

Washington University Law Review

VOLUME 87

NUMBER 5

2010

THE ARGOT OF EQUALITY: ON THE IMPORTANCE OF DISENTANGLING “DIVERSITY” AND “REMEDICATION” AS JUSTIFICATIONS FOR RACE-CONSCIOUS GOVERNMENT ACTION

RONALD J. KROTOSZYNSKI, JR.*

ABSTRACT

The rules governing “benign” forms of race-conscious government action are easy to state but very difficult to apply in practice. A great deal of the difficulty arises from the lack of precision associated with the use of terms of art, such as “diversity,” “remediation,” and “affirmative action.” Each of these terms should have a concrete and separate meaning, but in reality often serve as mere synonyms; this lack of precision in nomenclature is not always accidental. Although broad majorities support efforts to increase “diversity,” race-conscious government action aimed at remediating past racial discrimination enjoys much more limited popular support. The general public’s strong antipathy

* John S. Stone Chair, Director of Faculty Research & Professor of Law, University of Alabama School of Law. Emily White, Washington and Lee University J.D. Class of 2009, and Ben Dean, University of Alabama J.D. Class of 2010, provided excellent research assistance that greatly facilitated my work on this Article. I also wish to acknowledge the generous support of the University of Alabama Law Foundation, which provided research support for this project. The law faculties at the Wake Forest University School of Law, the Villanova University Law School, and the University of Arkansas-Fayetteville School of Law provided very insightful and helpful comments on earlier drafts of this Article. In addition, Professors Michelle Adams, Scott Dodson, Lyrissa Lidsky, Wendy Parker, James Puckett, and Christina Wells generously read and commented on earlier drafts of this Article; the piece reflects the benefit of their perceptive and helpful insights. As always, any and all errors and omissions are my responsibility alone.

*toward remedial race-conscious government action provides a powerful incentive for government officials to mislabel remedial programs as resting on a diversity rationale. Unfortunately, however, mislabeling a remedial affirmative action effort as a non-remedial diversity program can and will lead to virtually automatic judicial invalidation of the program, notwithstanding the fact that a compelling interest in remediation might support the program. The federal courts should consider carefully whether demanding truth in advertising is a higher constitutional value than securing voluntary remedial efforts from local, state, and federal government entities to undo the continuing contemporary effects of past discriminatory behavior. Moreover, the Supreme Court cannot reasonably demand more accuracy from government entities in describing the rationale for race-conscious action than the Court itself observes; the most recent decisions from the Supreme Court, including both Justice O'Connor's majority opinion in *Grutter v. Bollinger* and Justice Kennedy's critical concurring opinion in *Parents Involved in Community Schools v. Seattle School District*, both fail to deploy the argot of equality with exacting precision. Race is a difficult topic and plain talk about race is not easy for any government entity—including the federal courts. This state of affairs requires pragmatic realism, rather than empty formalism, in assessing the consistency of benign race-conscious government action with the equal protection mandate. In this regard, permitting government entities to defend benign race-conscious government action as resting on either remedial grounds or a combination of remedial and diversity concerns—regardless of a program's formal “diversity” label—would constitute a modest step in the right direction.*

INTRODUCTION

The rules governing “benign” forms of race-conscious government action are easy to state but very difficult to apply in practice. A great deal of the difficulty arises from the lack of precision associated with the use of terms of art, such as “diversity,” “remediation,” and “affirmative action.” Each of these terms should have a concrete and separate meaning, but in reality often serve as mere synonyms. Lack of care in using this nomenclature is not limited exclusively to government officers of the executive and legislative branches, but also includes the federal courts.

The general public's strong antipathy toward remedial race-conscious government action provides a key reason for this lack of accuracy in labeling remedial government programs; remediation of past racial wrongs constitutes a remarkably unpopular rationale for race-conscious

government action. By way of contrast, however, broad majorities support efforts to increase “diversity.” This political dynamic provides a powerful incentive for government officials to intentionally mislabel remedial programs as resting on the diversity rationale. Unfortunately, however, labeling a remedial effort a non-remedial “diversity” program can and does lead to virtually automatic judicial invalidation of the program, notwithstanding the fact that a compelling interest in remediation might support the program. Indeed, in the plurality decision of *Parents Involved in Community Schools v. Seattle School District*,¹ the Louisville, Kentucky, public school district’s ostensible “diversity” program appears to have suffered this fate—despite a compelling argument in favor of the program on remedial grounds, the Supreme Court invalidated it on diversity grounds.²

The federal courts should consider carefully whether demanding truth in advertising is a higher constitutional value than securing voluntary remedial efforts from local, state, and federal government entities to undo the continuing contemporary effects of past discriminatory behavior. The Supreme Court cannot reasonably demand more accuracy from government entities in describing the rationale for race-conscious action than the Court itself observes; the most recent decisions from the Supreme Court, including both Justice O’Connor’s majority opinion in *Grutter v. Bollinger*³ and Justice Kennedy’s critical concurring opinion in *Parents Involved*,⁴ fail to deploy the argot of equality with exacting precision. Race is a difficult topic to discuss, and plain talk about race is not easy for any government entity—including the federal courts. This state of affairs requires pragmatic realism, rather than empty formalism, in assessing the consistency of benign race-conscious government action with the equal protection mandate.

1. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Meredith v. Jefferson County Bd. of Educ.*, 127 S. Ct. 2738 (2007). The Supreme Court reviewed the U.S. Court of Appeals for the Sixth Circuit’s decision in *McFarland v. Jefferson County Board of Education*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom., Meredith v. Jefferson County Board of Education*, 547 U.S. 1178 (2006), concurrently with the U.S. Court of Appeals for the Ninth Circuit’s decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 547 U.S. 1177 (2006). In consolidated appeals, the citation convention is to cite only to the first named case under review; in this instance, to *Parents Involved*. Accordingly, all subsequent citations in this Article to the Supreme Court’s decision in *Meredith*, relating to the Jefferson County, Kentucky, public school district’s racial diversity program, will appear as citations to *Parents Involved*. In a consolidated case argued and decided in tandem, as in this instance, a single opinion resolves both appeals. See *Parents Involved*, 127 S. Ct. at 2746, 2749.

2. See *Parents Involved*, 127 S. Ct. at 2752, 2754 (2007).

3. *Grutter v. Bollinger*, 539 U.S. 306, 325–28 (2003).

4. *Parents Involved*, 127 S. Ct. at 2790–91 (Kennedy, J., concurring).

The question of permissible government use of “benign” racial classifications remains an important, but doctrinally muddled, area of constitutional law. A great deal of the confusion arises because of the imprecision with which government officials, including judges, use terms of art such as “diversity,” “remediation,” and “affirmative action.” Although each of these terms could refer to distinct and severable motives for government action that take race into account, a pronounced tendency exists among courts, commentators, and various government officers to use them as synonyms. Moreover, the Supreme Court’s own invocation of “diversity” as a basis for race-conscious government action has not reflected a consistent and coherent use of nomenclature.⁵

Such imprecision could have one or many root causes. Perhaps race is such a difficult and complex subject that straight talk about it simply is not possible, whether at the level of the local city government or at the Supreme Court. From this perspective, the nomenclature is intentionally imprecise and reflects an effort to render opaque that which, if transparent, might provoke unwanted attention or even public backlash.⁶ As Professor Peter Schuck puts the matter with respect to one key term of art,

5. See, e.g., *Grutter*, 539 U.S. at 343 (2003) (“It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public education. Since that time, the number of minority applicants with high grades and tests scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”) (citation omitted); *id.* at 332 (“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.”); *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring) (“The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”); *id.* at 2797 (“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. . . . The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.”). The language in these cases invokes rather directly concerns rooted in “equal opportunity” and “non-discrimination,” rather than the notion that “diversity” somehow improves the quality of the government’s educational efforts. Cf. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (opinion of Powell, J.) (“Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”); *id.* at 315 (“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, with the remaining percentage an undifferentiated aggregation of students. 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.”).

6. See Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 34 (2002) (arguing that “the diversity rationale should be seen as little more than a rhetorical Hail Mary pass, an argument made in desperation when all other arguments for preferences have failed”).

“[d]iversity, like equality, is an idea that is at once complex and empty until it is given descriptive and normative content and context.”⁷

There is, in all of this, something of a puzzle. As Professor Fred Schauer has explained, we expect judges to engage in principled decision making and to give the actual reasons that undergird a particular judicial pronouncement that the law is thus.⁸ As he puts the matter, “[t]he minimal sincerity conditions of ordinary conversational practice thus indicate that the giver of a reason is, at least at the moment of giving the reason, committed to no less than one result other than the result that prompted giving the reason.”⁹ Nevertheless, there is a substantial disconnect between the formal reasons given by Justice O’Connor in *Grutter* and Justice Kennedy in *Parents Involved*, and the rules that follow from those reasons. Both cases bless efforts to promote “diversity” even while adopting rhetoric strongly redolent of racial justice and the social imperative of affirmative action.¹⁰

Schauer acknowledges that reasons do not always explain outcomes, suggesting that “[p]erhaps there are things we can think but cannot write down.”¹¹ He asks, “But why would a judge believe an outcome to be correct when it could not be explained by a reason?”¹² Schauer suggests that “[o]ne possibility is that there is a reason for the result, albeit a legally, socially, or morally impermissible one.”¹³ Schauer’s examples of such reasons involve invidious racial discrimination,¹⁴ but one could postulate any motivation that does not square with a judge’s formal (and previously published) legal commitments, including, for example, a rule that states government may not attempt to remediate general social discrimination for which it bears no particularized responsibility.¹⁵

7. *Id.* at 37.

8. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–34 (1995).

9. *Id.* at 644.

10. *See infra* text and accompanying notes 26–39 and 91–94.

11. Schauer, *supra* note 8, at 652.

12. *Id.*

13. *Id.*

14. *See id.* (positing that a judge’s inability to provide a reason for a decision might stem from the reason being illegitimate, including, for example, “that the plaintiff should win because the plaintiff is white”). Schauer adds that a racially discriminatory reason for a judicial decision *is* a reason, but that “its social and moral unacceptability operates as a constraint [on the judge acknowledging it in a published decision].” *Id.*

15. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (opinion of Powell, J.) (rejecting remediation of societal discrimination as a compelling state interest and opining that “the purpose of helping certain groups whom the faculty of the Davis Medical School 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”); *see also Richmond v. J.A. Croson Co.*, 488 U.S.

If a judge believed such remedial efforts to be appropriate in some contexts but not others, finding a principled line of demarcation might prove to be a difficult, if not impossible, judicial task. One response might be to maintain the formal rhetoric rejecting remediation of social discrimination, while at the same time giving a wink and a nod to thoughtful programs that have this purpose and effect notwithstanding being labeled efforts to promote “diversity.” In taking such an approach, however, the Supreme Court, to borrow a phrase from Professor Bryan Fair, creates a jurisprudence “on a collision course with itself.”¹⁶

In the context of benign race-conscious government action, the Supreme Court has identified only two “compelling” government interests that can justify such measures: the remediation of past racial wrongs and the promotion of diversity in contexts where it could be relevant, such as in higher education, or where a government agency’s “operational needs” would be enhanced through a racially diverse work force.¹⁷ A significant problem arises, however, in the imprecise use of “diversity” and “remediation” as justifications for race-conscious government action.

Politicians, for perfectly sensible reasons, tend to hold fast to “diversity” as a rationale for race-conscious government action, even when, in reality, remediation or some combination of remedial and diversity motives serves as the basis in fact for government action.¹⁸ Both are compelling interests; both motives can support race-conscious government action.¹⁹ The problem is that an overt remediation rationale is

469, 496–99 (1989) (rejecting remediation of general social discrimination as a basis for adopting an affirmative action plan for city construction contracts because “an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota”).

16. See Bryan K. Fair, *Re(Caste)ing Equality Theory: Will Grutter Survive Itself by 2028?*, 7 U. PA. J. CONST. L. 721, 728 (2005).

17. *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 237 (1995) (holding remediation of past discrimination to be a compelling government interest); *Grutter v. Bollinger*, 539 U.S. 306, 328–30 (2003) (holding diversity to be a compelling government interest, at least in the context of higher education); see Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 938, 966–67 (2008) (discussing remediation and diversity as potentially compelling government interests sufficient to justify race-based government classifications).

18. See Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1450–54 (2005) (noting reticence of the University of Michigan officials and lawyers to invoke remediation as a justification for race-conscious admissions programs at the college and law school); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 172–80 (2005) (noting reticence of government officials to acknowledge past discrimination as a basis for race-conscious government action and the intentional misuse of the diversity rationale precisely because it avoids any admission of past racially discriminatory government action).

19. See Brown-Nagin, *supra* note 18, at 1453 n.69 (“Theoretically, however, nothing prevented the university from offering a combined diversity and remedial justification for its race-sensitive

much more likely to precipitate a political backlash from white voters.²⁰ Accordingly, there is a natural political pressure to misidentify remedial efforts as diversity efforts. Indeed, if the federal courts insist on the perfect use of the argot of equality, voluntary efforts to remediate the contemporary effects of past racial discrimination will simply not exist and any such remedial efforts will have to be judicially initiated or not initiated at all.

In light of these political realities, perhaps the Supreme Court should permit governments to say one thing (“diversity”) while actually doing another (“remediation”). If both of these interests truly are compelling, the Supreme Court should not demand that form transcend substance. As an alternative, government entities should be permitted to invoke both diversity and remediation as justifications for benign race-conscious government action and courts should sustain such programs if the agency can make a persuasive case on either ground. Circling back to the Supreme Court’s recent decisions, if one were to renormalize *Meredith v. Jefferson County Board of Education* as a continuing effort at remediation, the Jefferson County, Kentucky, Board of Education should be able to win its case if it were willing to defend its student assignment program on purely remedial grounds (or perhaps some combination of remedial and diversity grounds).²¹

This Article begins, in Part I, with a brief overview of the current argot of equality: the rules that ostensibly govern the use of race-conscious government classifications—rules that, although easy to state, have proven difficult to apply in practice. Part II then examines the rationale most currently in vogue for adopting benign race-conscious government action: the diversity rationale. The problem with the diversity rationale, at least to date, is that it has come to serve as a de facto proxy for remedial

admissions policies. Together, the two rationales might have offered a more compelling justification for affirmative action than either standing alone.”).

20. See Jones, *supra* note 18, at 173–75, 179–80; Michael E. Rosman, *Thoughts on Bakke and Its Effect on Race-Conscious Decision-Making*, 2002 U. CHI. LEGAL. F. 45, 47–52.

21. See Brown-Nagin, *supra* note 18, at 1453 n.69 (noting that the facts in *Grutter* supported asserting both remedial and diversity justifications for the law school’s admission program and observing that “many commentators view past and present discrimination as the true explanation for universities’ commitment to racially diverse student bodies”). *But cf.* Kenneth B. Nunn, *Diversity as a Dead End*, 35 PEPP. L. REV. 705, 714 (2008) (“In fact, in the *Grutter* case, the University of Michigan consciously avoided the remedial argument altogether.”). The logic of Justice O’Connor’s opinion in *Grutter* supports the view that the program could be upheld on remedial grounds; her concerns with visibly open paths to leadership and her firm conviction that race will not need to be considered in the future when making admissions decisions both bespeak a remedial, rather than diversity, rationale for sustaining the program against the equal protection challenge. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); see also *infra* text and accompanying notes 91–96.

concerns.²² Clearly there is a place for considering diversity, including racial diversity, in designing and staffing government programs. In some contexts, such as a police force or prison staff, a diverse work force can achieve results that a non-diverse group of employees simply cannot.²³ But government entities have deployed routinely the diversity rationale in contexts where the government's main rationale for race-conscious action has very little to do with the identifiable benefits of including persons of particular races to achieving a particular goal or purpose. Instead, these intentionally mislabeled "diversity" programs seek to promote remedial objectives that address our unfortunate history of government-sponsored racial discrimination and reflect deep-seated lingering doubts about the fundamental fairness of contemporary U.S. society. This Part argues that

22. See Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379, 407 (1979) (arguing that "[t]he raison d'être for race-specific affirmative action programs has simply never been diversity for the sake of education," but rather the diversity rationale is "a clever post facto justification for increasing the number of minority group students in the student body"); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 152 n.158 (2003) ("Admissions officers may have originally used race as one of these soft variables to compensate for past discrimination, but the Court has since disallowed the pursuit of this purpose in the educational arena except to remedy specific instances of formal and intentional discrimination."); Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1769 (2004) ("'Diversity' is the settled judicial rationale for affirmative action, and the diversity label has the great virtue of applying throughout the country."); Nunn, *supra* note 21, at 709 ("When affirmative action policies were first implemented in the 1960s, they were invariably justified on remedial grounds."); Schuck, *supra* note 6, at 34 (noting that "many of 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"); see also Guinier, *supra*, at 120 ("Now, with the Court's imprimatur on affirmative action, perhaps those who still feel excluded will return the conversation to more foundational concerns about the democratic purpose of higher education.").

23. See *infra* text and accompanying notes 67–82; see also *Petit v. City of Chicago*, 352 F.3d 1111, 1113–14 (7th Cir. 2003) (sustaining race-conscious hiring and promotions in municipal police force because "there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city" than in college and university student admissions decisions). In fact, according to Chief Judge Richard Posner, law enforcement activities provide "the very *clearest* examples of cases in which departures from racial neutrality are permissible." *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996) (emphasis in original); see also Robert J. Delahunty, "Constitutional Justice" or "Constitutional Peace"?: *The Supreme Court and Affirmative Action*, 65 WASH. & LEE L. REV. 11, 64 (2008) ("'Diversity,' in other words, was seen as a method of selecting applicants whose presence within the classroom (and to a lesser extent, on the campus) would create a richer mix of values, perspectives and experiences, and so improve the overall quality of the learning process."). *But cf.* Nunn, *supra* note 21, at 724 (criticizing the diversity rationale, at least in the context of higher education, for "stigmatizing" people of color and arguing that the concept entails using "people of color . . . as a means to white ends" and fails to engage meaningfully "[t]he claims that communities of color might have against majority institutions").

efforts at remedial affirmative action and racial justice should not be, and constitutionally cannot be, pursued under the rubric of “diversity.”

Part III considers and critiques the most powerful rationale for race-conscious government action: remediation of past discrimination by a government entity (whether the discrimination was through direct regulations or through participation in discriminatory institutions and markets).²⁴ This Part deconstructs the remedial justification and demonstrates that, despite its powerful theoretical and legal standing to validate race-conscious government action, the remediation rationale has, at best, nominal political utility in the contemporary United States. Indeed, if one takes the notion of remediation seriously, remedial programs would have to be so highly targeted as to be incapable of securing sufficient popular support for enactment in all but the rarest of cases.²⁵ This state of affairs in turn helps to explain why government entities deploy the diversity rationale so often in situations that, honestly appraised, reflect core remedial concerns.

Part IV considers the catch-22 that the Supreme Court has constructed for local city councils, university admissions offices, and public school districts: misinvoke diversity as a rationale for race-conscious government action and the federal courts will invalidate the program; properly invoke a remedial rationale and face electoral annihilation or be unable to muster the necessary votes to establish the program in the first place. The Supreme Court has essentially created a framework that precludes accurately described race-conscious government action, which raises the question: should truth-in-advertising matter if a government entity can persuasively justify a program on either diversity or remedial grounds or some combination of both? This Article argues that the Supreme Court cannot logically demand more truth-in-advertising from government officials than it upholds and observes itself. Lawyers for government entities defending race-conscious programs should be permitted to defend such programs on any basis that the facts will support, even if it is not the basis reflected in the official legislative history of the enactment, which would presumably be replete with paeans to diversity and nary a peep regarding a remedial motive.

Finally, the Article concludes that race is a difficult subject to discuss openly in the contemporary United States. Given the heavy cultural baggage associated with the history of race in the United States, notably

24. *See infra* text and accompanying notes 115–37.

25. *See infra* text and accompanying notes 123–30.

including slavery and a concerted multi-generational pogrom against the nation's native peoples, sustaining a reasoned discourse about race and racial justice is a very difficult, perhaps impossible, task. Constitutional law should take account of this socio-cultural reality in creating and enforcing the rules that define the metes and bounds of permissible government use of race. We should move beyond jabberwocky toward a form of pragmatic engagement that deals with race openly, but also realistically. The Supreme Court should not fashion and enforce equal protection rules and doctrines that essentially force government to fail when attempting to remediate past racial wrongs that continue to have contemporary social effects.

I. THE DOCTRINAL CONTOURS OF PERMISSIBLE RACE-CONSCIOUS GOVERNMENT ACTION: MASTERING THE ARGOT OF EQUALITY

Despite the internal inconsistencies within Justice O'Connor's majority opinion in *Grutter* and Justice Kennedy's crucial concurring opinion in *Parents Involved*, the doctrinal framework for analyzing race-conscious government action is not difficult to state. Under existing equal protection precedents, government may use race-conscious classifications to grant benefits or impose burdens to remediate past racial discrimination²⁶ in any context and to promote diversity in contexts where the government may plausibly claim some relationship between an ethnically diverse group and the attainment of the government's objectives;²⁷ the Supreme Court has held that these two government interests, and to date only these two interests, meet the compelling state interest requirement.

Turning to the first justification, the Justices have clearly ruled that remediation of past discrimination constitutes a compelling government interest justifying the use of racial preferences,²⁸ even if the beneficiaries

26. See *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 237 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491–93 (1989) (plurality opinion).

27. See *Grutter v. Bollinger*, 539 U.S. 306, 328–30 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311, 314–15 (1978) (opinion of Powell, J.); see also Guinier, *supra* note 22, at 117 (“The [*Grutter*] Court determined that diversity is a compelling governmental interest that justifies certain considerations of race.”). *But cf.* Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 577, 590 (2000) (observing that diversity “has become the favorite catchword . . . of those defending the use of racial or ethnic preferences” but also noting that “there is a debate about the relevance of diverse backgrounds to the quality of what is produced”).

