 249-251.

107. BOWEN & BOK, *supra* note 91.

108. *Id.*

related to living and working in a diverse society.¹⁰⁹ While the majority emphasized the educational relevance of democracy and socialization outcomes, it gave negligible consideration to learning outcomes. Learning outcomes relate to cognitive processes and are principally concerned with the aptitude for thinking and learning, which bear directly on students' academic performance.¹¹⁰ Much of the empirical evidence establishing the educational relevance of racial heterogeneity is premised upon the socio-psychological theory of thinking, which asserts that much of our thinking is non-conscious, automatic, and rote.¹¹¹ The environment best tailored to promoting non-conscious thinking is experientially homogeneous because its uniformity serves primarily to legitimate conventional experiences and exposures.¹¹² This type of thinking is paradigmatically the antithesis of the thought processes in which higher education students are encouraged to engage.¹¹³ Engaged thinking, as compared to non-conscious thinking, is characterized by creativity and originality, and serves primarily to motivate students to think outside of, rather than within, the proverbial

109. Hallinan, *supra* note 103, at 737 ("In the educational sphere, racial and ethnic diversity are believed to affect a number of student outcomes. Diversity is expected to affect students' academic growth, their attitudes and feelings toward intergroup relations, satisfaction with their educational institution, involvement in school and the learning process Moreover, student diversity is believed to have an impact on students' educational and occupational aspirations and attainment.").

110. "Students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." Expert Report, *supra* note 45, at 230.

111. "In fact much of the 'thinking' that we do is actually mindless, the result of previous learning that has become so routine or scripted that thinking is unnecessary." *Id.* at 249.

112. In *Bakke*, Justice Powell invokes the eloquent defense asserted on behalf of diversity by then-President of Princeton University William Bowen who stated,

[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; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, "People do not learn very much when they are surrounded by the likes of themselves."

Regents of the Univ. of Cal. v. *Bakke*, 438 U.S. 265, 313 n.48 (1978); see also Hallinan, *supra* note 103, at 747 (citing Poppy Lauretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. 248, 253 (1996) ("It has been reported that in a sample of undergraduate and graduate students, ethnic diversity in problem solving tasks leads to solutions that are more feasible and more effective than in all Anglo groups.").

113. "Educational institutions plainly want to find ways to engage the deeper, less automatic mode of thinking Complex thinking occurs when we encounter people who are unfamiliar to us, when they encourage us to think or act in new ways, when relationships are unpredictable, and when people we encounter hold different kinds of expectations of us." Expert Report, *supra* note 45, at 230.

box.¹¹⁴ This type of learning requires a more heterogeneous environment that allows for the challenging of conventional thought and inspires analysis informed by different experiences.¹¹⁵ These sophisticated thinking processes take advantage of the cognitive disequilibrium that results when one attempts to reconcile one's experiences with divergent experiences.¹¹⁶ Racial heterogeneity provides a diverse set of experiences, which serve to create the synergy essential to engaged learning.

A 1999 study conducted by Gary Orfield and Dean Whitley surveyed students at two of the nation's top law schools about the educational relevance of racial and ethnic heterogeneity.¹¹⁷ The data obtained from this study, which reflects that students experienced racial diversity as enhancing their education, also confirms the educational yield of racial diversity. Interpretation is a key aspect of higher order thinking, and experience significantly informs interpretive processes.¹¹⁸ There is a

114. *Id.*

115. Neil Rudenstine, Harvard University, The President's Report 1993-1995 p.33 (characterizing diversity as an educational resource comparable to faculty, research, and library resources); Patricia Gurin, The Compelling Need for Diversity in Higher Education, at <http://www.umich.edu/urel/admissions/legal/expert/summ.html>; see also Association of American Universities, On the Importance of Diversity in University Admissions, in N.Y. TIMES, Apr. 24, 1997, at A27. The statement provides in pertinent part:

[We write] to express our strong conviction concerning the continuing need to take into account a wide range of considerations—including ethnicity, race, and gender—as we evaluate the students whom we select for admission.

We speak first and foremost as educators. We believe that our students benefit significantly from education that takes place within a diverse setting. In the course of their university education, our students encounter and learn from others who have backgrounds and characteristics very different from their own. As we seek to prepare students for life in the twenty-first century, the educational value of such encounters will become more important, not less, than in the past.

A very substantial portion of our curriculum is enhanced by the discourse made possible by the heterogeneous backgrounds of our students. Equally, a significant part of education in our institutions takes place outside the classroom, in extracurricular activities where students learn how to work together, as well as to compete; how to exercise leadership, as well as to build consensus. If our institutional capacity to bring together a genuinely diverse group of students is removed—or severely reduced—then the quality and texture of the education we provide will be significantly diminished.

We therefore reaffirm our commitment to diversity as a value that is central to the very concept of education in our institutions.