28. See *Croson*, 488 U.S. at 509 (plurality opinion); see also *Adarand*, 515 U.S. at 237 (“The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out

of those preferences are not the specific persons against whom the government discriminated.²⁹ As Justice Stevens has explained, “race-conscious remedies are obviously required to remedy racially discriminatory actions by the State that violate the Fourteenth Amendment.”³⁰ Thus, even though equal protection rights belong to individuals and not to groups,³¹ the Supreme Court has consistently endorsed the use of group-based remedies to undo the contemporary effects of past discrimination.³² Remediation of the present-day effects of past discrimination is a potentially powerful and deep, but relatively narrow, rationale for the adoption of race-conscious government classifications.³³

“Diversity” provides the only other government interest that the Supreme Court deems sufficiently compelling to support race-based classifications. In 2003, the *Grutter* Court endorsed Justice Powell’s *Bakke* opinion³⁴ and held that colleges and universities possess a compelling

in previous cases.”); *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion) (“The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor.”).

29. See, e.g., *Paradise*, 480 U.S. at 167–70, 180–82; see also sources cited *infra* note 32.

30. *Paradise*, 480 U.S. at 189 (Stevens, J., concurring).

31. *Adarand*, 515 U.S. at 226–27 (explaining that the application of skepticism, congruence, and consistency rules for equal protection review of all government race-based classifications “all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*”).

32. See *Croson*, 488 U.S. at 491–92; see also *Adarand*, 515 U.S. at 237. It bears noting that Justices Scalia and Thomas have consistently dissented from this perspective, insisting that only the *actual victims* of past discrimination may obtain a remedy for proven discrimination. See *Adarand*, 515 U.S. at 241 (Thomas, J., concurring); see *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); *Croson*, 488 U.S. at 526–27 (Scalia, J., concurring). As Justice Scalia states the matter, “there is only one circumstance in which the States may act *by race* to ‘undo the effects of past discrimination’: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.” *Croson*, 488 U.S. at 524 (Scalia, J., concurring). By this, he means only that “a State may ‘undo the effects of past discrimination’ in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter’s employment.” *Id.* at 526. For Justice Scalia, then, Richmond could award contracting preferences not to members of groups suffering past discrimination within the market, but rather “to identified victims of discrimination.” *Id.* at 526–27; see *Adarand*, 515 U.S. at 239 (Scalia, J., concurring) (“Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race.”).

33. See *infra* text and accompanying notes 152–211.

34. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“We do not find it necessary to decide whether Justice Powell’s opinion is binding under *Marks*” because “for the reasons set out below, today we endorse Justice Powell’s view in *Bakke* that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).

interest in admitting and enrolling a diverse student body.³⁵ Although Justice O'Connor's opinion in *Grutter* purported to consider the University of Michigan Law School admissions program's use of race solely as a means of securing a diverse class, much of her opinion cleverly elides the rhetoric of remediation of the present-day effects of past discrimination, even as its internal logic evinces strong remedial motivations and concerns.³⁶ After *Grutter*, the question of precisely how inclusive "diversity" programs must be to survive equal protection review remained a very much open one.

In 2007, however, a new majority, effectively led by Justice Kennedy, significantly narrowed the scope of the diversity justification for race-conscious government action. *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*³⁷ constitute crucially important cases involving the adoption of voluntary racial-integration programs in the public schools for the purpose of advancing "diversity" values. In its decisions, the Supreme Court invalidated both the Seattle and Louisville affirmative action plans, finding that both were insufficiently inclusive to meet the equal protection mandate of narrow tailoring.³⁸ As a formal matter, however, the majority did not overrule or otherwise purport to limit *Grutter*'s holding that diversity could be a compelling government interest in the field of education.³⁹

35. *Id.* at 328 ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body."). The decision on this point was actually 6–3, rather than 5–4, because Justice Kennedy, although dissenting as to the ultimate outcome of the case, agreed with the majority on this issue. *See id.* at 392–93 (Kennedy, J., dissenting) ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking.").

36. *See id.* at 330–33 (noting the importance of a diverse leadership caste in industry, the military, and the legal profession and observing that "[i]n 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 342 (requiring, notwithstanding the "diversity" rationale for race-conscious admissions, that "race-conscious admissions policies must be limited in time"). This internal inconsistency between the rhetoric of diversity and the rhetoric of racial justice has not gone unnoticed in the scholarly commentary on *Grutter*. *See, e.g.,* Harry T. Edwards, *The Journey From Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 966–67 (2004); Fair, *supra* note 16, at 728, 760–61. As Judge Edwards aptly observes, "[i]n articulating the importance of diversity to the experiences of American business and the military, *Grutter*, unlike *Bakke*, suggests a link between diversity and the ongoing quest for racial equality." Edwards, *supra*, at 965.

37. 127 S. Ct. 2738 (2007).

38. *Id.* at 2753–54; *id.* at 2767–68 (plurality opinion).

39. *See id.* at 2753. To be sure, Chief Justice Roberts, writing for the plurality, finds that "[t]he

Reaction to the decisions was swift and decisive; scholarly commentators, elected government officials, and civil rights leaders all criticized the majority's ruling as constituting a betrayal of *Brown v. Board of Education*⁴⁰ and characterized it as a major setback in the effort to achieve some modicum of racial justice in the United States.⁴¹ The

present cases are not governed by *Grutter*." *Id.* at 2754. However, he clearly recites and seems to reaffirm the proposition that "diversity" programs, at least if such efforts comprise "part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints'" in the educational context and are "not simply an effort to achieve racial balance" may constitute a compelling government interest. *Id.* at 2753. At the same time, however, the Chief Justice plainly equivocates on answering directly whether the diversity interest *Grutter* validated in the context of higher education translates directly into the context of primary and secondary education. *See id.* at 2754 ("The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools."). Despite this language, however, Chief Justice Roberts then proceeds to undertake a careful and detailed examination of the specific diversity programs at issue, and faults them for lacking a sufficiently broad scope, rather than for failing to advance, even in theory, a compelling government interest. *See id.* at 2755–61. If diversity may never serve as a compelling government interest in the context of primary and secondary education, this entire analysis becomes wholly irrelevant; accordingly, the logical implication would be that diversity can constitute a compelling interest in this context. Justice Kennedy, on the other hand, squarely addresses the scope of *Grutter* and clearly opines that it extends to primary and secondary education. *See id.* at 2789 (Kennedy, J., concurring) ("Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."). Thus, Justice Kennedy, joined on this specific point by the four dissenting justices, *see id.* at 2820–22 (Breyer, J., dissenting), establish a clear five Justice majority for the proposition that diversity may constitute a compelling government interest in the context of primary and secondary education—and this holds true regardless of the proper interpretation of the plurality opinion.

40. 347 U.S. 483, 493–95 (1954) (overturning the doctrine of "separate but equal" and requiring local public school districts to cease excluding students from particular public schools on account of race).

41. *See* Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 88–89 (2007) ("Three characteristics of the prevailing opinion are striking in the light of our legal history: the astonishing use of *Brown* in defense of an analysis that is utterly unlike *Brown* in spirit and result; the failure to confront with perception the history and current reality of racial segregation in the United States; and the obtuse formalism, as an array of technical distinctions are mobilized to avoid confronting historical reality."); *see also* Derek W. Black, *Turning Stones of Hope into Boulders of Resistance: The First and Last Task of Social Justice Curriculum, Scholarship, and Practice*, 86 N.C. L. REV. 673, 718–21 (2008) (criticizing the *Parents Involved* plurality opinion for disallowing any voluntary public school district efforts to address racial isolation in the public schools arising from de facto residential housing segregation, questioning the plurality's application of strict scrutiny review to voluntary integration programs in the public schools, and noting with approval and quoting Justice Kennedy's rejection of the *Parents Involved* plurality opinion's suggestion that local communities must accept "the status quo of racial isolation in the schools"); George MacInnes, *Jersey Can Close the School Achievement Gap*, THE STAR LEDGER, July 9, 2007, at 15 ("Civil rights advocates assert that the decision eviscerates the spirit and letter of *Brown v. Board of Education*"); Editorial, *Reasonable on Race*, THE OKLAHOMAN, July 3, 2007, at A8 ("Last week's U.S. Supreme Court ruling against explicitly race-based school assignment programs in Seattle and Louisville brought howls from the political left, which reacted as if *Brown v. Board of Education* itself had been tossed into a dumpster."); *What They Said*, ST. PETERSBURG [FLORIDA] TIMES, June 29, 2007, at A17 (quoting Sen. Hillary Rodham Clinton as stating "[t]hese decisions take away the

standard interpretation of the Supreme Court's rulings was that the majority had abandoned the goal of creating and maintaining racially integrated public schools in the United States.⁴²

My reaction to the decisions in *Parents Involved* and *Meredith* was, and remains, somewhat more ambivalent. Serious design flaws existed with respect to both affirmative action programs, particularly if defended solely as an exercise in diversity, rather than as designed to remediate the contemporary effects of past racial discrimination. Moreover, neither school system attempted to defend the diversity programs as remedial efforts at any stage of the litigation, assuming such a defense might have been plausible.⁴³

The Seattle program simply did not meet the requirements of a constitutionally permissible diversity program as set forth either in *Grutter* or *Bakke*.⁴⁴ A public college or university may consider race incident to a comprehensive diversity program that (1) includes factors other than race,⁴⁵ (2) does not give grossly disproportionate weight to race as a

right of local communities to ensure that all students benefit from racially diverse classrooms.”); *id.* (quoting Rev. Jesse Jackson as stating that “[t]he premise is laid for the resegregation of America and the denial of opportunity”); *id.* (quoting Sen. Edward Kennedy as stating “[t]oday’s decision turns back the clock on equality in our schools”). *But see* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 149–51 (2007) (critiquing the notion that *Parents Involved* constitutes a “betrayal” of *Brown*, especially given the prior failure to secure integrated schools following the *Milliken* decision). Indeed, supporters of the *Parents Involved* decision anticipated the strong, sustained, and negative reaction from progressives in general and the civil rights community in particular:

It will be said that the very Court that led the fight for school desegregation turned history on its head; that the Court’s decision served to perpetuate resegregative trends in public education already underway; that the Court allowed the fact of housing segregation to foreclose educational opportunities as well; that the Court forsook not only its traditions but also its respect for precedent; that a Court majority ostensibly opposed to activism was all too ready to practice it; and, most seriously, that the Court abandoned African Americans in their long struggle to achieve true equality in these United States.

J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 159 (2007). Judge Wilkinson, although supportive of the outcome and reasoning of the *Parents Involved* decision, nevertheless concedes that “[t]he best of these arguments are not without poignancy and force.” *Id.* at 160.

42. *See* Black, *supra* note 41, at 718; Nussbaum, *supra* note 41, at 87–92; Ryan, *supra* note 41, at 131–33, 142–44, 149–56. Whether or not the Supreme Court has ever been seriously committed to creating and maintaining racially integrated public schools is a matter very much open to doubt. *See id.* at 151, 153–54.

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

44. *Grutter v. Bollinger*, 539 U.S. 306, 324–25, 336–39, 342 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313–15 (1978) (opinion of Powell, J.); *see also* *Parents Involved*, 127 S. Ct. at 2753–54.

45. *Grutter*, 539 U.S. at 314–16, 334–36; *Bakke*, 438 U.S. at 314–15 (opinion of Powell, J.).

diversity factor,⁴⁶ (3) gives individualized consideration to all candidates for all places (i.e., does not operate either de jure or de facto as a racial quota),⁴⁷ and (4) provides for institutional review of the program on a regular basis to ensure that race not remain a factor if it is no longer needed to ensure a diverse entering class.⁴⁸ The Seattle program fell short of meeting these requirements in several material respects.

To begin with, the Seattle public school district used race as the sole diversity factor, as the second part of a four-part tie breaker system applied immediately after a preference for would-be students with a sibling already enrolled at the school, but applied before consideration of geography and a last-step random selection tie-breaker.⁴⁹ At step two, the only considerations in granting or denying a would-be student admission to a particular public high school were the student's race and the racial composition of the public high school at issue.⁵⁰

The policy could have truly perverse effects, from the perspective of enhancing a particular public school's student body diversity. If a high school had already achieved a student body with an aggregated minority population in excess of the targeted range, a Native American student would be denied admission under the second-step tie breaker, even if she would have been the only Native American person enrolled in the particular high school (i.e., the other minority students were Asian, Hispanic, and African American) because the district failed to make any effort to ascertain whether a "critical mass" of particular disaggregated minorities existed at any particular school.⁵¹ How would denying admission to a Native American person on these facts enhance "diversity" at the school? The clear answer is that it would not; yet because the Seattle public school district's plan amalgamated all minorities into one undifferentiated whole, it would not have taken into account at all whether a particular racial minority was represented within the student body.⁵² In

46. See, e.g., *Grutter*, 539 U.S. at 324–25; *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003); see also *id.* at 279 (O'Connor, J., concurring).

47. *Grutter*, 539 U.S. at 334–35, 337–39; *Bakke*, 438 U.S. at 315–17 (opinion of Powell, J.).

48. *Grutter*, 539 U.S. at 342 (holding that "race-conscious admissions policies must be limited in time" and suggesting that this requirement may be met "by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity").

49. See *Parents Involved*, 127 S. Ct. at 2747.

50. *Id.* at 2753–54.

51. Cf. *Grutter*, 539 U.S. at 335–36 ("The Law School's goal of attaining a critical mass of under-represented minority students does not transform its program into a quota.").

52. See *Parents Involved*, 127 S. Ct. at 2790–91 (Kennedy, J., concurring) ("It has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students

sum, serious operational problems existed with the Seattle public school district's diversity plan, even if one were to assume, counterfactually, that a diversity program limited to race could pass constitutional muster in the context of a public high school.

Even though, as noted above, the Seattle public school district's diversity plan suffered from serious design defects, some critics of the *Parents Involved* decision have chosen simply to ignore them rather than engage them. One particularly prominent critic of the *Parents Involved* decision, Professor Martha Nussbaum, openly mocked Justice Kennedy's concurring opinion for seeking broad-based diversity in the assignments of elementary school students who are largely indistinguishable from one another, at least in the way that college or graduate students may differ:

[T]here is no relevant similarity between a law school admissions program and a program of assigning children to primary schools. In the former case, the applicants are planning to live away from home, so the main problem in the latter case, distance between home and school, simply does not exist. In the former case there is a dossier on a candidate that contains many factors, since by the age of law school application the candidate has been and done many relevant things. Little children can have no such admissions dossier, from which other factors relevant to admission might be drawn. This all-important opinion is a cipher: it did not announce a set of workable criteria that might possibly substitute for the Seattle criteria, which Justice Kennedy rejected on utterly unclear grounds.⁵³

However, even if "admissions dossiers" are not plausible for elementary school students, surely some disaggregated consideration of various racial and ethnic groups would be possible and, indeed, essential to any genuine effort to create broad-based racial and ethnic diversity within any public school, including even an elementary school. For example, even in the context of an elementary school, the district could include economic disadvantage as a diversity factor in addition to race when making student assignments.

In other words, if easily applied criteria exist to significantly enhance student body diversity and use of these factors would better advance the district's interest in creating diverse elementary schools, how can a

classified as 'white,' it has employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions."); see Wilkinson, *supra* note 41, at 187.

53. Nussbaum, *supra* note 41, at 93.

reviewing court, when applying strict scrutiny, not require the school to adopt and implement these measures? Treating all non-white racial and ethnic groups as an undifferentiated, and entirely fungible, mass hardly reflects a serious commitment to creating racial diversity in a particular school; entirely ignoring economic disadvantage as a non-racial means of advancing diversity also suggests that the Seattle school district's efforts at promoting diversity were not designed with sufficient thought or care to pass the "narrow tailoring" requirement of strict scrutiny. Indeed, a good argument exists that the Seattle program should not pass even rational basis review, given the extremely poor fit between the school district's stated goals and the means used to achieve these goals (i.e., the irrationality of denying a Native American student admission to a particular school based on the presence of an excess number of African American and Asian students).

It also bears noting that the program at issue in Seattle applied *solely* to high school student assignments. Even if Professor Nussbaum is correct in theory—that seeking applications from elementary school students constitutes bad farce⁵⁴—this does not hold true for high school applicants. Some high schools offer classes in Russian; some do not. Some have storied band programs; others might have a state championship wrestling team. It is entirely plausible to believe that a would-be high school student with particular curricular or extracurricular interests might have a strong preference for a specific high school that could meet those preferences more effectively than another.

Even if the differences among high schools are less pronounced than the differences that exist among colleges and universities, an essay explaining that a particular student wishes to study Russian, play the tuba

54. Although even this proposition is highly contestable: in cities like New York, Washington, D.C., and Los Angeles, it is not uncommon to have competitive application processes not only for the best private elementary schools, but also for kindergarten and pre-school programs. See Judith Berck, *Before Baby Talk, Signs and Signals*, N.Y. TIMES, Jan. 6, 2004, at F5; Winni Hu, *Where the Race Now Begins at Kindergarten*, N.Y. TIMES, Aug. 6, 2008, at B1; Valerie Strauss, *Preschool Admissions Process a Test for Parents Too*, WASH. POST, Feb. 13, 1995, at B1; Amy Westfeldt, *Competition Tough for Nursery Schools; Admission Process Zaps N.Y. Parents*, SAN DIEGO UNION-TRIB., Dec. 1, 2002, at A21. Unless these application processes are simply an empty marketing gesture, it must in fact be possible to draw distinctions among potential students even at a very young age. That said, I am willing to concede the point that, for purposes of assigning thousands of students to public kindergartens and elementary schools in a major urban center, the use of individualized applications generally would not provide useful information for assigning particular students to specific schools. However, treating all people of color as fungible, in addition to ignoring non-racial diversity characteristics like socioeconomic status, disability, or coming from a household in which English is a second language, would represent serious design defects in diversity programs designed for public elementary and middle schools in a large U.S. city.

in the school band, or take advanced computer programming courses would provide useful information that could permit a public school district to better match students and high schools. These considerations would also permit a district to create diverse student bodies with respect to the range of interests that entering students bring to the table. Thus, if the band program has been undersubscribed of late, a high school admissions officer might give a preference to an applicant stating a strong interest in participating in the band.

Other serious objections to the limited scope of the Seattle public school district's diversity plan exist and must be addressed before one could find the plan sufficiently narrowly tailored to meet the requirements of the Equal Protection Clause. Of particular importance: the fact that many diversity characteristics beyond race are salient for high school students, and perhaps younger students too, especially if a public school system operating in a diverse urban community genuinely believes that the public schools have an important civic education and community building function. Presumably diversity in the public schools helps to forge a pluralistic community and civic identity, thereby facilitating the creation of a diverse citizenry capable of working together toward common goals, both in the civic sphere and also in private employment contexts. Simply put, for a community to thrive, people from different backgrounds and walks of life must be able to work effectively with each other on a cooperative basis.

Accordingly, one would anticipate that an urban school district's efforts to foster cooperation across groups and subcultures within the local community would, of necessity, extend beyond race. But then, why did Seattle ignore characteristics such as an applicant's sexual orientation and gender identity? Or, for that matter, whether an applicant has same-sex parents? Whether an applicant's family uses a language other than English as a primary means of communication at home? Whether an applicant comes from a single-parent household? Whether an applicant has a disability? Even considering the occupational status of an applicant's parent or parents could help to create more genuinely diverse public schools that work to build bridges of understanding among students coming from very different racial, ethnic, economic, and even linguistic backgrounds. In particular, socioeconomic background could represent a very useful diversity characteristic in cities like Seattle, where neighborhoods vary greatly in their average household income levels.⁵⁵

55. See CTR. ON URBAN & METRO. POLICY, BROOKINGS INST., SEATTLE IN FOCUS: A PROFILE

The point is simple, but important: in thinking about crafting a “diverse” learning environment, even in a high school, middle school, or elementary school, factors beyond race are highly relevant to socializing students for life in a highly pluralistic community like Seattle. The question that begs to be asked—and answered—is why the Seattle public schools designed a “diversity” program that reduced diversity to race and did not even do a particularly careful job of disaggregating racial identities.

In sum, Professor Nussbaum’s observations are simply incorrect with respect to high school students in Seattle and, moreover, also utterly ignore the failure of the Louisville public school district, whose program, unlike Seattle’s, encompassed elementary, middle, and high schools, to seek diversity among minority groups. Even if one concedes that racial diversity, standing alone, might be a valuable characteristic in an elementary school, surely the school district has an obligation to seek diversity in a minimally coherent fashion. And, again, it is difficult to understand why other important characteristics, such as disability, sexual orientation, same-sex parents, single-parent household, the parents’ occupation, geographic origin (within the U.S. or a particular state itself), speaking English as a second language, and socioeconomic status, should not be considered in creating diverse student bodies within the public schools. These myriad factors appear to have been utterly ignored by the Seattle public school district.

Justice O’Connor wisely noted in *Grutter* that “[b]y virtue of our Nation’s struggle with racial inequality, [minority] students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”⁵⁶ Is it at all plausible to suggest that African American students, Asian students, Hispanic students, and Native

FROM CENSUS 2000 (Nov. 2003) (describing and discussing the economic and ethnic profile of Seattle, Washington); Dick Lilly, Op-Ed, *Seattle’s New Schools Chief Must Build on a Solid Base*, SEATTLE TIMES, July 10, 2003, at B7, available at <http://community.seattletimes.nwsourc.com/archive/?date=20030710&slug=lilly10> (“we need a new superintendent who has shown the ability to work in a community such as ours, made up of diverse racial and socioeconomic groups, for the betterment of each and the advancement of all”). An executive summary of the Brookings Institution report may be found at: http://www.brookings.edu/reports/2003/11_livingcities_seattle.aspx. To be clear, by raising the relevance of socioeconomic diversity, I do not wish to minimize or ignore the tremendous ethnic diversity that exists in Seattle. For example, one Seattle neighborhood, southeast Seattle, “has the largest K–12 school population and the city’s most diverse neighborhoods, with people from 73 different ethnic backgrounds living there.” Mickey Fearn, Editorial, *Natural Wonders in an Urban Setting*, SEATTLE POST-INTELLIGENCER, Feb. 16, 2006, at B7.