116. See generally JEAN PIAGET, THE EQUILIBRIUM OF COGNITIVE STRUCTURES: THE CENTRAL PROBLEM OF INTELLECTUAL DEVELOPMENT (1975).

117. Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield & Michael Kurleander eds., 1999).

118. *Id.* at 164. "Understanding the nature of law requires understanding the social and economic conditions in which law is applied. Many laws and court decisions rest on assumptions about such conditions, and in many instances it is necessary to understand such conditions (and the differing views about them) in order to evaluate court decisions, states and legal doctrines." *Id.*

compelling correlation between the breadth, depth, and nature of one's experience and the breadth, depth, and nature of one's interpretation of an issue or idea. However, the correlation may not adequately acknowledge that a learning environment comprised of persons with substantially divergent exposures and experiences may be as instructive to one's interpretive abilities as having the experience itself.¹¹⁹ The racial diversity rationale embraces this proposition as its central thesis.

A premium is placed on the ability of graduate and undergraduate students to discern, comprehend, and express multifaceted aspects of the issues, concepts, and problem sets that they encounter.¹²⁰ The most intellectually astute students are able to appreciate and articulate the supporting and obverse aspects of their analysis. To train minds to recognize and comprehend multiple interpretations of an issue or idea and to facilitate the expansion of their interpretative abilities to include a multitude of perspectives and considerations requires exposure to experiences distinct from their own. Experiential diversity serves as a learning and teaching tool that allows students to incorporate into their knowledge base different considerations, sensibilities, and lines of reasoning, which serve to exponentially augment their analytical proficiency.¹²¹ Providing students with a learning environment that serves to challenge and supplement the ways in which they engage in problem solving and analysis is one of the chief educational aims of institutions of higher learning and is served by the racial heterogeneity of the student body.

The majority needed to establish that the Law School proved the educational relevance of racial diversity in intellectual terms. Its analysis, bereft as it was of any substantive examination of the nexus between racial diversity and learning outcomes, provided no guidance to educational institutions about how to calibrate their admissions processes to achieve racial diversity's educational yield and qualify for the constitutional protection the majority afforded the Law School in

119. *Id.* at 160. As one student participant in the Orfield-Whitla study of the educational relevance of diversity in the law school context observed, "Being confronted with opinions from different socioeconomic and ethnic realms forces you to develop logical bases for the opinions you have and to discard those not based on such logic. You simply are forced to think more critically about your opinions when you know that people with differing opinions are going to ask you to explain yourself." *Id.*

120. *Id.* at 147 ("Law is an area in which effective analysis and advocacy obviously require as deep an understanding as possible of various points of view on key legal issues and of the social and economic realities in which they arise.").

121. "Indeed, one of the most important objectives of American legal education is to cultivate in law students the ability to understand an issue from many perspectives at the same time." Expert Report, *supra* note 45, at 256.

Grutter.¹²² The majority could have provided a utilitarian analysis of racial diversity; instead it published a categorical endorsement of the principle without regard for the particulars of the underlying justification.

V. CONCLUSION

As the Supreme Court deliberated over the constitutionality of the racial diversity rationale, the nation held its breath, anxiously anticipating an opinion that would provide a contemporary consideration of the race concept and a thoughtful examination of the relevance of race to pedagogic aims. Both proponents and opponents of the diversity rationale were disappointed by the Court's vacuous analysis of the justification, which endorsed the rationale without examining it. The *Grutter* majority's refusal to accord racial heterogeneity and its educational yield judicious consideration sabotaged the efficacy of the rationale and ultimately nullified the legitimacy of the justification.

The majority failed to distinguish adequately between racial diversity and the remedial affirmation action rationale and failed to demonstrate the appreciable nexus between racial heterogeneity and educational prerogatives. The most egregious error committed by the majority, however, was its reluctance to consider race according to its exogeneic aspect, which impaired its ability to define the compelling interest at issue with particularity. The majority's cryptic characterization of the compelling interest served by racial heterogeneity distorted the symmetry determination inherent to the narrowly-tailored prong of strict scrutiny and provoked the disastrous result in *Gratz*.

The patronizing character of the majority's endorsement of racial diversity was reinforced by its reticence to conduct an examined consideration of race, which would have required the majority to recognize the divergent and educationally relevant experiences of those separated by the color line. The contempt implicit in its unwillingness to regard the racial experience as something of value relegated race to the status of an issue only to be spoken of in hushed tones. The majority's spurious consideration of the justification divests it of the legitimacy inherent to its assertion that racial heterogeneity is educationally relevant and casts its affirmation of the rationale as a political accommodation, when it is actually in the dialogue between truth and evidence that racial diversity establishes its legitimacy.

122. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2349-50 (2003) (Scalia, J., concurring in part and dissenting in part).