56. *Grutter*, 539 U.S. at 338.

American students are entirely fungible with respect to their cultural and social experiences or in the ways discrimination or prejudice manifests itself in their life experiences? How can a school district reasonably assert a compelling interest in diversity when it fails to take the diversity of experiences among people of color seriously? To essentialize all people of color into a single “non-white” category utterly betrays the very interest in diversity that the Seattle public schools claimed in justification of its program.⁵⁷ That the district also rejected as relevant the existence of persons self-identifying as multiracial also undermines the district’s claim to be engaged in a serious effort to promote racial diversity within its schools.⁵⁸

A very similar design flaw also existed with respect to Jefferson County, Kentucky, school district’s diversity plan at issue in *Meredith*. The Louisville public schools defined race in bipolar terms, measuring solely the percentage of each schools’ student body that was “Black” or “Other.”⁵⁹ The district made no effort to ascertain the enrollment numbers of other minorities within the community, including Hispanic, Asian, and Native American students, instead amalgamating all of them with white students for purposes of analyzing a particular school’s progress in achieving racial diversity.⁶⁰ Such an approach might have worked as part of a remedial plan, based on the district’s prior history of discrimination against African Americans and not Hispanics, Asians, or Native

57. Not only did the Seattle public schools create a binary white/non-white ethnic universe, but school personnel also engaged in very troubling exercises in racial classification when a parent refused to indicate a racial identity. See *Parents Involved*, 127 S. Ct. at 2754 n.11 (“Upon enrolling their child with the district, parents are required to identify their child as a member of a particular racial group. If a parent identifies more than one race on the form, [t]he application will not be accepted and, if necessary, the enrollment service person taking the application will indicate one box.”).

58. See *id.*; see also Sharon Jayson, *Racial Identity: Not a Black-and-White Issue*, USA TODAY, Dec. 9, 2008, at D5 (noting the increasing self-identification of people from different ethnic backgrounds as “multiracial” and reporting on an academic study finding that “[t]here is much less ‘agreement’ about what race a person is than is commonly thought”). In fact, empirical data collected in California and Oregon “show change over time in racial self-identification and in the way people perceive the racial identity of others.” *Id.* Professor Ann Morning, a sociologist at New York University, predicts that President Obama “may become a role model for those who identify as black and those who say they are multiracial.” *Id.* In fact, the Department of Education has adopted new regulations that will require local public school districts to permit the families of enrolled students to self-identify as multiracial. Michael Alison Chandler & Maria Glod, *Multiracial Students to Be Counted in New Manner*, TIMES-PICAYUNE (New Orleans, La.), Apr. 26, 2009, at D22 (“Public schools are abandoning their check-one-box approach to gathering information about race and ethnicity in an effort to develop a more accurate portrait of classrooms transformed by immigration and interracial marriage.”). The new rules will take effect in 2010. *Id.*

59. See 127 S. Ct. at 2754.

60. *Id.*

Americans, but the district defended the plan solely on diversity grounds.⁶¹ Surely “diversity,” even if defined solely in terms of race, must incorporate minorities other than African Americans.

Moreover, to merge non-African American racial minorities with whites for purposes of analyzing the success of the program borders on the Kafkaesque, at least if one assumes that the Louisville school district genuinely sought to enhance the racial diversity of each school within the district. Even assuming for the moment that limiting a diversity program to race would be permissible in the first instance, how would excluding Asian, Hispanic, or Native American children from a public school because of the presence of a large number of white students rationally advance a coherent notion of racial diversity? Even if Louisville’s efforts at racial subordination were principally targeted at African Americans, the experience of other people of color in the United States has not been an entirely happy one (not to put too fine a point on the matter). To deny admission to students of color who wished to attend a particular public school because the district deemed the white enrollment to be too high simply boggles the mind. Yet, this is precisely how the Louisville program operated.

One might concede the utility of a binary “white”/“black” dichotomy, however, if the purpose of the program was not related to diversity, but rather to remediation. Certainly such a binary world would be defensible in a community in which discrimination against one group (blacks) and in favor of another (whites) was the most salient characteristic of public school assignment policy for generations. It would be perfectly sensible to inquire into whether backsliding, in the form of discrimination against African American students and in favor of white students, had crept back into the school system, whether by design or through default and path dependence.

In light of these serious deficiencies in the designs of both diversity programs, the Supreme Court decided both cases correctly on the facts and arguments presented at bar. Even so, the Louisville case arguably should have been decided differently on the facts presented had the district defended its program on remedial grounds.⁶²

61. *Id.* at 2752.

62. A remedy for proven discrimination against African American students could require providing targeted benefits to African American children, but not to other minority children. *See* *United States v. Paradise*, 480 U.S. 149, 166–71 (1987) (plurality opinion). In *Paradise*, the Supreme Court affirmed a remedial order that required the Alabama Department of Public Safety to hire one African American for every other open position, until the department’s personnel achieved an overall 25% African American work force and to undertake a similar one-for-one approach to promotions for

II. DIVERSITY: A BROAD BUT SHALLOW JUSTIFICATION FOR RACE-CONSCIOUS GOVERNMENT ACTION

Both the Seattle and Louisville public schools invoked “diversity,” rather than “remediation,” to support their racial preferences in assigning students to particular public schools. This is not surprising because, as Professor Schuck notes, “most discussions of diversity and the diversity rationale for affirmative action do not explain what it actually means, much less which groups with what kinds of attributes create diversity-value.”⁶³

What precisely is “diversity” and when may government invoke it to defend a race-conscious program? Professor Sanford Levinson notes that diversity “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.”⁶⁴ Moreover, this trend undoubtedly reflects the Supreme Court’s own embrace of this nomenclature: “if Simon says, ‘Start talking about diversity—and downplay any talk about rectification of past social injustice,’ then the conversation proceeds exactly in that direction.”⁶⁵ This Part first considers the theoretical and doctrinal bases for permitting race-conscious government action to promote diversity. It then examines the difficulty that courts, government officials, and legal academics have experienced in using the concept in a consistent and coherent fashion.

A. *The Doctrinal Contours of Diversity as a Compelling Justification for Race-Conscious Government Action*

Using *Grutter* and *Bakke* as guides, one can infer that diversity counts as a compelling interest only in circumstances where government can plausibly argue that racial diversity somehow contributes to the success of

senior management positions until the department reached an identical 25% threshold. *Id.* at 160–66, 185–86. Thus, this order had the necessary effect of precluding the department from hiring a member of another racial minority (say an Asian person) for every other spot; in other words, the remedy had the effect of classifying all applicants as “black” and “other,” just like the Jefferson County public schools’ student assignment program. If a targeted remedy for past discrimination can single out a specific minority group for preferred treatment, the necessary implication is the creation of a binary world in which the government entity must classify all applicants (or students) as falling within or outside the group benefitted by the remedial order. From this perspective, the Jefferson County public schools properly adopted a binary “black”/“other” system of monitoring student assignments.

63. Schuck, *supra* note 6, at 37.

64. Levinson, *supra* note 27, at 577.

65. *Id.* at 578.

the government's project.⁶⁶ A diverse college or university student body enhances the quality of the program; so would a diverse college or university faculty. By parity of logic, diversity should also extend to high school student bodies, faculties, and administration. Of course, the Supreme Court rejected a role model theory in *Wygant v. Jackson Board of Education*,⁶⁷ but the diversity argument seems easily distinguishable from the role model theory that the Jackson, Michigan, public school district advanced in *Wygant*. Racial and ethnic diversity enhance the effectiveness of the educational process and also its success at socializing students for life in a pluralistic society.⁶⁸

Other areas in which racial diversity might plausibly relate to the quality of the government's results include a police force, a prison work force, and the staffing of "scared straight" programs aimed at redirecting the trajectories of troubled youths.⁶⁹ As Professor Michelle Adams has

66. *See id.* at 586 (noting that corporate defenders of racial diversity in the workforce suggest that it conveys a competitive advantage). Levinson notes that defining advantage in this context requires asking "can it plausibly be said that a diverse workforce will produce a better-tasting product or that it will even produce the same product in a better manner, e.g., more efficiently?" *Id.* He posits that "[i]t is obvious how the answer *might* be affirmative." *Id.*

67. *See* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986). Local school administrators in Jackson, Michigan, adopted racial preferences in hiring, staffing, and firing teachers within the school district. *Id.* at 272. The board adopted these policies on the theory that minority students suffered diminished educational results because of the pernicious effects of general societal discrimination and that these negative effects could be successfully addressed by the presence of positive professional role models of the minority students' race or ethnicity. *Id.* Both the district court and the U.S. Court of Appeals for the Sixth Circuit accepted this argument, holding that "the Board's interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination, was sufficiently important to justify the racial classification embodied in the layoff provision." *Id.* at 274. The Supreme Court granted review and reversed. Justice Powell, writing for the plurality, squarely rejected this approach as inconsistent with the central mandate of the Equal Protection Clause: "The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose." *Id.* at 275; *see also id.* at 274 (noting that the "Court never has held that societal discrimination alone is sufficient to justify a racial classification" and emphasizing that "the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination"). For a thoughtful and comprehensive critique of the Supreme Court's rejection of the role model theory in this context, while endorsing it in others, *see* Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1431–58 (1996).

68. Mark R. Killenbeck, *Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CAL. L. REV. 1299, 1323–35 (1999) (arguing that social science data generally support the claim that diversity within a student body and faculty enhances the quality of education).

69. *See* *Alexander v. City of Milwaukee*, 474 F.3d 437, 445 (7th Cir. 2007); *Petit v. City of Chicago*, 352 F.3d 1111, 1114–15 (7th Cir. 2003) (police force); *Wittmer v. Peters*, 87 F.3d 916, 919–20 (7th Cir. 1996) (boot camp correctional officers); *see also* *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 601–02 (1990) (Stevens, J., concurring) ("The public interest in broadcast diversity—like the interest in an integrated police force, diversity in the composition of a public school faculty or diversity in the

noted, “[t]he operational needs argument connects the ability of the public employer to perform its public function directly to the presence of a racially diverse workforce.”⁷⁰ For example, if achieving the remedial purposes of a boot camp program required taking gender and race into account in making staff selections and assignments, it is likely that a reviewing court would sustain the government’s race-conscious action as being essential to the attainment of a compelling government interest (i.e., the non-recidivism of the youths being “scared straight”).

It is easy to hypothesize other circumstances in which a true diversity motive related to operational imperatives would target race as a factor in hiring and assignments.⁷¹ If the FBI were investigating “La Cosa Nostra,” commonly known as “the mafia” or “the mob,” assigning an African American or Asian agent to infiltrate the group might not be the most effective approach—just as assigning a white agent to infiltrate a Tong or Triad (Chinese organized crime groups) suspected of engaging in unlawful activity would likely meet with poor results.⁷² In such a case, the hiring or assignment to a specific investigation of an agent with particular racial, ethnic, or cultural ties would be essential to the successful attainment of the government’s objective. No remedial rationale exists for the posting; the government seeks a white agent in one case and an Asian, perhaps Chinese, agent in the other solely because the nature of the task at hand requires it and no less race-conscious means exist to achieve the government’s interest in criminal law investigation and enforcement.⁷³

student body of a professional school—is in my view unquestionably legitimate.”); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) (“[T]his court has held that at least in the area of policing and corrections it is possible to justify nonremedial affirmative action upon a showing—which must however be based on evidence rather than merely on conjecture—that such action is necessary to the accomplishment of important law-enforcement objectives”).

70. *Adams*, *supra* note 17, at 966.

71. *But cf.* Levinson, *supra* note 27, at 590–91 (noting that “there is a debate about the relevance of diverse backgrounds to the quality of what is produced,” both in government and corporate settings, and citing and quoting relevant social science literature). Obviously, the relevance of diversity to a particular task is very likely to be context specific; in other words, one cannot ask, in general, does diversity improve the quality of products or services, but rather one must ask if a diverse workforce, whether in a public or private setting, improves *this* product or service. *See id.* at 584–89.

72. For a description and discussion of various organized crime entities with ethnic or racial identities operating in the United States, see PRESIDENT’S COMM’N ON ORGANIZED CRIME, *THE IMPACT: ORGANIZED CRIME TODAY* 33–128 (1986).

73. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314–15 (1986) (Stevens, J., dissenting) (arguing that, in some contexts, achievement of plainly legitimate government interests requires consideration of race and gender in both hiring and making work assignments); *see also Adams*, *supra* note 17, at 965–67 (discussing the “operational needs” theory of diversity-based race-conscious government action and the contexts in which it could apply).

Thus, at a broader level of analysis, it seems clear that an effective law enforcement agency must be composed of a diverse group of officers if it is to effectively discharge its institutional mission. In this specific context, a racially and ethnically diverse government work force is simply a better, more effective work force than a homogeneous work force.⁷⁴ And, again, the government's motivation for seeking out a racially and ethnically diverse law enforcement agency has nothing to do with concerns rooted in racial justice or the amelioration of the present-day effects of past government racial discrimination.

The same considerations would apply in hiring and staffing a prison, a TSA check point, a police department, a department of social services, and even a hospital or emergency response team. Suppose that a community has a large presence of Hmong immigrants; recruiting and retaining persons capable of speaking Hmong Der or Mong Leng, the two main dialects of Hmong language, might be important, even crucial to various public health and safety functions.⁷⁵ If a person calls 911 seeking assistance, the dispatcher's fluency in an ethnic community's language could be essential to fielding the call and dispatching assistance in a timely manner. Similarly, if one is investigating reports of parental neglect of a child, the investigator's familiarity with the household's culture and relevant language skills could be necessary to the successful investigation and resolution of complaints.

Certainly a police department, hospital, or department of social services could attempt to find a non-Hmong person who speaks Hmong Der or Mong Leng and also understands Hmong cultural norms and etiquette; even so, the fit between membership within the group and the necessary ethnic and cultural traits is quite strong and it would be at least arguable that a preference for a person from the Hmong community would be a narrowly tailored means of advancing the government's interests in providing vital social services. In these circumstances, the government's

74. See *Wygant*, 476 U.S. at 314–15 (1986) (Stevens, J., dissenting) (arguing that certain government services will function more effectively with a racially and ethnically diverse staff); *Petit*, 352 F.3d at 1115 (accepting an operational needs justification for considering race in making promotions with a city's police department); see also Michael K. Fridkin, *The Permissibility of Non-Remedial Justifications for Racial Preferences in Public Contracting*, 24 N. ILL. U. L. REV. 509, 515 (2004) ("Besides diversity, a frequent candidate for consideration as a non-remedial justification for racial preferences is an agency's 'operational needs.'"); Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 693–700 (2004) (discussing "instrumental" justifications for race-conscious government hiring and promotion decisions and reviewing relevant courts of appeals decisions sustaining such action).

75. See *Wygant*, 476 U.S. at 314 (Stevens, J., dissenting) ("race is not always irrelevant to sound governmental decisionmaking").

interest in adopting a Hmong preference has no remedial basis at all; the government seeks to achieve certain goals, namely the provision of certain services and enforcement of certain rules and regulations, and a government entity can meet these objectives with greater efficacy if it employs persons hailing from the Hmong community.⁷⁶

These considerations led Justice Stevens, in *Wygant*, to observe that race and gender can be highly relevant to achieving wholly legitimate government purposes, including “law enforcement” objectives. Justice Stevens explains that, “in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.”⁷⁷ He extends this reasoning to include racial hiring preferences for public schools, the policy at issue in *Wygant*.⁷⁸

Concerns of this sort strike both liberal and conservative judges as sensible. Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit authored an opinion upholding the use of racial hiring preferences for a state correctional boot camp because of the importance of an integrated corrections staff to maintaining order, ensuring the safety of the incarcerated persons held at the facility, and preventing participants from becoming recidivists.⁷⁹

In contexts such as higher education or the military, one can certainly mount a strong case that diversity bears a significant relationship to the quality of the government’s program or the program’s efficacy in advancing the government’s objectives.⁸⁰ In other words, in both of these contexts, and in others like them, a strong argument can be made that

76. See Adams, *supra* note 17, at 965–67.

77. *Wygant*, 476 U.S. at 314 (Stevens, J., dissenting).

78. See *id.* at 315 (“In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty.”).

79. See *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996). The U.S. Court of Appeals for the Seventh Circuit has strongly endorsed “the compelling nature of the state’s interest in diversity in law enforcement.” *Alexander v. City of Milwaukee*, 474 F.3d 437, 445 (7th Cir. 2007); see also *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003); *Reynolds v. City of Chicago*, 296 F.3d 524, 529–31 (7th Cir. 2002).

80. See Killenbeck, *supra* note 68, at 1323–35 (surveying social science evidence supporting a link between diverse learning environments in colleges and universities and improved educational outcomes and concluding that the link is a very plausible one); see Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action*, 113 YALE L.J. 1093, 1114–23 (2004) (arguing that military forces have to maintain credibility with local populations on a global basis and that a diverse population of military service persons directly advances and secures this government interest and also observing that diversity can enhance performance in other contexts, and also increase the ability of the military to recruit volunteers successfully).

racial diversity makes the government's end product better than it would be absent the diversity consideration. As one moves from contexts where the adoption of the racial hiring preference or assignment policy bears a direct and obvious connection to the successful attainment of the government's objectives to situations in which the link to diversity is more attenuated, the viability of diversity as a rationale for race-conscious government action becomes more questionable. Indeed, many contexts exist in which such a showing would be difficult, if not impossible, to make.

Consider, for example, the construction of streets and highways. There might be symbolic importance to having a racially or gender integrated workforce in government-sponsored road construction; even so, the road surface itself does not reflect either the race or the gender of the persons who built it.⁸¹ If a government entity wishes to adopt race or gender preferences in this context, the diversity rationale provides little, if any, justification or support.⁸² Thus, the diversity rationale provides an important, but limited, basis for the adoption of race-conscious government action.

In all of this, one should take care to note that diversity *does not* have the effect of validating private bias in most contexts, for example, in college and university admissions; instead, it simply recognizes both the fact of cultural difference and its salience to achieving a particular constitutionally permissible government objective.⁸³ Thus, unlike the state of Florida's use of race in *Palmore v. Sidoti* to deny a custodial biological mother continued custody of her daughter because of the mother's interracial marriage to an African American man,⁸⁴ the use of diversity to create a racially and ethnically diverse student body does not "directly or indirectly" validate or give effect to "private biases."⁸⁵ On the other hand, the use of diversity in other contexts, such as in hiring staff for a police department or prison or in recruiting for the military, could arguably have

81. See Levinson, *supra* note 27, at 587 ("[I]f a non-discriminatory process generates a non-diverse workforce, for whatever reason, it may still be the case that the particular product is the best it can be, and being produced as efficiently as it could be.")

82. Cf. *Johnson v. Transp. Agency*, 480 U.S. 616, 641–42 (1987) (permitting affirmative action based on gender to remediate past gender-based discrimination by the agency).

83. Cf. *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984) (holding that "[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody" because to permit government action on this basis would ratify private racial bias and imbue its status with the full authority of the government).

84. See *id.* at 430–31.

85. See *id.* at 433.

the effect of ratifying preexisting social prejudice because the interest in racial and ethnic diversity arises, at least in part, from mistrust and bias that reflect part of the social reality of the contemporary United States.

In theory, *Palmore* holds that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”⁸⁶ Yet, in decisions such as *Wittmer v. Peters*⁸⁷ and *Petit v. City of Chicago*,⁸⁸ the lower federal courts have accepted the fact of racial prejudice in society and upheld government efforts to create diverse law enforcement workforces that can function effectively notwithstanding these prejudices. To the extent that diversity efforts take race into account in circumstances where private prejudice creates an incentive to hire government employees or to assign government employees by race, the practice would seem to run afoul of *Palmore*’s central holding.

The best response one can make to this ironic circumstance would be to note that the same compelling interest that justifies the use of race in a diversity program would also, at least potentially, justify a derogation from *Palmore*’s mandate to achieve an overriding government interest such as providing a safe prison, or effectively policing all neighborhoods in a major urban center, or effectively discharging the duties of a social welfare services office. In this sense, then, the diversity rationale rests uncomfortably up against the core purpose of the equal protection principle, for at least in some circumstances, the government’s interest in promoting diversity will have the perverse effect of ratifying and perhaps helping to maintain, at least at the margins, preexisting private racial bias.

Another possible response to a potential *Palmore* objection relates to the synergies that a diverse workforce can provide. Social science data suggest that a diverse workforce can be a more effective workforce, at least in some contexts.⁸⁹ A government entity could adopt a diversity plan

86. *Id.*

87. *See Wittmer v. Peters*, 87 F.3d 916, 919–21 (7th Cir. 1996).

88. *See Petit v. City of Chicago*, 352 F.3d 1111, 1114–15, 1118 (7th Cir. 2003).

89. *See Levinson, supra* note 27, at 586; *see also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 220–40 (1998); Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 63 (1998) (“Proponents of racial diversity argue that, in many contexts, an employer’s ability to accomplish its goals is enhanced by a diverse work force. Racial and ethnic diversity is often viewed as a proxy for diversity of opinions, experiences, and beliefs. In an otherwise overwhelmingly white work force, minority employees introduce valuable differences into a setting of comparative homogeneity.”); Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 723–25 (1999) (reviewing WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (noting that college and university students self-report significant benefits from learning in a racially diverse

because of these synergies; different people working together are simply better able to tackle problems than a homogeneous group because they see common problems in different ways. Thus, even if adoption of a diversity program generates an ancillary benefit that derives in part from the prejudices of society, this might well not be the government's primary motivation for adopting the diversity program.⁹⁰

If diversity is generally a good thing and, in any case, often demonstrably correlates positively to enhanced results, there should not be any need to sunset diversity programs. Dean Caminker and Professor Amar note, "Diversity, unlike remedy, is a justification that is not temporally linked to past events; whereas remedy looks to the past, diversity looks to the educational benefits today and in the future."⁹¹ In this sense, Justice O'Connor's insistence in *Grutter* that diversity programs in college and university admissions must be reviewed regularly and should end in twenty-five years⁹² makes very little sense. Does anyone

environment, notably including the ability to "get[] along with others' from diverse backgrounds," and also contributes significantly to the students' "ability to work with others" in later life); *id.* at 730 ("According to the study, having a diverse student body helps students—all students—prepare to live in a diverse world; it introduces them to people they may not have met otherwise until later in life, if at all, and it clearly helps them work with others during their careers."). *But cf.* Schuck, *supra* note 6, at 43–46 ("After carefully interrogating the diversity rationale for racial preferences, then, one is left with serious doubts about its coherence and persuasiveness. There is something to it, surely, but not much."). Professor Selmi, drawing on lessons contained in a large scale study of college and university students' self-perception of the costs and benefits of affirmative action both while in school and when employed in later life, concludes that "the greatest contribution the study makes [to the literature on the potential value of diversity] is a rather definitive demonstration that affirmative action works, and that it works on all the various dimensions that the authors suggest an educational policy should work." *Id.* at 726.

90. As an analogy, people invest in individual retirement accounts because of the tax savings, but they also invest because they believe that saving money constitutes a prudent personal financial course of conduct. It is not clear that the tax savings, rather than the motive to save more generally, is the cause in fact of a particular contribution. By parity of reasoning, obtaining the benefits associated with a heterogeneous workforce could easily be the cause in fact for a government agency adopting a particular diversity program.

91. Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541, 543 (2003); see Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 69–71 (2004) (arguing that the forward-looking benefits associated with an integrated society, rather than remediation of past racial wrongs, undergirds *Grutter's* theory of affirmative action); Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 91–96 (1986) (arguing against affirmative action policies predicated on past government discrimination, which Sullivan terms the "sins of discrimination" approach, because such remedial policies are likely to be more difficult to establish, underemphasize collective social responsibility for past discriminatory policies, are subject to sharp criticism for insufficient tailoring, "keep[] alive protests about windfalls to nonvictims and injustice to innocents," and generally prove to be less effective than forward-looking policies based on the relationship of diversity and pluralism to a just and well-functioning society, which Sullivan denominates an "aspirations for the future" approach).

92. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

think that learning in an all-white, all-male college or university will ever be superior to learning in a comprehensively integrated environment?

Moreover, just as people continue to celebrate Cinco de Mayo, St. Patrick's Day, and Columbus Day, and just as the U.S. Postal Service produces postage stamps celebrating Eid, Hanukkah, Christmas, and Kwanza for the use of persons who identify with and celebrate these holidays, there is no reason to think that race, ethnicity, national identity, religion, gender, sexual orientation or other longstanding self-definitional traits (whether immutable, like race, or self-selected, like religion) will cease to have all relevance in 2028. Thus, I do not think that the Ancient Order of Hibernians⁹³ should feel ambivalent about its existence after 2028 or consider seriously disbanding in order to facilitate the realization of the melting pot metaphor. Why then the 2028 sunset requirement in *Grutter*?⁹⁴

If one viewed the law school's program in *Grutter*, at least with respect to race, as either remedial in nature *or* as a dual effort at both diversity and remediation, a sunset requirement would make perfect sense. After all, once a governmental entity has remediated the present effects of past discrimination, there would be no need for further remedial efforts. What we see, then, is that the Supreme Court itself tends to revert into a remedial mindset even when, in theory, discussing a diversity program.⁹⁵

We should expect that at some discrete time in the future efforts to remediate past discrimination, unlike diversity programs, will have some natural stopping point: when the contemporary effects of the past discrimination have been completely negated, when the contemporary effects of the past discrimination are so attenuated that nothing is left to

93. The Ancient Order of Hibernians is an Irish-American fraternal organization; members must be male, belong to the Roman Catholic Church, and have Irish ancestry. See *N.Y. County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 360–62 (S.D.N.Y. 1993); see also Katrina Dix, *When Everyone's Irish*, THE DAILY LOCAL (West Chester, Pa.), Mar. 15, 2010, available at <http://www.dailylocal.com/articles/2010/03/15/news/srv0000007820958.txt>. Among other activities, local chapters of the Ancient Order of Hibernians commonly sponsor parades celebrating St. Patrick's Day.

94. Amar & Caminker, *supra* note 91, at 543–44 (“If diversity (including but not limited to racial diversity) truly is a compelling interest—and Justice O'Connor spends a lot of time in *Grutter* explaining that it is—and if individualistic race consciousness is in fact a constitutionally unproblematic way to accomplish this interest consistent with the Fourteenth Amendment, then there should be no ‘requirement’ that the permissible means not be employed indefinitely.”).

95. This point relates to a major criticism of the modern Supreme Court's embrace of “diversity” rather than “remediation” as the most constitutionally defensible governmental interest for race-conscious admissions policies. As Professor Michelle Adams has observed, “one of the more devastating criticisms leveled against *Grutter* (and against *Bakke* before it) concerns the adoption of ‘diversity’ as the principal justification for affirmative action, as opposed to a candid recognition of present racial inequality and the continuing effects of past discrimination.” Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 285 (2006).

remediate, or some combination of the two. On the other hand, diversity programs should in theory be relevant so long as we believe that pluralism is relevant to the excellence and success of the government program at issue.⁹⁶

B. The Difficulty in Defining “Diversity”

Even though it is relatively easy to define “diversity” in a fashion that disentangles the concept from “remediation,” the wires get crossed with great regularity in both legal scholarship and the decisions of the Supreme Court.⁹⁷ As Professor Levinson has aptly noted, “‘diversity’ is one of those words, like ‘equality,’ ‘democracy,’ and ‘freedom,’ whose meaning, if not entirely a construct of the speaker, is, nonetheless, significantly ambiguous.”⁹⁸

For example, Professor Lani Guinier writes of the *Grutter* majority opinion that “[n]ow, with the Court’s imprimatur on affirmative action, perhaps those who still feel excluded will return the conversation to more foundational concerns about the democratic purpose of higher education.”⁹⁹ Of course, Justice O’Connor’s *Grutter* opinion almost completely abjures the phrase “affirmative action”;¹⁰⁰ instead Justice O’Connor assiduously hews to the law school’s self-selected nomenclature of “diversity” to describe the institution’s efforts to admit and enroll not only a racially diverse class, but also a diverse class in other respects.¹⁰¹ In fact, Justice O’Connor places great weight on the fact that under the law school’s diversity program, the University of Michigan Law School

96. See Amar & Caminker, *supra* note 91, at 543–44.

97. See *supra* text and accompanying notes 5–21.

98. Levinson, *supra* note 27, at 608; see also Jones, *supra* note 18, at 176 (“Diversity lacks a substantive, clearly defined meaning in contemporary parlance. The concept means different things to different people depending upon when, where, and by whom it is invoked.”).

99. Guinier, *supra* note 22, at 120.

100. The main text of the *Grutter* opinion contains only a single use of the words “affirmative action.” See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (“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*.”). The words “affirmative action” appear only one additional time in the *Grutter* majority opinion—in a citation to a book. See *id.* at 330 (“Diversity Challenged: Evidence on the Impact of Affirmative Action (G. Orfield & M. Kurlaender eds., 2001)”). “Diversity,” by way of contrast, appears 52 times in the opinion (including one citation to a book, *id.* at 330). *Id.* at 314–16, 319, 321–22, 324–26, 328–30, 333–35, 337–43. Thus, contrary to Professor Guinier’s assertion, Justice O’Connor simply did not use the phrase “affirmative action” as a synonym for “diversity” in the *Grutter* majority opinion. Given the fifty-two to two ratio of use within *Grutter*, it seems very clear that Justice O’Connor intentionally embraced the more precise nomenclature of “diversity” over the more generic “affirmative action.”

101. See *Grutter*, 539 U.S. at 337–39, 341.

offered admission to non-minorities with lower LSAT scores and undergraduate grade point averages than those of the minority students who had been offered admission incident to the law school's diversity program.¹⁰² She writes, "The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity."¹⁰³

It would be unfair, however, to single out Professor Guinier for criticism based on lack of precision in her use of nomenclature.¹⁰⁴ Myriad commentators have used the term "diversity" as a generic synonym for remedial affirmative action efforts, without making much, if any, effort to distinguish diversity and remedial justifications for benign race-conscious government action.¹⁰⁵ For example, Professor Douglas Laycock flatly declares that "[d]iversity' is the settled judicial rationale for affirmative action, and the diversity label has the great value of applying throughout the country."¹⁰⁶

Professor Alan Dershowitz argues that "[t]he checkered history of 'diversity' demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals," and, in particular, is "a clever post facto justification for increasing the number of minority group students in the student body."¹⁰⁷ This, however, is not the

102. *Id.* at 338 ("The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well.") (citation omitted).

103. *Id.*

104. *See generally* Levinson, *supra* note 27, at 608 ("'[D]iversity' as a general notion is thought to be a 'good thing,' though, concomitantly, someone who doesn't share one's own views about the concrete meaning of this good is often subject to dismissive contempt.")

105. *See* Rosman, *supra* note 20, at 63 n.72 (collecting and quoting various sources that take note of, and object to, this phenomenon).

106. Laycock, *supra* note 22, at 1769. In fairness, Professor Laycock also observes that "scholarly analysis and political argument are not confined to the rationales adopted judicially" and that the *Grutter* opinion "should not cause policy makers to lose sight of other powerful reasons for affirmative action, or of affirmative action's special value in the South." *Id.* Of course, Professor Laycock's approach conflates "diversity" with "affirmative action," which, given the context he raises, "the South," strongly suggests that he embraces a remedial function for ostensibly diversity based affirmative action programs. Moreover, substantial portions of his article and analysis, see *id.* at 1776–89 (discussing litigation to desegregate the public schools and universities in the South and the remedial decrees issued in these cases), seems to conflate diversity, affirmative action, and remedial race-conscious government actions. For example, Laycock faults the *Grutter* Court because "it did not cite *Fordice*, and it made no explicit connection to the law of desegregation." *Id.* at 1792. Given that the University of Michigan Law School never made any attempt to defend its programs on a remedial basis, however, it should not be at all surprising that Justice O'Connor did not rely on precedents arising in the remedial context, rather than in the context of promoting diversity as a permissible government objective.

107. Dershowitz & Hanft, *supra* note 22, at 407.

“diversity” that Justice Powell had in mind in *Bakke*. As Judge Harry Edwards notes, “It is plausible to view racial equality as only incidental to Justice Powell’s idea of diversity, for he did explicitly note that diversity embraced more than race and ethnicity.”¹⁰⁸ And the *Grutter* Court itself invited a remedial understanding of diversity because “*Grutter*, unlike *Bakke*, suggests a link between diversity and the ongoing quest for racial equality.”¹⁰⁹ Thus, Judge Edwards, like Professor Guinier, can reasonably conclude that “it is highly plausible that *Grutter* uses diversity as a proxy for redress against past racial discrimination.”¹¹⁰ As Professor Trina Jones

108. Edwards, *supra* note 36, at 963; *see also* Laycock, *supra* note 22, at 1770 (“For Justice Powell, diversity meant diversity of background and experience within the classroom, for the purpose of improving the educational experience in that classroom.”). Professor Brown-Nagin criticizes this iteration of “diversity” precisely because, in both design and effect, it actually benefits non-minorities more than minorities:

The predominant line of reasoning running through the Michigan opinion remained that affirmative action furthers the interests of whites as a group, even if such programs sometimes deny individual whites access to certain selective institutions of higher education. In other words, the interests of the majority converged with the interests of the minority, and it is this convergence that justified programs that otherwise would be deemed unlawful.

. . . The question of whether slavery and Jim Crow justified race-sensitive admissions was deemphasized in the Court’s embrace of the diversity rationale.

Brown-Nagin, *supra* note 18, at 1484–85; *see also* Nunn, *supra* note 21, at 724 (“Apparently, the reason the Supreme Court found a compelling state interest in *Grutter* was that people of color could be used as a means to white ends. . . .” “Thus, although the Supreme Court has demonstrated why diversity might be good for white people, it fails to speak to why diversity might be good for people of color.”).

109. Edwards, *supra* note 36, at 965; *see also* Laycock, *supra* note 22, at 1773–74 (“The label, ‘diversity,’ is the same [as in *Bakke*], and retaining that label had rhetorical advantages for the Court, but the meaning has fundamentally changed.”).

110. Edwards, *supra* note 36, at 967; *see also* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 61–65 (2003). *But cf.* Karst, *supra* note 91, at 69 (“The goal articulated in *Grutter*—integrating the leadership of major American institutions—does not look back to catalogue all the multifold harms of slavery and Jim Crow, and offer a remedy. Rather, the opinion places us in the Here and Now, and looks to our national future.”). Professor Karst suggests that Justice O’Connor was more concerned with the future benefits of an integrated society (and leadership caste) than with addressing the contemporary effects of past racial discrimination: “In this way, integration promises not the erasure of harms from past racial exclusions, but the avoidance of future racial exclusions, and the harms they would surely bring.” *Id.* at 71; *see* Robert S. Chang & Catherine E. Smith, *John Calmore’s America*, 86 N.C. L. REV. 739, 755 (2008) (“[D]iversity, though providing a constitutional basis for affirmative action, can also be a trap for this very reason” because “[s]chools, rather than engaging in . . . research and documentation [to support a remedial predicate for a race-conscious affirmative action plan], which would be expensive to document and which would call for a guilty plea of sorts to the charge of racism, will instead opt for the diversity rationale as the constitutional basis for the race-conscious plans.”); Sullivan, *supra* note 91, at 92, 96 (arguing that “[m]aking sins of past discrimination the justification for affirmative action . . . dooms affirmative action to further challenge even while legitimating it” and arguing that instead governments should embrace “aspirations for the future rather than past sin” as the basis for race-conscious affirmative action programs, and specifically use “forward-looking” reasons for such programs).

has noted, “the Michigan opinions contained something for everyone, and in so doing, raised more questions than they answered.”¹¹¹

To be clear, I am not suggesting that a remedial rationale for race-conscious college and university admissions policies lacks either merit or persuasive force.¹¹² I agree with Professor Laycock when he argues that “[t]he case for affirmative action that considers race is much broader and deeper than a simple commitment to diversity as Justice Powell used that concept in *Bakke*.”¹¹³ The problem, however, revolves around operationalizing the concept of diversity when the weight of opinion suggests that the *Grutter* Court really had remedial concerns as much in mind as a core notion of diversity in enhancing the quality of educational programs.¹¹⁴ Precisely how is a state or local government official supposed to invoke this “diversity-but-not-really” rationale for adopting race-conscious remedial preferences? Moreover, in light of *Parents Involved*, a majority of the Supreme Court no longer appears willing to embrace a wink-wink, nudge-nudge approach to strict scrutiny review of race-

111. Jones, *supra* note 18, at 189; see Brown-Nagin, *supra* note 18, at 1478 (“But the meaning of Justice O’Connor’s rhetoric enshrining diversity with constitutional significance is far from clear.”).

112. See Levinson, *supra* note 27, at 587 (“[T]he highest good of an ‘anti-discrimination’ focus is not the achievement of a diverse workforce per se, but, rather, the achievement of a bias-free selection process that guarantees to those rejected that they were not victimized by the use of illegitimate criteria and to the outside public, including shareholders, that the products are being produced in the most efficient manner possible.”); see also Chang & Smith, *supra* note 110, at 755 (criticizing the improper use of the diversity rationale in order to avoid making potentially embarrassing admissions about past discriminatory behavior, amounting to “a guilty plea of sorts to the charge of racism,” and arguing that “[i]nstead of, or in addition to, pursuing diversity as a stand-alone rationale, schools should be paying more attention to race-conscious programs as a remedy”).

113. Laycock, *supra* note 22, at 1840; see Chang & Smith, *supra* note 110, at 755 (arguing that ample remedial grounds exist to support race-conscious public school access policies, if only local public school districts were sufficiently committed to locating and using the available evidence of past discrimination).

114. One possible explanation for the lack of consistency in Justice O’Connor’s *Grutter* opinion would be that she accepted de facto a remedial justification in the guise of promoting diversity, but did so primarily to protect existing reliance interests. As Dean Caminker and Professor Amar put it, Justice O’Connor

self-consciously approaches the next twenty-five years willing to tolerate a transitional state of constitutional affairs as we move slowly from where we are today to a state she would prefer, where we use means other than race consciousness to attain the desirable diversity (if any affirmative means remain necessary at all).

Amar & Caminker, *supra* note 91, at 551; see also *id.* at 547–50 (exploring the importance of reliance interests to the *Grutter* holding). In light of the reliance interest, Caminker and Amar “speculate [that] Justice O’Connor was somewhat uncomfortable with using race-conscious admissions decisions to attain the compelling goal of racial diversity in higher education” but “at the same time, [they] surmise, she was worried that an abrupt about-face (rather than gradual weaning) from *Bakke* would immediately, openly and notoriously undo the country’s recent progress towards a more integrated society.” *Id.* at 549.

conscious government actions misidentified as diversity efforts, even when an obvious remedial rationale exists on the record.¹¹⁵

III. REMEDIATION: A NARROW BUT DEEP JUSTIFICATION FOR RACE CONSCIOUS GOVERNMENT ACTION

Remediation serves as a compelling government interest only when deployed by a governmental entity to remediate past racial discrimination that it either caused or facilitated through its participation in a discriminatory private market. *City of Richmond v. J.A. Croson* makes plain that a city government, for example, could adopt remedial measures to correct for helping to support and maintain in the past a pervasively racially discriminatory construction trades market with its purchases of goods and services.¹¹⁶ Whether direct or indirect, however, some causal nexus must exist between the governmental entity adopting the remedial program and the condition to be redressed.¹¹⁷

When remediation serves as the basis for a race-conscious program, government has a duty to narrowly tailor the group to be benefitted to the scope of the benefit. Thus, in *Croson*, the city of Richmond failed to justify a generic 30% set aside for minority-owned contractors because the benefitted groups had not all faced discrimination facilitated by the city and because the degree of the preference, 30% of the city's net construction dollars, did not constitute a reasonably targeted measure to undo the contemporary effects of the city's past behavior as a supporter of a racially discriminatory market for construction-related services.¹¹⁸

115. *Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2761–69 (2007) (plurality opinion) (rejecting remedial rationale for the diversity plans under review and emphatically rejecting Justice Breyer's proposed lenient approach to applying strict scrutiny in the context of a voluntary public school district integration plan); *id.* at 2789–90, 2793–94 (Kennedy, J., concurring) (reiterating that strict scrutiny review applies to all race-based government classifications and rejecting “[t]he dissent’s permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review)” because a weakened form of strict scrutiny “could invite widespread governmental deployment of racial classifications”).

116. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491–93 (1989) (plurality opinion) (opining that a local government may adopt measures to prevent racial discrimination in private markets and also may “take affirmative steps to dismantle such a system” if it participates in a discriminatory private market); *id.* at 509 (opinion of O’Connor, J.) (“Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.”).

117. *See Croson*, 488 U.S. at 492, 498–500 (plurality opinion) (finding no such causal nexus); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986) (plurality opinion); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307–10 (1978) (opinion of Powell, J.) (finding no causal nexus).

118. *Croson*, 488 U.S. at 505–08.

If we take the Supreme Court seriously, Richmond should have adopted a program that benefitted only African Americans, the group that suffered past discrimination.¹¹⁹ Further, Richmond had a duty to make some showing that the market for building trades would include more African Americans today than it does but for the city's complicity in past discrimination.¹²⁰ Precisely how the city should accomplish this task remains something of a mystery. How would one establish how many African American carpenters or brick masons would be working in Richmond if entry into these trades were not restricted based on race fifty years ago? In theory, Richmond must proffer some plausible connection between the degree of benefit and the attainment of a market that would look like a hypothetical market that would have existed but for the past racial discrimination.¹²¹

The federal government, in addressing racial discrimination at the national level, might be able to adopt remedial programs that broadly include multiple racial and ethnic groups. Indeed, *Fullilove v. Klutznick* approved just such a program¹²² and both *Adarand Constructors, Inc. v. Pena*¹²³ and *Croson*¹²⁴ reaffirmed the proposition that Congress, in addressing a problem of national scope, may adopt a remedy that is national in scope.¹²⁵ For local governments, however, the narrow tailoring requirement creates a very difficult problem.

119. *See id.* at 505–06.

120. *Id.* at 507–08.

121. *See id.* at 509–11.

122. *See Fullilove v. Klutznick*, 448 U.S. 448, 486–89 (1980) (plurality opinion) (upholding on remedial grounds a national affirmative action program that reserved subcontracts for disadvantaged business enterprises, including businesses owned by members of certain designated racial and ethnic minority groups).

123. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (“The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”).

124. *Croson*, 488 U.S. at 504 (“Congress has made national findings that there has been societal discrimination in a host of fields” and has also “explicitly recognized that the scope of the problem would vary from market area to market area.”) However, the Court held that, with respect to the local program that the City of Richmond had adopted, “the random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.”)

125. *But cf. Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1045, 1050 (Fed. Cir. 2008) (invalidating a federal remedial affirmative action program under an equal protection challenge because “the defects . . . noted [in disparity studies used to support a nationwide race-conscious remedial program] detract dramatically from the probative value of these six studies, and, in conjunction with their limited geographic coverage, render the studies insufficient to form the statistical core of the ‘strong basis in evidence’ required to uphold the statute”); *id.* at 1050 (“[B]ecause Congress did not have a ‘strong basis in evidence’ upon which to conclude that [the Department of Defense] was a passive participant in pervasive, nationwide racial discrimination—at

In Phoenix, Arizona, for example, the history of local racial discrimination reflects bias against Hispanics of Mexican origin and certain Native American groups, notably including members of the Apache and Navajo tribes (the tribes whose historical lands are most proximate geographically to Phoenix). If Phoenix were to adopt a remedial affirmative action program for city building projects, it logically would extend a preference *only* to businesses owned by persons of Chicano, Navajo, and Apache ancestry.¹²⁶ Given the fact of general social discrimination in both Arizona and the nation against other racial minorities, however, and the presence of voters belonging to these groups in contemporary Phoenix, a constitutionally permissible remedial program that would benefit any persons of Chicano, Navajo, and Apache ancestry would likely prove to be politically toxic. In other words, a city council member desirous of holding her seat in the next election would either oppose the targeted program or insist that the program be amended to include members of other minority groups who have historically suffered from both official and social discrimination, even though the discrimination was not actually present in Phoenix because members of the particular minority group did not reside in Phoenix prior to the enactment of comprehensive federal civil rights statutes, including the Civil Rights Act of 1964¹²⁷ and the Voting Rights Act of 1965.¹²⁸

No prudent local politician will tell African American, Asian, and Hispanic voters not of Mexican ancestry that they are to be excluded from an affirmative action program because, as an historical fact, the city of Phoenix neither discriminated against their group nor helped to sustain private markets that discriminated against them. Yet, *Croson's* narrow-

least not on the evidence produced by [the Department of Defense] and relied on by the district court—the statute fails strict scrutiny.”).

126. See *Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001) (invalidating Cook County, Illinois’s remedial affirmative action program on overinclusiveness grounds because “[t]he concern with racial discrimination [in Cook County] does not extend to Spanish or Portuguese people, or the concern with ethnic discrimination to persons of Spanish or Portuguese ancestry born in the United States”); see also *Jana Rock Constr., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 206 (2d Cir. 2006) (“We conclude that the narrow-tailoring requirement allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating conclusively that no other groups merit inclusion.”); *id.* at 208–09 (“But whether or not, in light of *Croson*, it would be constitutionally permissible for New York State to include persons of Spanish descent in [a state remedial affirmative action program], there can be no question that New York risks having its MBE program struck down if it expands it further than necessary to remedy past discrimination in New York.”).

127. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

128. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (2006)).

tailoring requirement mandates just such an outcome; it puts local government officials in the impossible position of either adopting an unconstitutionally overbroad program that conveys a preference on all minority groups or adopting no program at all. By way of contrast, a federal district court judge does not face the prospect of a plebiscite on her performance and can issue a remedial injunction that targets a specific group and only that group; unelected federal judges, holding lifetime appointments with constitutionally protected salaries,¹²⁹ have the freedom to adopt highly targeted, narrowly tailored race-conscious remedies that local government and state government officials simply cannot adopt without suffering significant political consequences.¹³⁰

To be sure, Congress has adopted highly targeted remedial legislation incident to its Section 5 power¹³¹ to enforce Section 1 of the Fourteenth Amendment.¹³² The Freedmen's Bureau, including its promise of "40 acres and a mule," benefited only African Americans and no other minority group.¹³³ Congress also has enacted targeted efforts to assist Native Americans,¹³⁴ although the efficacy of these programs, as an historical matter, is very much open to doubt.¹³⁵ And, most recently, in

129. See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.")

130. See, e.g., *United States v. Paradise*, 480 U.S. 149, 167, 171 (1987); see also *NAACP v. Allen*, 340 F. Supp. 703, 705–06 (M.D. Ala. 1972).

131. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")

132. See JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES* 293–319 (2d ed. 1956) (discussing Reconstruction and various race-conscious programs adopted by Congress to facilitate freed slaves' transition from slavery to full and equal citizenship); JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 36–39, 56–61, 152–69 (Daniel J. Boorstin ed., 2d ed. 1994) (describing the creation and role of the Bureau of Refugees, Freedmen, and Abandoned Lands, commonly known as the "Freedmen's Bureau", and the political and social conditions in the states of the former Confederacy that necessitated continued congressional activity to protect the civil rights of African Americans).

133. See Maxine Burkett, *Reconciliation and Nonrepetition: A New Paradigm for African-American Reparations*, 86 OR. L. REV. 99, 107–08 & n.22 (2007) (discussing early "first wave" reparations for slavery in the United States in the 1860s, including the promise of forty acres of land and a mule to farm the land).

134. See, e.g., Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, 104 Stat. 3048 (codified at 25 U.S.C. §§ 3001–3013 (2006)); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3269 (codified at 25 U.S.C. §§ 1901–1963 (2006)).

135. See THEODORE FISCHBACHER, *A STUDY OF THE ROLE OF THE FEDERAL GOVERNMENT IN THE EDUCATION OF THE AMERICAN INDIAN* (1967); Daniel M. Rosenfelt, *Indian Schools and Community Control*, 25 STAN. L. REV. 489 (1973); see also Indian Appropriation Act of 1891, ch. 543, 26 Stat. 989. For a brief history of the U.S. government's efforts to "civilize" Native American children, see C. Eric Davis, Note, *In Defense of the Indian Child Welfare Act in Aggravated Circumstances*, 13 MICH. J. RACE & L. 433, 437–42 (2008).

1988, Congress enacted legislation offering remedial payments to the victims of the Japanese American relocation and internment program during World War II.¹³⁶ But these are the exceptions that prove the rule. Moreover, they all addressed very obvious, indeed notorious, acts of racial aggression toward African Americans (slavery), Native Americans (multigenerational pogrom starting with the Jackson Administration), and Japanese Americans (forced relocation, loss of all business and residential property, and imprisonment without charge or judicial process during World War II).

Passive participation by a local city government in a pervasively racially discriminatory building trades market is not likely to constitute a widely known or appreciated fact. Thus, if the political and factual trigger for remedial legislation is the metaphysical equivalent of human chattel slavery, the forced relocation of Native Americans, or the Japanese American internment,¹³⁷ a great deal of government support of racial discrimination is going to go unremedied and the contemporary effects of the past discrimination will carry forward into the indefinite future. This result should not be acceptable—either to people of good will or to the incumbent members of the Supreme Court.

IV. THE PROBLEM WITH TRUTH IN ADVERTISING

Polling data consistently show that “remediation” is less popular with non-minorities as a rationale for race-conscious government action than “diversity.”¹³⁸ Accordingly, a prudent city council member would invoke “diversity” rather than “remediation” as a justification for any city’s race-conscious program in order to decrease the probability of an angry constituent backlash.¹³⁹ The problem, however, is that a constitutionally permissible diversity program cannot promote only racial diversity, and,

136. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903. For a discussion of this legislation and its relationship to the contemporary debate over reparations for slavery, see Chad W. Bryan, Comment, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 601–03, 605 (2003).

137. See ALFRED L. BROPHY, REPARATIONS: PRO & CON, at xv (2006); see also Katrina Miriam Wyman, *Is There a Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127, 128–39, 143–47 (2008).

138. See *infra* text and accompanying notes 211–29.

139. From a more cynical perspective, a government entity might also invoke the diversity rationale in order to avoid making “a guilty plea of sorts to the charge of racism.” Chang & Smith, *supra* note 110, at 755; see Sullivan, *supra* note 91, at 92, 96–97 (noting that government entities might naturally resist making public admissions of past racial wrongdoing and calling instead for the development of more positive, “forward-looking” predicates for government race-based affirmative action programs).

moreover, diversity must plausibly relate to the quality of the government's enterprise.¹⁴⁰

A. Government Entities Routinely Adopt Remedial Programs Under the Rhetorical Rubric of Diversity

When government adopts a remedial program but intentionally mislabels it as a diversity effort, it invites a hostile judicial reaction. At the same time, were the government entity to label a remedial program truthfully, it would invite a hostile electoral reaction. In the real world, governments routinely adopt remedial programs under the rubric of "diversity." Several cases reflect this trend, including *Metro Broadcasting, Inc. v. FCC*¹⁴¹ and *Meredith*.¹⁴²

In *Metro Broadcasting*, the FCC adopted a preference for granting licenses to minority-owned-and-operated radio and television broadcast stations.¹⁴³ In comparative hearings to award new licenses, minority-controlled applicants would receive a preference.¹⁴⁴ Similarly, the owner of a license could transfer an endangered license to a minority-controlled company, for not more than 75% of fair market value, under the FCC's distress sale policy.¹⁴⁵ The agency defended both programs not on remedial grounds, but as a carefully targeted effort to enhance the diversity of the airwaves.¹⁴⁶ In fact, both in its brief and at oral argument, the FCC expressly disclaimed any remedial justification for the programs.¹⁴⁷

Of course, the agency's diversity rationale does not bear up to close scrutiny; the FCC's effort to merge the race or gender of a station owner with a broadcast station's programming format lacks persuasive force and arguably insults the business acumen of minority station owners.

140. See *supra* text and accompanying notes 63–96.

141. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

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

143. *Metro Broad.*, 497 U.S. at 554–58.

144. *Id.* at 556–57.

145. *Id.* at 557–58.

146. *Id.* at 566 ("Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies."); see *id.* at 611 (O'Connor, J., dissenting) ("[I]t is equally clear that the policies challenged in these cases were not designed as remedial measures and are in no sense narrowly tailored to remedy identified discrimination.").

147. *Id.* at 611 (O'Connor, J., dissenting) ("The FCC appropriately concedes that its policies embodied no remedial purpose, and has disclaimed the possibility that discrimination infected the allocation of licenses.") (citation omitted); *id.* at 612 ("The Court evaluates the policies only as measures designed to increase programming diversity. I agree that the racial classifications cannot be upheld as remedial measures.") (citation omitted).

No good reason exists to believe that a prudent racial minority station owner invariably will program a station unprofitably in order to advance a political or ideological agenda grounded in group identity, instead of seeking to maximize the station's financial returns.¹⁴⁸ And, if programming aimed toward a particular community would enhance the public interest, the owner's racial identity need not, and probably will not, track the station's programming. In other words, race-neutral means exist to ensure that a licensee will broadcast programming designed for a particular audience or adopt a particular programming format; where government can achieve its purpose using race neutral means, in this case, conditioning the grant of a license on the licensee's agreement to program the station in a certain way, narrow tailoring requires that government adopt the race-neutral means.¹⁴⁹

"*Adarand* and *Croson* make clear that government must use race-neutral means to achieve its objectives whenever such means are both available and effective."¹⁵⁰ Accordingly, Justice O'Connor's dissent in *Metro Broadcasting* has the better of the argument;¹⁵¹ the FCC's programs made little sense as diversity efforts.

As remedial efforts, however, the programs possessed substantial merit. At the time the FCC first distributed radio and television station licenses, very few minorities or women received licenses, or had any hope of receiving them. The Commission essentially created an all-white, all-male ownership class by virtue of its distributional rules and procedures. Indeed, "Congress found that 'the effects of past inequities stemming from

148. See Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 852-55 (2000) (arguing that minority and female broadcast station owners will work to maximize shareholder value, consistent with their fiduciary obligations, rather than program a station in an unprofitable, or less profitable, fashion that correlates with the owner's race or gender, noting that actual real-world owner behavior validates this view, and concluding that the theory "that some inextricable link exists between race and gender and programming patterns seems, at best, dubious"). Indeed, "[i]n many respects, it is insulting to assume that minority station owners would be more likely to forego sound business decisions to pursue an ideological agenda" because "[f]rom the perspective of an equity holder, the object of the enterprise is to make money, not political statements." *Id.* at 852-53.

149. *Id.* at 856 ("If providing the public with particular programming formats is essential to serving the public interest, the Commission could easily deploy regulations that would ensure the existence of a wide variety of program formats. Rather than using race as a proxy for programming preferences, the Commission could simply condition the grant of a license on programming to a particular audience.")

150. *Id.*

151. *Metro Broad.*, 497 U.S. at 622 (O'Connor, J., dissenting) ("The FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity."); *id.* at 622-23 ("And if the FCC can direct programming in any fashion, it must employ that direct means before resorting to indirect race-conscious means.")

racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications.”¹⁵² Notwithstanding this remedial predicate for the FCC’s policies, however, “Congress and the Commission [did] not justify the minority ownership policies strictly as remedies for victims of this discrimination”¹⁵³ The question that begs to be asked and answered is: “why not?”

If the current ownership of mass media outlets reflects an initial distribution that systematically disfavored racial minorities and women, the FCC should be free to attempt to undo the contemporary effects of its past distributional inequities. In *United States v. Fordice*,¹⁵⁴ the Supreme Court adopted a very broad notion of causation with respect to the present-day effects of past discrimination; even though public universities in Mississippi had long since ceased to exclude applicants based solely on race, the use of entrance examinations, the duplication of certain programs at historically white and black state colleges and universities, and the continued operation of eight public institutions of higher learning offering duplicative and overlapping educational programs all supported the conclusion that Mississippi had failed to remediate completely the present-day effects of its past bad behavior.¹⁵⁵

As Justice White explained, “[i]f the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.”¹⁵⁶ Moreover, this is so “even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.”¹⁵⁷ Justice O’Connor, in her concurring opinion, echoed these views and emphasized that “[o]nly by eliminating a remnant

152. *Id.* at 566 (majority opinion); see S. Jenell Trigg, *The Federal Communications Commission’s Equal Opportunity Employment Program and the Effect of Adarand Constructors, Inc. v. Pena*, 4 COMMLAW CONCEPTS 237, 262 (1996) (“The history of broadcasting in America is riddled with discriminatory practices that have prevented minorities and women from full participation in employment, management and ownership positions.”).

153. *Metro Broad.*, 497 U.S. at 566.

154. 505 U.S. 717 (1992).

155. *United States v. Fordice*, 505 U.S. 717, 733–43 (1992).

156. *Id.* at 731.

157. *Id.* at 731–32.

that unnecessarily continues to foster segregation or by negating insofar as possible its segregative impact can the State satisfy its constitutional obligation to dismantle the discriminatory system that should, by now, be only a distant memory.”¹⁵⁸

In fashioning a remedy, Justice White emphasized that the Supreme Court was making “no effort to identify an exclusive list of unconstitutional remnants of Mississippi’s prior *de jure* system” and was instead delegating the specific identification of existing policies that tended to support the continued segregated racial identity of Mississippi’s public colleges and universities to the lower federal courts on remand.¹⁵⁹ Thus, the *Fordice* Court suggested that, on remand, the court of appeals “examine, in light of the proper standard, each of the other policies now governing the State’s university system that have been challenged or that are challenged on remand in light of the standard that [the Supreme Court] articulate[d]” for their possible segregative effects.¹⁶⁰ Nevertheless, Justice White identified and found substantial shortcomings in four general areas of public college and university governance: “admissions standards, program duplication, institutional mission assignments, and continued operation of all eight public universities.”¹⁶¹ The Court did not attempt to write a detailed remedial decree, however, leaving the specific details of implementing the *Fordice* decision to the lower federal courts.¹⁶² Nevertheless, the Supreme Court’s mandate to the lower courts was remarkably broad in its potential scope.¹⁶³

The implications of *Fordice* for remedial affirmative action programs are potentially staggering and, for the most part, wholly underutilized, if not *unutilized*. Simply ceasing past discriminatory practices is not a sufficient response when path dependence ensures that a state’s public colleges and universities will retain their historical racial identities. Consistent with the *Fordice* mandate, historically white colleges and universities in Mississippi could constitutionally seek to overcome path dependence by actively and aggressively recruiting African American students. Such efforts logically could include targeted recruiting efforts at

158. *Id.* at 744–45 (O’Connor, J., concurring).

159. *Id.* at 733.

160. *Id.*

161. *See id.*; *see also id.* at 734–43 (discussing segregative effects of the contemporary policies and possible responses to cure them).

162. *Id.* at 742–43.

163. *See id.* at 743 (“To the extent that the State has not met its affirmative obligation to dismantle its prior dual system, it shall be adjudged in violation of the Constitution and Title VI and remedial proceedings shall be conducted.”).

predominantly minority high schools, dedicated scholarships, and active promotion of the institution of higher education within the African American community.

If one's siblings, parents, aunts, uncles, and grandparents did not attend a particular college or university, it becomes less likely that a graduating high school senior will attend the school.¹⁶⁴ The reverse also holds true: if a family has strong intergenerational ties to an institution of higher learning, it is very likely that a graduating high school senior would seriously consider attending the institution.¹⁶⁵ Yet, these family ties across generations are the wake that remains of decades of state enforced de jure discrimination. Moreover, absent aggressive, concerted efforts over time, these effects will never be erased and the public college or university will never come to look as it would have looked but for the past de jure discrimination.¹⁶⁶

164. See Laurie Fox, *First-Generation Scholars: Increasing Number of Students Attending College Though Parents Didn't*, DALLAS MORNING NEWS, Oct. 13, 1998, at A20 (reporting a U.S. Department of Education study finding that only 20% of first-generation students apply to and attend a four-year college or university if the applicant's parents did not attend a four-year university, whereas 36% of students with parents who attended a four-year institution apply to and attend four-year colleges and universities); see also Franco Ordonez, *Latinos Strive to Meet College Costs; Support Groups Focus on Financial Realities*, BOSTON GLOBE, May 11, 2003, at Globe West 1 ("Questions such as where to apply and what to study make college decisions daunting for almost any family. But higher education can be doubly difficult to navigate for many Latino parents with limited English skills, many of whom have never attended college, taken the SATs, applied for financial aid, or sought out their own loans.")

165. See *Campus Visit Drives College Choice*, STUDENTPOLL, Jan. 29, 2004, <http://www.artsci.com/StudentPOLL/v5n5/printer-friendly.htm> (reporting a 2003 study that found that "[y]our parents or other family members" constitute the second most important factor on student college and university applications and admissions decisions, with 39% of respondents identifying this factor as a significant influence); see also Jonathan Meer & Harvey S. Rosen, *Altruism and the Child-Cycle of Alumni Donations* 13 (CEPS, Working Paper No. 150, 2007), available at <http://www.princeton.edu/ceps/workingpapers/150rosen.pdf> (reporting a study finding that nearly 53% of college and university applicants will apply to their parents' alma mater).

166. For thoughtful discussions of the importance of historically black colleges and universities to the African American community, and the difficulty of convincing non-minorities to enroll at HBCUs, see Drew S. Days, III, *Brown Blues: Rethinking the Integrated Ideal*, 34 WM. & MARY L. REV. 53, 63-74 (1992); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1435-39, 1445-46 (1993); Cory Todd Wilson, Note, *Mississippi Learning: Curriculum for the Post-Brown Era of Higher Education Desegregation*, 104 YALE L.J. 243, 256-58, 259-63 (1994). Wilson explains that "[t]he costs to society would simply be too high, especially given the possibility that African-American students, particularly those who cannot afford to leave the state, will drop out of the system rather than attend predominantly white schools." Wilson, *supra*, at 262; see *id.* at 256 n.82 ("In fact, over a third of all African-American college applicants in Mississippi who qualify for automatic admission to predominantly white schools still choose to go to historically black colleges."). On the other hand, "[o]ne approach holds that constraints imposed by the white majority distort African-Americans' choices, forcing them to attend historically black schools they otherwise would not." *Id.* at 256.

The breadth of the remedy, if taken seriously, is jaw dropping, yet entirely justified and appropriate. Anything less means that the state retains the “benefit” of past unconstitutional action by operating public colleges and universities that maintain historical racial identities rooted in the Jim Crow era.¹⁶⁷ In fact, the herculean nature of the task makes it highly unlikely that a state university would voluntarily undertake it or that a federal court would require a serious and sustained effort on the university’s part to achieve it.¹⁶⁸ Moreover, the implications are dire for historically black colleges and universities, which would be just as obligated as historically white institutions to disestablish their racial identities.¹⁶⁹ After all, the racial identity of these institutions also reflects the decision to exclude whites from them as much as to create “separate but equal” institutions of higher learning for African Americans.¹⁷⁰

167. For examples of this phenomenon in a contemporary context involving the inappropriate politicization of civil service appointments in the Department of Justice, the Bureau of Immigration Appeals, and other federal agencies, see Eric Lichtblau, *Mukasey Won’t Prosecute for Hiring Bias*, N.Y. TIMES, Aug. 13, 2008, at A19; Charlie Savage, *Vetted Judges More Likely to Reject Asylum Bids*, N.Y. TIMES, Aug. 24, 2008, at A17; Charlie Savage, *White House Pushed List of ‘Loyalists’ for Hire*, N.Y. TIMES, July 31, 2008, at A17. By permitting persons hired unlawfully for ideological reasons to remain employed, these government agencies will not only look differently, but also will act differently, than they would have in the absence of the use of unlawful and inappropriate hiring criteria. See Savage, *Vetted Judges*, *supra*, at A17 (reporting that immigration judges hired using unlawful ideological considerations vote more reliably against those seeking asylum in the United States than do immigration judges hired using neutral hiring criteria).

168. See Molly L. Mitchell, Comment, *A Settlement of Ayers v. Musgrove: Is Mississippi Moving Towards Desegregation in Higher Education or Merely a Separate but ‘More Equal’ System?*, 71 MISS. L.J. 1011, 1019–26 (2002) (describing and critiquing the final settlement of the *Ayers* lawsuit, in which very little changed at the state’s public colleges and universities, but all parties agreed to call the effort good enough for government work).

169. Justice Thomas strongly objected to this possible effect of *Fordice*, arguing that so long as admissions are color blind, the continued existence of historically black public colleges and universities does not constitute a constitutional wrong. *Fordice*, 505 U.S. at 748–49 (Thomas, J., concurring); *id.* at 748 (“In particular, we do not foreclose the possibility that there exists ‘sound educational justification’ for maintaining historically black colleges *as such*.”); *id.* at 749 (“Although I agree that a State is not constitutionally *required* to maintain its historically black institutions as such, I do not understand our opinion to hold that a State is *forbidden* to do so. It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.”) (citation omitted).

170. As of 2010, the student bodies at Mississippi’s three historically black public colleges and universities—Alcorn State University, Jackson State University, and Mississippi Valley State University—remain over 90% African American; it would be nonsensical to suggest that these institutions have ceased to be racially identifiable state-supported institutions of higher learning. Elizabeth Crisp, *Mississippi students defend need for HBCUs*, CLARION-LEDGER (Jackson, Miss.), Feb. 22, 2010, at A1 (“More than 13,500 African Americans are enrolled in Mississippi’s three public historically black universities—Alcorn, Jackson State and Mississippi Valley State. On each campus, more than 90 percent of the students are black.”). That said, the contemporary culture at traditionally white public universities in Mississippi, and the continuing legacy of racial mistrust, could in part explain this phenomenon. See Shaila Dewan, *Debate Host, Too, Has Message of Change*, N.Y. TIMES, Sept. 24, 2008, at A14 (noting that current minority students at the flagship University of Mississippi

It is odd that *Fordice* has received so little attention from legal scholars, legislators, and public institutions that wish to engage in race-based affirmative action efforts. It establishes a very high bar for eradicating the contemporary effects of past discrimination, and, so long as a causal nexus exists between the institution's contemporary racial identity and past segregation,¹⁷¹ overt and direct forms of targeted race-conscious action to eradicate those effects would be perfectly constitutional. Notwithstanding sustained good-faith efforts to promote integration at institutions of higher learning in Mississippi, the project remains very much a work in progress; state institutions, such as the University of Mississippi, continue to retain their pre-desegregation racial identities.¹⁷²

If one links the duty to remediate past discrimination, as set forth in *Fordice*, with the means of eradicating past discrimination approved in *United States v. Paradise*,¹⁷³ the scope of remediation as a justification for race-conscious government action comes into even clearer focus. The federal district court judge in the *Paradise* litigation, Judge Frank M. Johnson, Jr., found that pervasive race discrimination infected the hiring decisions of the Alabama Department of Public Safety; for over thirty-

"point out that the university still has far to go [in creating a hospitable and nurturing environment for African American students]," citing examples of sources of racial misunderstanding and mistrust including, (1) "At football games, many black students remain seated when the band plays Dixie and fans chant 'The South will rise again.,'" (2) "A white fraternity still holds an annual Old South party where escorts in Rebel uniforms and women in hoop skirts mingle at a plantation," and (3) "Black students are viewed as having virtually no chance of being elected to honorary positions like homecoming queen or Miss Ole Miss"). In sum, "[w]hat many white students think of as hallowed tradition, blacks find an unwelcoming affront." *Id.* "When we get here," said Nickolaus Luckett, a black honor student who is on the student debate steering committee, "we see it instantly." *Id.* Nevertheless, the *Clarion-Ledger* reports that African American student enrollment at state colleges and universities has increase by 32% over the past ten years, with two-thirds of this growth in minority enrollments taking place at previously segregated white institutions of higher learning. Crisp, *supra*, at A1.

171. See Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643, 669 (2001) (arguing that theories of causation routinely used in tort law to assess responsibility for socially harmful outcomes should logically also inform the assessment of causation in the context of equal protection claims). She asks why a "cause in fact" standard should apply when inquiring into equal protection violations, whereas much more searching theories of causation are sufficient to establish liability in tort. *Id.*

172. See Dewan, *supra* note 170, at A14 (reporting that at the University of Mississippi "[b]lack students are viewed as having virtually no chance of being elected to honorary positions like homecoming queen or Miss Ole Miss. What many white students think of as hallowed tradition, blacks find an unwelcoming affront."); Kitty Bean Yancey, *Ole & New*, USA TODAY, Sept. 26, 2008, at D1 ("Many Oxford residents resent being identified with Meredith's travails and segregation" although other local residents argue that "there's a great sense of community" without regard to race.).

173. *United States v. Paradise*, 480 U.S. 149, 167, 170 (1987) (plurality opinion).

seven years, the department simply refused to hire African American state troopers:

Plaintiffs have shown without contradiction that the defendants have engaged in a blatant and continuous pattern and practice of discrimination in hiring in the Alabama Department of Public Safety, both as to troopers and supporting personnel. In the thirty-seven-year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers. This unexplained and unexplainable discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment.¹⁷⁴

In order to remediate this blatant and longstanding pattern of overt racial discrimination, it would not be sufficient simply to order the department to cease discriminating on a prospective basis. “Under such circumstances as exist in these cases, the courts have the authority and the duty not only to order an end to discriminatory practices, *but also to correct and eliminate the present effects of past discrimination.*”¹⁷⁵

Accordingly, Judge Johnson ordered the department to hire one African American trooper for every non-African American trooper until African Americans comprised not less than 25% of the state trooper ranks.¹⁷⁶ Judge Johnson’s approach to the prospective injunctive relief aimed at denying the department the “benefit” of its ill-gotten racial gains. Even if the department ceased to engage in its discriminatory hiring practices, absent some intervention to disrupt the existing racial composition of the force, the existing state trooper ranks would reflect the past discriminatory behavior.¹⁷⁷ Indeed, it could well have taken years, if not decades, before the department’s personnel would cease to reflect the past racially discriminatory hiring. And, because of path dependence, the interest of African Americans in becoming state troopers would likely lag as compared to the interest of whites; if no parent, no uncle or aunt, or no grandparent works in a particular line of work, it stands to reason that a young person would be less likely to consider seriously pursuing a livelihood in that profession.

174. NAACP v. Allen, 340 F. Supp. 703, 705 (M.D. Ala. 1972). Although the Supreme Court did not directly review Judge Johnson’s decision in *Allen*, in *Paradise* the Supreme Court ruled on the constitutionality of the *Allen* remedy, upholding it. See *Paradise*, 480 U.S. at 154–56, 165–66.

175. *Id.* (emphasis added).

176. *Id.* at 706.

177. See *supra* note 62.

The *Paradise* remedy also has a striking feature: the order had the effect of precluding the hiring or promotion of other minority candidates who were not African American. The injunctions at issue in the *Paradise* litigation required that every other hire and promotion go to an African American candidate; this would not only exclude whites from consideration, but also Hispanics, Asians, and Native Americans. This effect, although superficially troubling, is a necessary consequence of a targeted remedy aimed at eradicating the present-day effects of past discrimination against a particular racial group.

Had other racial or ethnic groups successfully sued the department and established a similar pattern of systematic exclusion after application for employment, they too would have been entitled to relief. But, herein lies the rub of remediation as a basis for race-conscious government action: it is one thing for a federal district judge to order hiring preferences for a single minority group, in this case, African Americans; it is quite another for a school board or a city council to take such a step. Were such an elected body to adopt a similar program that systematically disenfranchised other minorities within the community, the political consequences would probably be quite severe.¹⁷⁸ In this sense, highly targeted remedial efforts are most likely to be the product of judicial proceedings, rather than voluntary efforts adopted by state and local governments, or federal agencies like the FCC.

In fact, a remedial justification would strongly support both programs at issue in *Metro Broadcasting*. If the Alabama Department of Public Safety in *Paradise* may constitutionally be required to hire one African American for every non-African American and to promote African American candidates within the state trooper ranks in a race-conscious fashion,¹⁷⁹ by parity of logic, the FCC could adopt aggressive remedial programs designed to distribute licenses to groups that were categorically excluded from receiving licenses in the past.¹⁸⁰

178. This political fact of life helps to explain, at least in part, why the Richmond, Virginia, city council adopted a very broad-based definition of disadvantaged business enterprise when adopting the policy at issue in *Croson*. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477–78, 506 (1989). Had the city council established a preference solely for black persons working in the construction trades, it is likely that other minorities within the community would have strongly objected to the program.

179. See *United States v. Paradise*, 480 U.S. 149, 166–86 (1987) (plurality opinion); *id.* at 186, 188–89 (Powell, J., concurring); *id.* at 189–90, 194–95 (Stevens, J., concurring). Although she dissented in *Paradise*, see *id.* at 196 (O'Connor, J., dissenting), Justice O'Connor later cited the holding in *Paradise* with approval. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

180. See *Krotoszynski & Blaiklock*, *supra* note 148, at 847–52.

Justice O'Connor, dissenting in *Metro Broadcasting*, conceded that “despite the harms that may attend the Government’s use of racial classifications, we have repeatedly recognized that the Government possesses a compelling interest in remedying the effects of identified race discrimination.”¹⁸¹ The FCC failed to award many licenses to either racial minorities or women in the initial distribution of radio and television station licenses through comparative hearings;¹⁸² subsequent market transactions have never cured this initial distributional imbalance. Moreover, the FCC consistently failed to discipline licensees who used their broadcast licenses to oppose equal rights and to support overt forms of state-sponsored racial discrimination.¹⁸³ Beyond an initial distribution of broadcast licenses to white men, the FCC failed to make any effort to prevent abuse of these licenses, in ways that would likely lead racial minorities and women to perceive the broadcasting industry as an inhospitable place to work.

The remedial rationale extends not only to regulatory schemes that denied opportunities based on race, such as a de facto policy of not issuing broadcast station licenses to minority applicants, but also to government actions that help to facilitate private forms of racial discrimination. “Thus, if the [FCC] could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local [broadcasting] industry, we think it clear that the [agency] could take affirmative steps to dismantle such a system.”¹⁸⁴ The *Croson* Court explained that “[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of

181. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 611 (1990) (O’Connor, J., dissenting).

182. *See id.* at 621–22; Leonard M. Baynes, Making the Case for a Compelling Government Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing, 57 RUTGERS L. REV. 235, 261–93 (2004) (advancing six different theories on which a federal court could find that the FCC discriminated in the distribution of broadcast station licenses, in the renewal of these licenses, and also in the markets for various broadcast services, including advertising); *see also* Trigg, *supra* note 152, at 262.

183. *See, e.g.*, Office of Comm’n of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (rebuking Commission for renewing license of a Jackson, Mississippi, television station, WLBT, which openly advocated racism and consistently provided false, negative coverage of the civil rights movement); Mary Tabor, Note, Encouraging “those who would speak out with fresh voice” Through the Federal Communications Commission’s Minority Ownership Policies, 76 IOWA L. REV. 609, 612–16 (1991) (analyzing and criticizing the “FCC Tolerance for Racism” in its licensing decisions from the 1960s to the 1970s). For an excellent history of the Commission’s persistent failure to reign in openly racist broadcasters during the Civil Rights Era, see STEVEN D. CLASSEN, WATCHING JIM CROW: THE STRUGGLES OVER MISSISSIPPI TV, 1955–1969 (2004).

184. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).

private prejudice.”¹⁸⁵ Accordingly, in order to justify race-conscious remedial action, the FCC need not document a policy of discrimination itself, provided that it could document that it knowingly licensed broadcasters that engaged in unconstitutional forms of discrimination and subsequently renewed those broadcasters’ licenses, repeatedly, thereby facilitating “the evil of private prejudice” not only with taxpayer dollars, but also with the public airwaves.

Why, then, did the FCC litigate the case on a diversity rationale? My thesis is that the politics of diversity are far less stormy than the politics of remediation; no government entity wishes to state publicly that “we discriminated in the past and must make up for it now.”¹⁸⁶ Moreover, an agency is also unlikely to admit readily that it stood by and did nothing when faced with incontrovertible evidence of private racism by others, resulting in private racism directly advanced and facilitated by the agency’s regulatory and licensing decisions.¹⁸⁷ It is much easier to invoke the soothing, but ill-defined, concept of advancing “diversity” but to limit the “diversity” program to track essentially remedial concerns—even though this means “affirmative action,” “remediation,” and “diversity” all become essentially synonymous concepts with entirely overlapping purposes and objectives. This might make the adoption of remedial measures more politically palatable, but it dooms the actions to judicial

185. *Id.*

186. See Sullivan, *supra* note 91, at 92 (“Making sins of past discrimination the justification for affirmative action, however, dooms affirmative action to further challenge even while legitimating it” because “it subjects affirmative action plans to potentially protracted litigation over the ‘factual predicate’ for adopting them: how much past discrimination is enough?” and “having to ask that question may deter implementation of voluntary affirmative action at all”); see also Chang & Smith, *supra* note 110, at 755 (observing that government agencies are unlikely to offer voluntarily “a guilty plea of sorts to the charge of racism” and also noting that the “research and documentation” required to support an agency’s claim that a race-conscious program constitutes a narrowly tailored remedy for such past racial wrongdoing, if challenged in federal court, “would be expensive to document”); Karst, *supra* note 91, at 64 (agreeing with Professor Sullivan that a focus on “remedying specified past discrimination” could “make affirmative action politically acceptable” but “self-defeating”).

187. Professor Sullivan notes that predicating affirmative action on past discrimination “is against employers’ and unions’ self-interest, and indeed, may invite race discrimination lawsuits by nonwhites.” She suggests that “the task of self-judgment and self-condemnation in *any* form casts a chill over efforts to implement affirmative action voluntarily” if predicated on a remedial basis. Sullivan, *supra* note 91, at 92. In addition, “viewing affirmative action as penance for past discrimination invites claims that the focus on that discrimination should be sharper.” *Id.* This, in turn, would logically imply that remedial efforts be so targeted with respect to the beneficiaries as to become politically untenable because no rational city council member, county commissioner, or state legislator would vote in favor of a remedial program that applies to some but not all minorities in order to be sufficiently tailored to meet constitutional narrow tailoring requirements. See *supra* text and accompanying notes 122–37.

invalidation if a person or entity burdened by the program elects to hail the agency into court.

Returning to the Jefferson County, Kentucky, public schools in *Parents Involved*, it is clear that a remedial justification for tracking African American enrollment would exist in a school district that practiced overt de jure segregation of the races until the 1970s and did not exit continuing judicial scrutiny of the operation of its schools until 2000.¹⁸⁸ Chief Justice Roberts suggested that, having achieved unitary status,¹⁸⁹ Jefferson County simply could not invoke a remedial rationale for race-conscious assignment policies.¹⁹⁰ He writes, “We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that ‘the Constitution is not violated by racial imbalance in the schools, without more.’”¹⁹¹ Thus, “[o]nce Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.”¹⁹² It is not at all clear, however, that Chief Justice Roberts has this right.

To be sure, the concept of “unitary status” implies that continuing judicial supervision of a public school system is no longer warranted, whether “in whole or in part”,¹⁹³ because the district has ended its discriminatory practices and reduced its contemporary effects to the extent practicable.¹⁹⁴ In a larger sense, however, the notion that any district has truly eradicated all contemporary vestiges of de jure segregation is a legal

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

189. On the concept of “unitary status,” see *Freeman v. Pitts*, 503 U.S. 467, 473, 486–87 (1992); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 245–46 (1991).

190. See *Parents Involved*, 127 S. Ct. at 2752 (noting that the Jefferson County school district did not invoke a remedial rationale for its program because it achieved unitary status under the *Freeman* standards in 2000); see also *id.* at 2749 (giving history of federal court supervised desegregation of the Louisville public schools, beginning in 1973 and ending in 2000).

191. *Id.* at 2752.

192. *Id.*

193. A public school district subject to a desegregation order may seek and obtain unitary status on a piecemeal basis rather than on a comprehensive basis. See *Freeman*, 503 U.S. at 490–91.

194. See *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237, 247–50 (1991); see, e.g., *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000) (releasing the Jefferson County public school district from continuing judicial supervision under a 1973 desegregation order because the defendant school district had achieved unitary status by eliminating “[t]o the greatest extent practicable” the vestiges of its prior policy of segregation). For a detailed discussion of the concept of unitary status and the problems associated with its relatively vague contours, see Daniel J. McMullen & Irene Hirata McMullen, *Stubborn Facts of History—The Vestiges of Past Discrimination in School Desegregation Cases*, 44 CASE W. RES. L. REV. 75 (1993); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1161–80 (2000); Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283 (2002).

fiction,¹⁹⁵ the identity of particular schools within the community are a present fact rooted in the past, as are residential housing patterns that developed, at least in part, due to the geographic boundaries associated with public school assignments.¹⁹⁶ Unitary status is more a form of judicial surrender than a genuine declaration of victory.¹⁹⁷

The federal courts also have made plain their antipathy for serving as school boards of last resort. In a variety of contexts, including procedural due process,¹⁹⁸ student free expression rights,¹⁹⁹ school library collection decisions,²⁰⁰ and public employment,²⁰¹ the Supreme Court has indicated that local school boards deserve a wide margin of appreciation²⁰² for

195. See Ryan, *supra* note 41, at 132 (“The truth is that racial integration is not on the agenda of most school districts and has not been for over twenty years.”).

196. For a discussion of another contributor to the racial identity of public schools, see Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 38 (2008) (arguing that teacher assignments in many public school districts reflect the racial composition of a particular school’s student body, that this results in significant, racially identifiable differences in teacher experience, and that “[t]he inequality caused by teacher segregation also reveals the transformative power of integration”). Professor Parker is quite correct to state that “[a]s a society, we too often ignore the consequences of school segregation, and pretend any inequities are entirely nonracial in cause and effect.” *Id.* at 52.

197. See *id.* at 33–40, 49–51 (noting the failure of the *Brown* line of cases to achieve meaningful integration of the public schools in most public school districts, noting that increasing racial integration within public schools generally does not constitute a priority for contemporary school boards, and criticizing the “disinterest [in integration] found in the overwhelming majority of school districts”).

198. *Ingraham v. Wright*, 430 U.S. 651 (1977).

199. *Morse v. Frederick*, 127 S. Ct. 2618 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); cf. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that students in public schools hold “First Amendment rights, applied in light of the special characteristics of the school environment,” noting that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” and observing that “[t]his has been the unmistakable holding of this Court for almost 50 years”); see S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 119–20, 126–37 (1995) (discussing and critiquing the Supreme Court’s *Tinker* line of free speech cases involving speech and expressive conduct by public school students in the public schools).

200. *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (permitting school libraries absolute discretion to select books for school libraries as an incident of their control over the curriculum and holding that judges should not superintend such decisions, but limiting the ability of a school board to remove a book previously selected for the collection, but only if the reason for doing so relates to viewpoint discrimination as opposed to curricular concerns); *ACLU of Fla. v. Miami-Dade Sch. Bd.*, 557 F.3d 1177, 1183–90, 1199–1203, 1211–22 (11th Cir.), *cert. denied*, 130 S. Ct. 659 (2009) (upholding removal of *Vamos a Cuba* from school district library shelves because the decision rested on a legitimate pedagogical purpose, rather than on viewpoint discrimination).

201. *Pickering v. Bd. of Educ. of Township High Sch. Dist.*, 391 U.S. 563 (1968).

202. The concept of a “margin of appreciation” derives from the jurisprudence of the European Court of Human Rights. See *Dudgeon v. United Kingdom*, App. No. 7525/76, 4 Eur. H.R. Rep. 149, 164–65 (1981); *Tyler v. United Kingdom*, App. No. 5856/72, 2 Eur. H.R. Rep. 1, 10 (1978); see also J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 148 (1988) (discussing the concept of the “margin of appreciation” in the European Court of Human Rights’s jurisprudence). I have borrowed the concept in this context to suggest that the

making basic decisions associated with running the local schools. As the Court has explained, “local autonomy of school districts is a vital national tradition.”²⁰³ The same sort of reflexive judicial deference also manifests in cases involving the operation of prisons²⁰⁴ and the military.²⁰⁵

Given this de facto thumb on the scale in favor of local control and autonomy with respect to the operation of the public schools, it would be entirely sensible to have a reasonably generous floor for establishing that a district has done all that it *must* do in order to desegregate. To say, however, that a school district has done all that it *must* do is not necessarily to say that it has done all that it *may* do; one could reasonably posit a floor, the satisfaction of which would support a finding of unitary status, but also the existence of a higher ceiling, which would permit a local school district, after having achieved unitary status, to continue voluntary efforts at ameliorating the continuing contemporary effects of past discrimination.

Indeed, even the majority opinion of *Freeman v. Pitts*, authored by Justice Kennedy, frankly acknowledged that achieving unitary status was not contingent on total success in undoing the present effects of past

Supreme Court of the United States enforces constitutional rights against certain government defendants more leniently than against others, conveying a kind of “margin of appreciation” on favored government entities, such as the military, prisons, and public school authorities.

203. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977).

204. *See Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125–26, 128 (1977) (“The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations”); *Pell v. Procunier*, 417 U.S. 817, 822, 827–28 (1974) (rejecting First Amendment claims of the media to access inmates and inmates to speak with the media because of “legitimate penological objectives of the corrections system” in limiting such access); *see also Turner v. Safley*, 482 U.S. 78, 87, 91, 95–99 (1987) (holding that prisons may limit prisoners’ exercise of fundamental constitutional rights, including the right to marry, as necessary to secure legitimate penological interests, provided that a restriction is “reasonably related” to such interests, but invalidating a flat ban against inmates marrying while incarcerated). The Supreme Court has essentially reduced its scrutiny of First Amendment claims in the context of prisons to a true rationality standard under which prison authorities may suspend speech, association, and assembly rights more or less at will: “Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators.” *Jones*, 433 U.S. at 126.

205. *Compare Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding that Fort Dix, an Army military base otherwise open to the public and in many material respects resembling a town, may categorically ban all political speech activity within its borders without any showing that proposed speech activity would impair any military functions), *and Goldman v. Weinberger*, 475 U.S. 503, 508–10 (1986) (upholding against a free exercise of religion challenge the military ban on armed forces personnel wearing any visible unauthorized articles of clothing, including a yarmulke), *with Marsh v. Alabama*, 326 U.S. 501, 508–510 (1946) (reversing criminal trespass conviction on free speech grounds and holding that a company-owned town could not proscribe speech activity within the town center because the private owner had assumed the role of a municipal corporation in all material respects), *and Sherbert v. Verner*, 374 U.S. 398 (1963) (requiring South Carolina to pay unemployment benefits to applicant unable to obtain employment because of a religious objection to working on Saturdays).

discrimination.²⁰⁶ If this sentiment is sincere, it stands to reason that a school district might wish to escape continuing district court jurisdiction over a desegregation order, even though the local school board and superintendent believe that continued efforts to redress the contemporary effects of past discrimination remain vitally important and necessary.

The notion of a constitutionally required floor with a higher voluntary ceiling is hardly a novelty to contemporary constitutional law. For example, even though the Free Speech Clause of the First Amendment does not, of its own force, require a privately owned shopping mall owner to provide access to the property for those who wish to engage in expressive activities,²⁰⁷ a state may, as a matter of statutory law or through interpretation of the state constitution's free speech guarantee, order third-party access to such spaces for the purpose of engaging in expressive activities.²⁰⁸ In other words, the constitutionally required "floor" does not preclude Congress, a state, or a local government from establishing a broader duty to provide public access to private property for speech activity. This directly impedes the free speech interests of the property owner in not being forced to dissociate itself from the third-party speech or risk being misidentified with it. Thus, a rule mandating third-party access to private mall property comes at the price of the mall owner's free speech interests, yet the balance is one that Congress or a state or local government may choose to strike in favor of third-party access.²⁰⁹

206. *Freeman*, 503 U.S. at 495 ("In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist.").

207. *See* *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567–70 (1972).

208. *See* *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

209. Obscenity doctrine provides another example in which the states and, in theory, Congress are free to protect more speech than the First Amendment requires. *See, e.g., State v. Henry*, 732 P.2d 9, 17 (Or. 1987) ("We hold that characterizing expression as 'obscenity,' [which is not protected under the U.S. Constitution] does not deprive it of protection under the Oregon Constitution."); *see also* *City of Nyssa v. Duflath*, 121 P.3d 639, 643–44 (Or. 2005) (applying *Ciancanelli* to invalidate a local ordinance that prohibited nude dancers from performing within four feet of patrons); *State v. Ciancanelli*, 121 P.3d 613, 618–20, 633–35 (Or. 2005) (reaffirming the continuing validity of *Henry* and extending the holding to expressly include totally nude dancing). However, because the harm resulting to third parties from the "overprotection" of obscene speech, at least if viewed from the vantage of federal constitutional law, is less targeted and is more widely distributed than the burden of forced third-party access to private property for expressive activities, the analogy to *Pruneyard*, 447 U.S. 74, seems more apt. If third-party property owners must suffer a diminution of their right not to speak or to subsidize the speech of third parties with whom they disagree, it stands to reason that efforts to remediate past discrimination might impose costs on groups that did not suffer from de jure racial discrimination. In this sense, the Louisville school district's use of "black" and "other" to analyze the racial composition of the local schools, *see* *Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2746, 2754 (2007), makes perfect sense: any effort to measure

Of course, the Louisville public school district never made any effort to defend the program in remedial terms before the federal courts. The fact that the school board adopted the plan in 2001, the year immediately after the local federal district court ceased its ongoing monitoring of the school district's efforts to undo the present effects of past racial discrimination, however, bespeaks a remedial purpose. The design of the Louisville plan, tracking black and "other" enrollments also strongly suggests a remedial, rather than diversity, motivation for the plan.

Although "[d]iversity, depending on its meaning and definition, is a compelling government educational goal a school district may pursue,"²¹⁰ the Louisville schools were not seriously pursuing diversity. The question that then arises and begs to be answered is "why didn't the attorneys for the school board brief and argue a remedial rationale for the program?" The answer to that question cannot be discerned from the face of the briefs or the transcript of the oral argument; survey data, however, strongly suggest that public opposition to race-based remedial efforts could have informed the school board's public pronouncements about the "diversity" plan and also its litigation strategy.²¹¹

B. Remediation and Reparations Enjoy Weak Public Support and Engender Fierce Opposition

Polling data conclusively demonstrate that diversity concerns resonate more positively with the contemporary American public, and particularly with white citizens, than do concerns rooted in remediation and distributive justice.²¹² The "data indicates that while the public generally

progress toward undoing the past effects of targeted discrimination against African Americans would, of necessity, require measuring the population of Louisville schools in terms of "black" and "non-black" or "other" students.

210. *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring).

211. See Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 365–66 (2003) ("With elected officials opposing quotas and opinion polls showing popular opposition to racial preferences in college admissions (despite a poll showing that eighty percent of Americans also think it important for colleges to have 'a racially diverse student body'), proponents of affirmative action had reason to fear the Court would approve affirmative action but narrow the ways in which schools could consider race."). Indeed, the Supreme Court itself arguably incorporated public opinion on these questions to help inform its decision in *Grutter*. See Brown-Nagin, *supra* note 18, at 1487 ("*Grutter* offers no coherent theory of justice because it gives every major constituency involved in the affirmative action debate a bit of what it wanted to hear. The dominant rhetorical tone of the opinion is moderate, elitist, and utilitarian."); Post, *supra* note 110, at 8 (arguing that "constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture" and suggesting that the "beliefs and values of non-judicial actors" help to explain the outcome in *Grutter*).

212. See *infra* text and accompanying notes 212–29.

tends to regard diversity favorably, there is large-scale resistance to diversity measures focused on race (even in areas where diversity is more likely to be favored, like education and employment).²¹³ Diversity provides a clever means of avoiding a topic that makes many people uncomfortable.

As Professor Jones has posited, “[b]y shifting from a conversation about securing access to previously disempowered groups to a dialogue about diversity writ in the abstract, people are not forced to ‘soil their tongues’ with words like ‘discrimination’ and their minds with thoughts about how to deal with America’s history of oppression.”²¹⁴ Thus, “[t]he controversial nature of the corrective and distributive justice rationales, and their absence from discussions of diversity, explain why diversity initiatives may be more palatable to persons outside of the civil rights community than more traditional affirmative action programs.”²¹⁵ Poll after poll show that U.S. citizens oppose “remedial” race-conscious government action, but at the same time broadly support government efforts to promote “diversity.”²¹⁶

For example, a comprehensive 1998 survey sponsored by the Ford Foundation concluded that “[v]oters *overwhelmingly* believe it is critically important that people of diverse backgrounds learn how to live and work together—the future simply demands it.”²¹⁷ This survey encompassed over 2,011 respondents, all registered voters selected across the nation, and has “a margin of error of +/- 2.2% at the 95% confidence interval.”²¹⁸ It found

213. Jones, *supra* note 18, at 179–80; *see also* Brown-Nagin, *supra* note 18, at 1525 n.455 (“Polls consistently show that Americans, including a near majority of blacks and a majority of Hispanics, believe it is unfair to give preferential treatment to minorities if doing so requires lowering ‘standards’ such as test scores.”).

214. Jones, *supra* note 18, at 180.

215. *Id.* at 174.

216. *See* Schuck, *supra* note 6, at 54–55 (“Affirmative action has never had much public support, ‘with little evidence of change over time.’ The vast majority of Americans, including more than a third of blacks and more than 70% of Hispanics, oppose racial preferences in hiring and promotion, with the level of this opposition rising somewhat over time.”); *see also* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 178–83 (1997); *cf.* Paul M. Sniderman & Edward G. Carmines, *Reaching Beyond Race*, 30 PS: POL. SCI. & POL. 466 (1997).

217. DIVERSITY WEB, ASS’N OF AM. COLLEGES & UNIVS., NATIONAL POLL ON DIVERSITY IN HIGHER EDUCATION (1998), http://www.diversityweb.org/research_and_trends/research_evaluation_impact/campus_community_connections/national_poll.cfm (reproducing report summarizing results of Ford Foundation’s national survey on attitudes toward diversity) [hereinafter “Ford Foundation Survey”]; *see also* Sam Fulwood III & Kenneth R. Weiss, *Americans in Poll Overwhelmingly See Value in Diversity*, SEATTLE TIMES, Oct. 7, 1998, at A5 (reporting on the results of the Ford Foundation comprehensive national survey conducted by DYG, a New York based polling firm). Of course, as Professor Brown-Nagin has noted, “Poll data is not necessarily a reliable indicator of actual preferences, especially as they relate to race.” Brown-Nagin, *supra* note 18, at 1450 n.59.

218. Ford Foundation Survey, *supra* note 217.

that “the vast majority of American voters support diversity education in general and the numerous specific programs which fall under that heading.”²¹⁹

Some specific relevant results include findings that 97% of the respondents agree that “[i]n the next generations, people will need to get along with people who are not like them,” 94% agree that that “America’s growing diversity makes it more important than ever for all of us to understand people who are different than ourselves,” and 91% agree that “[t]he global economy makes it more important than ever for all of us to understand people who are different than ourselves.”²²⁰ With respect to diversity in the context of colleges and universities, “66% ‘think colleges and universities should take explicit steps to insure diversity in the student body’” and “75% ‘think colleges and universities should take explicit steps to insure diversity among the faculty.’”²²¹ It bears noting that 50% of respondents to the survey define “diversity” as meaning “different ethnicity, race, nationality or culture,” and that this definition dwarfed the next most popular definitional response, “people with different thoughts and ideas,” at 18%.²²²

Other, more recent, polls find similarly strong support for “diversity,” both in the context of workplaces and in higher education.²²³ Support for “affirmative action” also appears to be significantly stronger than support for race-based policies in general, and race-based admissions policies in particular.²²⁴

By way of contrast, surveys on public support for race-based affirmative action find a majority of white citizens strongly opposed to such practices: “the idea of making decisions on racial grounds is

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. See Charles Lane, *High Court Mirrors Public Sentiment, Rulings ‘About Right’ on Key Issues, Poll Finds*, FT. WAYNE J. GAZETTE, July 8, 2003, at 4 (reporting on 2003 AP poll that found 80% of respondents found it “very important” or “somewhat important” for a college or university to have a racially diverse student body); Linda K. Wertheimer, *Few Definitive Answers in Race Poll*, DALLAS MORNING NEWS, Mar. 23, 2003, at 35A (reporting results of nationwide Associated Press poll that found 80% support for “racially diverse student bodies” although only 51% of the respondents endorsed affirmative action as an acceptable means of achieving “diversity,” with 43% of the respondents opposed to the use of such measures); Harvard Graduate School of Education, *News Features & Releases, National Poll Shows Strong Public Support for Affirmative Action, Diversity on College and University Campuses*, May 17, 2001 (reporting results of poll finding 64% of respondents support “affirmative action for women and minorities”).

224. See Schuck, *supra* note 6, at 55–56; see also Gregory Freeman, *‘Preference’: Word Inflames Debate on Affirmative Action*, ST. LOUIS POST-DISPATCH, Aug. 22, 1995, at 13B (“polls have shown that the public supports affirmative action but opposes preferential treatment”).

unpopular—especially among whites, who oppose preferences for blacks by a 73–22 percent margin in the new *Newsweek* Poll.”²²⁵ Moreover, “[m]inorities are nearly as dubious, opposing preferences for blacks by 56–38 percent.”²²⁶ Similarly, an ABC News/Washington Post poll found that over two-thirds of respondents supported “assistance—but not preference” in affirmative action programs, and that two-thirds of respondents oppose “preference” programs.²²⁷

Quite literally, then, the devil is in the details; public support or opposition to a race-conscious affirmative action (i.e., remedial) program depends significantly on how the government entity adopting it describes the program to its constituents. As Professor Schuck has explained:

widespread agreement exists on the value of diversity in school classrooms, but support for affirmative action declines the more the question characterizes the remedy as “hard” (mandatory; explicit preferences; numbers) rather than “soft” (voluntary; focused on enhancing opportunity enhancement, as with greater outreach or job training; confined to tie-breaking), and the more it describes the rationale as redistribution or representation rather than fairness or equal opportunity.²²⁸

Schuck also observes that the “public’s opinion remains decidedly and intensely negative, pretty much regardless of how the questions are formulated, the state of the economy, or personal financial conditions,” although he also cautions that “it is hard to know the precise division of opinion.”²²⁹ These conclusions undoubtedly are correct regarding public opinion associated with overtly remedial programs and also hold true for

225. Howard Fineman & Tamara Lipper, *Spinning Race*, NEWSWEEK, Jan. 27, 2003, at 26, 28.

226. *Id.*

227. ABC News/Washington Post Poll, Jan. 20, 2003 (released on Jan. 24, 2003); see Lane, *supra* note 223, at 4 (reporting a Fox poll finding overwhelming opposition to “allowing an applicant’s race to be a factor in college admissions procedures” but, at the same time, 49 percent in favor to 43 percent opposed to “affirmative action preferences for racial minorities”). Professor Gail Heriot has collected polling data that she claims shows “overwhelming white opposition to ‘preferences’ in hiring or college or university admissions.” See Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmation Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 HARV. J. ON LEGIS. 217, 225–28 (2003) (collecting, discussing, and citing relevant polling data and results). Michael Rosman, general counsel of the Center for Individual Rights, also has collected and summarized survey data showing that “RCDM [race-conscious decision-making] has become increasingly unpopular” and lacks majority support in the body politic. See Rosman, *supra* note 20, at 47, 47–52 (describing and discussing relevant polling data). However, neither Heriot nor Rosman address or refute the polling data that show supermajority support for “diversity” in a variety of contexts, including college and university admissions programs.

228. See Schuck, *supra* note 6, at 55–56.

229. *Id.* at 56.

some affirmative action programs; however, it bears noting that they *do not* hold true with respect to polling data associated with self-described efforts to promote “diversity.” In sum, empirical evidence demonstrates the existence of deep skepticism—and hostility—towards remedial race-conscious government action.

The history of reparations in the United States bears out the implication of the polling data; neither Congress nor the states have adopted many remedial programs, and those that have been adopted usually make merely symbolic or token efforts to compensate the victims and their descendants. For example, Congress enacted a remedial program for the victims of the Japanese American Internment policy of the Roosevelt Administration.²³⁰ The policy was denounced as a gross violation of basic equal protection principles even before the end of World War II.²³¹ Victims received an official apology and cash payments of \$20,000 in 1988, over forty years after the internment ended and at a time when most of the adult internees were quite elderly.²³² The federal government made no effort either to

230. See War and National Defense Restitution for World War II Internment of Japanese-Americans and Aleuts, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified as amended at 50 U.S.C. app. § 1989b-4 (1990)); see also COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, JUSTICE DENIED (1982).

231. See *Korematsu v. United States*, 323 U.S. 214, 225–26 (1944) (Roberts, J., dissenting) (“This is not a case of keeping people off the streets at night . . . nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.”); *id.* at 233 (Murphy, J., dissenting) (“This exclusion of ‘all persons of Japanese ancestry, both alien and non-alien,’ from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism.”); see also *Ex Parte Endo*, 323 U.S. 283, 297 (1944) (“We are of the view that Mitsuye Endo should be given her liberty” because “we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure”); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.”); *id.* at 110 (Murphy, J., dissenting) (“Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war.”). For discussion of the Japanese American internment policy and its social, economic, and political effects, see ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II 22–40 (2001); RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE INTERNMENT (Eric K. Yamamoto et al. eds., 2001).

232. See *supra* note 136.

ascertain or compensate for individual internees' actual financial losses associated with the forced relocation or interest on those economic losses.

Similarly, a number of state legislatures, including the legislatures of Virginia and Maryland, have enacted public apologies for both slavery and Jim Crow,²³³ yet none of these bills commit any public resources to addressing the contemporary effects of these state-supported policies. Although the sentiments of the apologies are laudable, the absence of any serious efforts to address the inequities associated with state-sponsored slavery and racism seriously undercut the utility of these enactments.²³⁴

Moreover, even in cases in which the victims of state-sponsored racism and their descendants are either known or knowable, as with, for example, the Springfield, Illinois, race riot of 1908,²³⁵ the East St. Louis, Illinois, race riot of 1917,²³⁶ or the Tulsa, Oklahoma, race riot of 1921,²³⁷ neither

233. See S.J. Res. 332, 2007 Reg. Sess. (Va. 2007); S.J. Res. 6, 2007 Reg. Sess. (Md. 2007); Wendy Koch, *Va. 1st State to Express "Regret" over Slavery*, USA TODAY, Feb. 26, 2007, at 5A. Following Virginia and Maryland, several other states, including North Carolina, Alabama, and California enacted similar resolutions, as did several major U.S. cities. See Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 2 n.5 (2007). For a general discussion of reparations and the legal arguments that undergird it, see Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (2006).

234. See generally Burkett, *supra* note 133, at 104–30 (discussing past efforts to make reparations for slavery and Jim Crow, canvassing contemporary arguments for and against such reparations, and examining potential legal, political, and economic obstacles to the enactment and implementation of such measures). The most recent legislative apologies for past racial injustices simply continue the preexisting pattern of offering an apology without any form of financial or other restitution. See, e.g., William Douglas, *Senate Passes Apology for Slavery*, SEATTLE TIMES, June 19, 2009, at A4 (noting passage by U.S. Senate of a resolution that calls for a formal apology for the practice of human chattel slavery in the United States and acknowledges “the fundamental injustice, brutality, and inhumanity of slavery and Jim Crow laws,” but does not provide for financial reparations or any other form of restitution); Editorial, *'Sorry' Says Something*, L.A. TIMES, July 25, 2009, at A28 (“The [California] legislation expressing the state’s ‘profound regret’ for discriminatory laws is purely symbolic, carrying with it no obligation for reparations akin to the \$20,000 paid by the federal government in 1988 to Japanese and Japanese Americans who were interned during World War II. Which raises a key question: Without atonement, how does one assess the value of contrition?”); Corina Knoll, *Legislature Apologizes for Past Discrimination against Chinese*, L.A. TIMES, July 23, 2009, at A3 (noting the California state legislature’s passage of a resolution of apology but also observing that the resolution failed to include any form of financial or other restitution to the descendants of the persecuted Chinese immigrants); *California: Apology to Immigrants*, N.Y. TIMES, July 23, 2009, at A23 (noting that “[t]he California Legislature apologized for the state’s past persecution of the Chinese immigrants who built the state’s railroads, gold mines and agriculture industry”).

235. See Christopher Wills, *Land of Lincoln Remembers 1908 Attacks on Blacks*, SEATTLE TIMES, Aug. 10, 2008, at A5 (noting that “Lincoln’s city—where Barack Obama launched his presidential campaign—is finally commemorating the events that erupted 100 years ago [in August in Springfield, Illinois],” events that led “[o]utraged activists” to found the NAACP; describing the 1908 riot; and reporting that “[f]or generations, it was ignored in Springfield”); See also Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 94–96 (2004). The Springfield, Illinois, Race Riot “was overshadowed by larger riots in East St. Louis and Tulsa, Okla.” Wills, *supra*, at A5.

236. See Alberto B. Lopez, *Focusing the Reparations Debate Beyond 1865*, 69 TENN. L. REV.

state nor local governments have ever agreed to take responsibility for the financial losses caused by white mobs that, acting with the active encouragement and participation of local law enforcement agencies, destroyed in toto entire black economic communities. The ownership of the affected businesses would not be difficult to discern; the class of potential recipients of reparations would be knowable and limited in number. Yet, to date no level of government—federal, state, or local—has shown any interest in remediating the economic losses associated with these instances of mob violence acting under color of state authority.

The lack of quick action, even in cases where causation is not in doubt and the victims and their lineal descendants could be identified with a high degree of confidence, demonstrates quite clearly that governments are either unwilling, or perhaps unable, to remediate past discriminatory acts. If remediation is a slow, difficult, and ineffectual process in the clearest cases of racial injustice, it seems hopelessly optimistic to expect university presidents and local school boards to promote remediation of past discriminatory practices beyond the constitutionally mandated floor of unitary status. Even if a particular university or local school district wished to pursue such policies, the probable public reaction to the policies would make their adoption and enforcement unduly politically risky.

C. The Result: Inaction or the Mislabeling of Remedial Programs

Because of these facts of contemporary political life, remediation is likely to be an underutilized basis for race-conscious government action, even in circumstances where the government entity could plausibly defend a race-conscious program of preferences as narrowly tailored to undo the contemporary effects of past discrimination. The easiest, and most politically prudent, course of action for a local school board member is simply to do nothing after a district achieves unitary status. No adverse legal or political consequences flow from such an approach.²³⁸ If a school

653, 674 (2002) (discussing the East St. Louis race riot of 1917). The City of St. Louis, Missouri, did pay compensation to the victims of the East St. Louis, Illinois, race riot. *See id.* at 676.

237. *See generally* ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921 (2002). In fact, major race riots took place in many U.S. cities from the 1890s into the 1930s; few if any retain any place in the nation's collective consciousness. *See* Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1060–62 (2003). For an excellent review of arguments for and against reparations for these events, and for slavery, *see* BROPHY, REPARATIONS PRO & CON, *supra* note 137.

238. And, as a factual matter, this is precisely how most school boards behave in the contemporary United States. *See* Ryan, *supra* note 41, at 144–46. As Professor Jim Ryan succinctly states the issue, “[t]he first point to recognize, and perhaps the most important, is that the vast majority

board member's primary goal were retaining her seat, this approach would maximize the probability of a happy outcome.

Suppose, however, that a conscientious school board member believes, notwithstanding a federal court finding that the district has achieved unitary status, that serious racial inequities, traceable to patterns established during the period of de jure segregation, continue to exist and result in unequal educational opportunities and outcomes for minority children attending the local public schools.²³⁹ How would such a public official logically respond to the polling data showing unremitting hostility for remedial race-conscious programs but broad-based support for race-conscious government action aimed at enhancing "diversity"?

To the extent that local and state governments do adopt remedial programs, it is highly likely that they will be mislabeled as "diversity" efforts in an effort to wrap them in a more electorally-friendly "cellophane" wrapper.²⁴⁰ The critical question then becomes whether the federal courts will tolerate anything less than absolute truth-in-advertising when a government entity pursues a remedial goal under the rubric of diversity.²⁴¹

of school districts do not take race into account when assigning students." *Id.* at 144. Ryan estimates that at most around 1000 of some 16,000 public school districts consider race when assigning students to particular district schools, *see id.* at 145, and also notes that "[l]ooking across various accounts of race-based student assignment plans, I count fewer than thirty districts that have plans similar to those in effect in Seattle and Louisville, where students are given a broad choice among regular public schools and where that choice is constrained by racial guidelines." *Id.* at 146-47.

239. *See, e.g., Parker, supra* note 196, at 37-40 (arguing that great disparities exist with respect to teacher experience and quality, that these disparities track race in disturbing, but predictable patterns, and positing that contemporary racial disparities among public schools might begin or start with teacher experience and quality, but surely do not end there).

240. *See United States v. Kahriger*, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting) ("However, when oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure."). Justice Frankfurter's point is that the Supreme Court should not credit an implausible reason (*viz.*, "it's a tax!") for the adoption of a regulatory program simply because if accepted the reason would establish the program's constitutionality. By parity of logic, if a race-conscious government action for a remedial purpose is mislabeled as a diversity program, a reviewing court should consider the real reason for the program, rather than the "cellophane" in which the government entity has wrapped it.

241. *See Devins, supra* note 211, at 380-81 (arguing that the Supreme Court's approach to affirmative action both reflects and incorporates the public's complex attitudes toward remedial and diversity objectives). Devins states that "knowing that its decisions would be embraced by elected officials and opinion leaders, the Court (by ruling against the college in the face of widespread amicus support for the college) was able to appear independent and countermajoritarian without worrying about possible political reprisals." *Id.* at 381; *see also Brown-Nagin, supra* note 18, at 1467-68 (observing that "elites wield a significant degree of influence in the legal spaces that are constitutive elements of the American political environment, often through interest groups representing public and private interests on a wide range of issues" and noting that "[t]he courts are 'yet another point of

CONCLUSION: PANDEMIC MALAPROPISM AND THE DIFFICULT POLITICS OF RACE

The Supreme Court has established a doctrinal framework on race-conscious government action that provides theoretical clarity to the permissible metes and bounds of both remedial and diversity efforts that include some consideration of race. It is simple enough to rehearse the rules that permit race to be used to grant benefits or impose burdens in order to remediate past discrimination or in order to enhance the quality of the government's program or better secure attainment of its objectives.²⁴² Even so, the Justices themselves seem incapable of using these classifications in a principled fashion.

Right-leaning members of the Supreme Court do not take seriously the notion that remediation of the contemporary effects of past discrimination requires race-conscious government action that benefits a particular racial or ethnic group. Limiting a remedial effort only to the persons who personally suffered racial discrimination, and thereby disallowing the use of group-based injunctive relief, has the effect of allowing a government agency to enjoy the "benefit" of the past discrimination well into the foreseeable future because those hired under the unconstitutional race-based standards will remain and race-neutral future hiring will not necessarily address the absence of racial minorities in the government agency's contemporary work force. *Paradise*²⁴³ and *Fordice*²⁴⁴ both properly rejected this approach in favor of a requirement that government make serious efforts to undo the contemporary effects of its past bad behavior; the government agency has a duty not merely to cease discriminating on the basis of race, but also an affirmative duty to undo the racially-identifiable work force that resulted from its past unlawful behavior. Limiting remedial objectives to persons who have moved into other careers, or perhaps even retired from work entirely, constitutes a very weak commitment to securing equal protection of the law to all.

The conservative members of the Supreme Court, particularly Justices Scalia and Thomas, also seem utterly insensitive to the notion that in some contexts ethnic diversity constitutes an essential consideration in achieving

access' for elites, and the Supreme Court is more responsive to the perspectives of elites than of others—if only because elites are repeat players in the legal process").

242. See *supra* text and accompanying notes 5–21 and 26–48.

243. *United States v. Paradise*, 480 U.S. 149, 166–71 (1987) (plurality opinion).

244. *United States v. Fordice*, 505 U.S. 717, 729–32 (1992).

a particular government objective;²⁴⁵ an all-white occupying force in Iraq or Sudan seems less likely to win hearts and minds of the local populations than an ethnically diverse occupying force.²⁴⁶ So too, a department of social services that lacks persons familiar with the language and cultural traditions of particular minority groups within the community will simply be less effective at protecting children than a department that possesses these skills within its workforce.²⁴⁷

If the conservative bloc is too parsimonious in its definition of remediation and its willingness to see the value of diversity, the progressive wing of the Court appears hopelessly unprincipled when it endorses programs that do not rationally advance the government's stated interest in diversity.²⁴⁸ Even if Seattle has an interest in creating and maintaining ethnically and racially diverse public high schools, the means selected, aggregating all people of color into one undifferentiated mass

245. *Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2783 (2007) (Thomas, J., concurring) (“The segregationists in *Brown* embraced the arguments the Court endorsed in *Plessy*. Though *Brown* decisively rejected those arguments, today’s dissent replicates them to a distressing extent.”); *id.* at 2785 (“The similarities between the dissent’s arguments and the segregationists’ arguments do not stop there. Like the dissent, the segregationists repeatedly cautioned the Court to consider practicalities and not to embrace too theoretical a view of the Fourteenth Amendment.”); *Adarand Constructors v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“I join the opinion of the Court, except Part III-C, and except insofar as it may be inconsistent with the following: In my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”); *id.* (“To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.”).

246. See WILLIAM B. BRENTS & SARA MORGAN, U.S. ARMY WAR COLL. STRATEGY RESEARCH PROJECT, AMERICA’S CULTURAL AWAKENING, Abstract (2007), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA469107&Location=U2&doc=GetTRDoc.pdf> (“the military, and the army in particular, must genuinely understand the cultures and languages of the places they are sent if they are to successfully carry out US foreign policy”); *id.* at 5–12 (arguing that U.S. armed forces with more diverse, culturally aware, personnel would enhance the effectiveness of U.S. armed forces engaged abroad and increase the probability of mission success). Of course, diversity also enhances the cohesiveness and effectiveness of the armed forces, independent of its utility in winning hearts and minds abroad. See Leach, *supra* note 80, at 1114–23.

247. See *supra* text and accompanying notes 66–82.

248. See, e.g., *Parents Involved*, 127 S. Ct. at 2811–16 (Breyer, J., dissenting) (rejecting strict scrutiny review of voluntary efforts to integrate the public schools, invoking pre-*Crosby* decisions to support this proposition); *id.* at 2817–19 (arguing that the Supreme Court should apply a less demanding form of strict scrutiny to the Seattle and Louisville public school diversity programs). Justice Kennedy explained the potential shortcomings of Justice Breyer’s highly permissive approach:

As to the dissent, the general conclusions upon which it relies have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling. The dissent’s permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review) could invite widespread governmental deployment of racial classifications.

Id. at 2793 (Kennedy, J., concurring).

and treating all people of color as essentially fungible, lacked even a rational relationship to a plausible conception of racial diversity in the public schools. To vote to uphold such a program is essentially to adopt a rule that commits to the political safeguards of equal protection²⁴⁹ any self-described benign race-conscious government action.

To be sure, John Hart Ely's theory of representation reinforcement²⁵⁰ would support a vision of equal protection that withholds protection from members of the political majority in circumstances where the majority imposes a burden on itself in order to favor the interests of minorities. If this is really the theory that the progressive wing of the Supreme Court endorses, then its members should say so openly, rather than engage in a game of verbal charades. Such an approach rejects the notion that equal protection works to protect individuals, rather than groups, but this hardly disqualifies it from serious consideration.

The larger problem for a minimalist theory of equal protection, at least for "benign" forms of race-conscious government action in which a majority burdens itself, involves determining precisely what group, or groups, constitute the "majority." In a state like California, in which no single racial or ethnic group commands a majority of voters statewide,²⁵¹

249. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 169–70, 194–205 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also *Printz v. United States*, 521 U.S. 898, 956–58 (1997) (Stevens, J., dissenting) ("Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the Legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom."); *Garcia v. San Antonio Metro-Transit Auth.*, 469 U.S. 528, 552 (1985) ("In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 66–67, 70–89 (2004) (describing and critiquing the political safeguards argument). But see *Printz*, 521 U.S. at 928–30 (rejecting the argument that the political safeguards of federalism will adequately protect state government officers from being commandeered by the federal government).

250. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87–104 (1980).

251. The U.S. Census Bureau estimates that as of 2008, non-Hispanic whites comprise no more than 42.3% of the state's population, and are the largest ethnic group within the state. California QuickFacts, U.S. Census Bureau (Feb. 23, 2010), <http://quickfacts.census.gov/qfd/states/06000.html>. California's residents also include Hispanics (36.6%), Asians (12.5%), African Americans (6.7%), and Native Americans (1.2%). *Id.* In fact, as of 2010, four states, California, Texas, New Mexico, and Hawaii, along with the District of Columbia, have minority-majority populations, i.e., non-Hispanic

precisely what group constitutes the majority? How would one apply a minimalist theory of equal protection in these circumstances? Moreover, as the United States becomes more ethnically diverse in the years to come, successfully identifying a “majority” and a “minority” race will become harder rather than easier.²⁵²

When one steps back from the hyperbolic rhetoric in the Supreme Court’s affirmative action cases, one sees two stark, competing, and unrealistic visions for judicial review of benign race-conscious government action: the conservative wing of the Court rejects the legitimacy of *any* race-conscious government action, save that which is theoretically race neutral, such as compensating the actual victims of past discrimination, whereas the progressive wing of the Court sustains virtually any race-conscious government action designed to benefit people of color. The formal classifications of “diversity” and “remediation” that ostensibly limit government race-conscious action are little more than empty shells, mere placeholders for a larger, more epic battle about the proper role of the federal courts in overseeing democratically accountable government entities that adopt benign race-conscious programs, a battle that has largely been fought in code words and subtext rather than forthrightly.

All of this tends to support the attitudinalist critique of the classic legal model. “The classic legal model suggests that the path of the law can be identified through reasoned analysis of factors internal to the law.”²⁵³ By way of contrast, “the attitudinal model joins the tradition of legal realists and critical legal scholars in dismissing the language [of published court opinions] as merely a legitimating myth.”²⁵⁴ The attitudinal model “suggests that judicial decisionmaking is not based upon reasoned judgment from precedent, but rather upon each judge’s political ideology and the identity of the parties.”²⁵⁵

whites no longer constitute a majority of the state’s population. Orlando Patterson, *Race and Diversity in the Age of Obama*, N.Y. TIMES, Aug. 16, 2009, at Book Review 23 (“Over all, minorities now constitute slightly over a third of the [U.S.] population; in four states, minorities are the majority: Hawaii (75 percent), New Mexico (58 percent), California (57 percent) and Texas (52 percent), as they are in the District of Columbia (68 percent).”).

252. See, e.g., Sam Roberts, *In Biggest U.S. Cities, Minorities Are at 50%*, N.Y. TIMES, Dec. 9, 2008, at A28 (“For the first time, Hispanic, black, Asian and other nonwhite residents account for half the population of the nation’s largest cities, according to new census figures.”). Nor is racial and ethnic diversity solely a characteristic of urban America: “Further, the data document a rapidly growing ethnic diversity in small-town America as well.” *Id.*

253. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255 (1997).

254. *Id.* at 263–64.

255. *Id.* at 265; see Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting*

Empirical studies seeking to ascertain the role of ideology in judging have found that it matters, even if the effects of ideology on appellate judging do not have predictable, linear outcomes.²⁵⁶ For example, “in most of the areas investigated [in the study], the political party of the appointing president is a fairly good predictor of how individual judges will vote” but “there are noteworthy counterexamples to [the] general findings.”²⁵⁷ The correlation depends on the nature of the case presented and breaks down in some substantive areas of law, such as “criminal appeals, takings claims, and Commerce Clause challenges to congressional enactments.”²⁵⁸ It should not be surprising then, that ideological variables would warp not only the voting behavior of judges but also the development and application of legal doctrine in an area as hotly contested as the use of racial preferences in government decisionmaking.

What is perhaps surprising is the failure of the Supreme Court to use its nomenclature in a systematic, coherent fashion. Both the conservative and liberal wings of the Court are guilty of malapropism in the use of key terms of art such as remediation, diversity, and affirmative action; all sides attempt to obfuscate the ultimate legal objective, whether the creation of an ahistorical “colorblind” constitution or committing affirmative action policies to the political branches of the local, state and federal governments.

Professor Schauer posits that “when institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies.”²⁵⁹ Moreover, “[a] reason-giving mandate will also drive out illegitimate reasons when they are the only plausible explanation for particular outcomes.”²⁶⁰ When government uses race to impose a burden

on *Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 309 (2004) (“According to the attitudinal model, judges have certain ‘attitudes’ toward areas of the law, and these attitudes are good predictors of judicial votes in difficult cases.”). *But cf.* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1411–12, 1498–99 (1998) (questioning the explanatory force of the behavioralist critique of the classic legal model of judging and noting that “[w]hile the greater than expected influence of several background variables is consistent with the behavioral hypothesis, the influence of other environmental and legal factors reveals the inadequacy of behavioralism as a fully explanatory model”).

256. *See, e.g.*, Sunstein, Schkade & Ellman, *supra* note 255, at 304–06.

257. *Id.* at 305–06.

258. *Id.* at 306.

259. Schauer, *supra* note 8, at 657.

260. *Id.* at 657–58; *see* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 508 (2002) (“Psychological studies suggest

or withhold a benefit, the federal courts should demand a very good reason to justify the use of a presumptively illegitimate basis for discrimination (indeed, the exemplar of an invidious form of discrimination). To the extent that existing legal doctrine holds government to a high standard of accountability with respect to race-conscious government action,²⁶¹ the lessons of racial history in the United States suggest that this approach simply reflects pragmatic realism. Accordingly, “any 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.”²⁶²

To say that a government entity must proffer a compelling reason when hailed into court does not mean, however, that a government entity attempting to defend a race-conscious action must be limited solely to the content of a press release issued at the time of adoption. If judges themselves have difficulty in speaking plainly about race, it would be more than a little ironic if reviewing courts refused to consider compelling reasons offered in open court simply because the reasons advanced in the briefs include reasons not emphasized in the legislative history of the program.

To speak plainly to the point, government entities attempting to defend race-conscious action should be free to defend such programs on a remedial basis even if the programs are styled “diversity” efforts, and reviewing courts should not attempt to enforce estoppel against a government agency that offers a plausible and constitutionally sufficient remedial justification for an ostensible “diversity” program. Indeed, for judges who often decry the utility of legislative history as useless, if not meaningless,²⁶³ it is difficult to understand why a government defendant

that accountability, if properly structured, can significantly improve the quality of decisionmaking in the sense of minimizing the extent to which individuals unthinkingly rely on inappropriate decisionmaking rules or fall prey to psychological biases.”). Seidenfeld posits that judicial review of agency action enhances the quality of agency decisions simply by “provid[ing] an audience, albeit not the only audience, for those engaged in formulating and defending the rule,” and concludes that “judicial review provides an effective mechanism for enhancing the impact of accountability and discouraging the impact of directive leadership.” *Id.* at 509–10, 547.

261. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (“Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”); *see id.* at 223–24 (holding that federal courts must review with “skepticism” all race-conscious government actions).

262. *Id.* at 224.

263. *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring); *ANTONIN SCALIA, A MATTER OF INTERPRETATION* 17–25, 25–37 (1997); *see also* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 31–32 (1988) (noting rise of “plain meaning” approaches to statutory interpretation that reject recourse to legislative history materials, critiquing this

should be strictly limited to public pronouncements regarding the purpose of a particular race-conscious program. At the end of the day, if the government can establish a proper remedial purpose and narrow tailoring, a reviewing court should sustain the program, regardless of whether or not it was labeled an effort to promote “diversity,” instead of as a remedial measure.²⁶⁴

The Supreme Court also has a duty to speak plainly regarding the differences between diversity and remediation as predicates for benign race-conscious government action. When the Justices identify and invoke remedial concerns in support of a benign race-conscious government program, as in *Grutter*, the program under judicial review must itself be *remedial*, rather than designed to promote diversity, again, as in *Grutter*.

In its Takings Clause jurisprudence, the Supreme Court sowed doctrinal confusion by adopting an open-ended fundamental justice inquiry, asking whether a particular regulation that adversely affects the value of property “substantially advance[s] legitimate state interests”,²⁶⁵ in *Lingle v. Chevron U.S.A., Inc.* however, the Supreme Court squarely relocated any open-ended fundamental fairness concerns to substantive due process.²⁶⁶ *Lingle* makes clear that the Takings Clause relates to the misdistribution of the financial burdens of government regulation, not the fundamental fairness of such regulation:

An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. But such a test is not a valid

approach to statutory texts as a form of “judicial activism” inconsistent with a meaningful respect for legislative policies, and explaining that “[t]o the extent that a review of the legislative history persuades one that the legislature could not have intended what the ‘plain meaning’ seems to indicate, a judge is doing the legislature no favor in enforcing the ‘plain meaning’”; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–24, 646–48, 650–53 (1990) (discussing the “new textualism,” which “posits that once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant,” and Justice Scalia’s general rejection of the relevance of legislative history in statutory interpretation).

264. See Schauer, *supra* note 8, at 647 (“Are 1992’s decisionmakers committed in 1995 to the result indicated by the reasons *they* gave in 1992, even though when faced with 1995’s situation they realize that what they said in 1992 was not what they should have said? . . . Are reasons actually given to be considered commitments, of the same genus as contracts and promises, or are they simply noncommitting statements subject to unimpeded defeat in the event of changed or newly discovered circumstances?”).

265. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

266. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540–45 (2005). Justice O’Connor explained that “[a]lthough *Agins*’ reliance on [due process] precedents is understandable, the language the Court selected was regrettably imprecise.” *Id.* at 542.

method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment.²⁶⁷

Accordingly, the *Lingle* Court held that “the ‘substantially advances’ formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation.”²⁶⁸

Thus, in the context of its regulatory takings jurisprudence, the Supreme Court recognized its own muddying of the waters and the unsustainable legal framework that resulted—i.e., the expansion of the regulatory takings doctrine in *Agins* to a point where it effectively and completely overlapped the contours of substantive due process. The same sort of overlap problem presently exists in the Court’s deployment of diversity as a compelling interest for race-conscious government action and, as in *Lingle*, the Justices need to undertake an effort to keep the categories of diversity and remediation reasonably separate and distinct if they in fact want government entities to use these as separate and divisible legal categories rather than mere synonyms.

Even if the Justices were to restore some measure of doctrinal clarity to the concepts of diversity and remediation, however, a significant problem remains: if courts hold government strictly accountable based on labeling and legislative histories, the politics of race will essentially preclude any voluntary legislative or executive efforts to adopt remedial programs. To be clear, at some point a government entity, like the Jefferson County, Kentucky, public school board, must actually invoke a remedial justification for its program; it would be asking too much of courts to suggest that they must provide a defense that a litigant steadfastly refuses to mount.²⁶⁹ If, however, a defendant is prepared to argue publicly that a

267. *Id.* at 542 (citation omitted).

268. *Id.* at 545.

269. However, this suggestion is perhaps not as farfetched as it might seem at first blush. In the context of equal protection and substantive due process challenges to generic economic and social legislation, federal courts inquire into whether a particular enactment bears a rational relationship to a legitimate state interest. *See FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–16 (1993) (describing and applying the traditional rationality standard of judicial review). In applying this test, the government defendant bears virtually no burden of production or persuasion; a reviewing court will ask if any theoretical rational basis exists that might render the law minimally rational. *See id.* Thus, in such cases the burden falls entirely on the plaintiff to prove a negative—i.e., the non-existence of any set of facts on which a rational legislator might enact the law at issue. Of course, the whole point of strict scrutiny is that, in some cases, the government should lose its presumption of constitutional action because the specific action in question transgresses a fundamental right or otherwise uses a suspect form of classification. Given that race is perhaps the most suspect form of classification, I do not propose or endorse having courts, *sua sponte*, inquire into a remedial justification for a law or program that the government defendant has not invoked. Consistent with such an approach, Chief Justice Roberts was correct not to inquire into whether the Jefferson County public school district had

particular program advances remedial concerns, whether in addition to or in lieu of diversity concerns, a reviewing court should consider the remedial defense on the merits.

In an ideal world, governments would say what they mean and mean what they say. Alas, we do not live in an ideal world and governments often find themselves in the awkward position of saying one thing, while doing another. Thus do “taxes” morph into the less politically odious “user’s fees” or “revenue enhancement measures” and “wars” magically become “conflicts” or “enforcement actions.” Governments routinely mischaracterize the nature and purpose of their actions because they believe that doing so will make the actions, deemed necessary but not popular, less electorally problematic. One might well wonder if democratic self-government could go on in the absence of spin.

Thus, the political reality is that governments will not readily invoke a remedial rationale for race-conscious actions, even when a particular action has a strong remedial predicate. The question that a reviewing court must then ask and answer is whether truth-in-advertising should trump voluntary efforts to ameliorate the present-day effects of past discrimination. Given that legislative and executive efforts to remediate discrimination can be much more comprehensive, and therefore generally more effective, than judicial remedies,²⁷⁰ it would make sense to encourage, rather than discourage, such efforts.

Permitting governments to say one thing while doing another would constitute a modest, relatively picayune, concession to the realities of contemporary racial politics. So long as, at the end of the day, a government can meet the rigorous demands of strict judicial scrutiny, the imperatives of the equal protection principle have been met. Pragmatic realism, rather than empty formalism,²⁷¹ would better help to secure racial justice in the contemporary United States.

designed a narrowly tailored remedial program. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2752 (2008) (“Jefferson County accordingly does not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students.”).

270. *See* Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1427–28 (1995) (noting that legislative remedies for constitutional violations can be more comprehensive, and thereby more effective, than judicially crafted remedies).

271. *See* Nussbaum, *supra* note 41, at 24–30, 87–93, 96–97 (discussing and criticizing the Supreme Court majority’s undue “lofty formalism” in *Parents Involved*).