The (Un)Compelling Interest for Underrepresented Minority Students: Enhancing the Education of White Students Underexposed to Racial Diversity

David Kow

Follow this and additional works at: http://scholarship.law.berkeley.edu/blrlj

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/blrlj/vol20/iss1/5

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38836D

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley La Raza Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
The (Un)compelling Interest for Underrepresented Minority Students: Enhancing the Education of White Students Underexposed to Racial Diversity*

David Kow**

"Ask not what your country can do for you
— ask what you can do for your country."
— President John F. Kennedy
Inaugural Address

INTRODUCTION

Affirmative action programs in the United States have been interpreted and reinterpreted by judges and the lay public alike. Since such programs originated in a very different social context than their constitutionally permissible applications today, the expression "affirmative action" means different things to different people.¹

Rarely do preferential admissions programs address other pertinent issues that confront minority students and their communities and impact their access to educational opportunities and development. For instance, modern concepts of race-based affirmative action do not call for the provision of resources, such as mentoring and guidance, to disadvantaged minority students who may not have considered applying to college. Such concepts also fail to provide assistance and guidance to minority students regarding course selection, internships, etc., once they begin their undergraduate or graduate careers, which could curtail their access to educational opportunities.

Institutions that employ such measures are not only opening the door to minority

---

* © DAVID KOW, 2010. The author can be contacted at kow_david@yahoo.com.
** J.D., Albany Law School 2009, B.S., Cornell University 1992. I am grateful to Raymond H. Brescia for his guidance, encouragement and wisdom, making this article possible. I owe special thanks to Anthony Paul Farley and Maria Grahn-Farley for their support and invaluable feedback on a previous draft, and their sage advice going forward. I thank the attendees of the 2009 LatCrit XIV Conference who offered extremely helpful comments at my presentation, including Carlton Waterhouse. Many thanks to Nancy K. Ota for introducing me to LatCrit years earlier and for all the mentoring along the way. Thanks to Rhonda V. Magee and Carol Wilson for helping me to find my law school voice. Thanks also to Linda Lara and the members of the Berkeley La Raza Law Journal for their talented work on my behalf. Heartfelt thanks to Peggy Yi Kow for sharing the driving, feeding the pig and walking the dog during the evolution of this article. Finally, the unwavering love and support of my mother, Yen Chu Kow, has sustained me through every challenge and I will try my best to hau soong everyday.

1. See, e.g., Eboni S. Nelson, What Price Grutter?: We May Have Won the Battle, But Are We Losing the War?, 32 J.C. & U.L. 1, 24, 28-29 (2005). Nelson calls for an expanded view of "affirmative action":

Rarely do preferential admissions programs address other pertinent issues that confront minority students and their communities and impact their access to educational opportunities and development. For instance, modern concepts of race-based affirmative action do not call for the provision of resources, such as mentoring and guidance, to disadvantaged minority students who may not have considered applying to college. Such concepts also fail to provide assistance and guidance to minority students regarding course selection, internships, etc., once they begin their undergraduate or graduate careers, which could curtail their access to educational opportunities.
Historically, such policies were established as a means to address the wide discrepancies between Whites and racial minorities in areas of employment and contracting, due to the long history of racial discrimination against people of color. Today, the Equal Protection Clause of the Fourteenth Amendment, of the United States Constitution, serves as a check against such affirmative action policies as are deemed a form of so-called "reverse discrimination" against Whites. Proponents of affirmative action face a shifting jurisprudence away from constitutional recognition for both the justification and methodology of such policies and programs.

The United States Supreme Court decision in Korematsu v. United States established that all governmental classifications by race trigger the strict scrutiny standard of review. "This means that such classifications are constitutional only if

students but also encouraging them to walk through it.

2. The expressions "minorities" and "people of color" are used interchangeably (as are "minority students" and "students of color") throughout this article to refer to the same demographic group. The reason is to conform to the University of Michigan School of Law's usage of "minority students" while promoting the usage of "students of color" as the preferred expression. See ROBERT B. MOORE, RACISM IN THE ENGLISH LANGUAGE, IN RACE, CLASS, AND GENDER IN THE UNITED STATES 376, 381 (Paula S. Rothenberg ed., 1995). In a study of label preferences to identify themselves and for others to identify them, involving 371 American college students of European descent, the labels in order of preference were: White, Caucasian, White American, European American, Euro-American, Anglo, WASP. JUDITH N. MARTIN et al., WHAT DO WHITE PEOPLE WANT TO BE CALLED?: A STUDY OF SELF-LABELS FOR WHITE AMERICANS, IN WHITENESS: THE COMMUNICATION OF SOCIAL IDENTITY 27, 33-38 (Thomas K. Nakayama & Judith N. Martin eds., 1999); see also Angela Onwuachi-Willig et al., CRACKING THE EGG: WHICH CAME FIRST—SIGMA OR AFFIRMATIVE ACTION?, 96 CAL. L. REV. 1299, 1301 n.5 (2008) ("[W]e capitalize the words 'Black' and 'White' when we use them as nouns to describe a racialized group; however, we do not capitalize these terms when we use them as adjectives.").


4. U.S. CONST. amend. XIV, § 1 ("No State shall... deny to any person within its jurisdiction the equal protection of the laws.").


7. Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. ... [C]ourts must subject them to the most rigid scrutiny."). But see id. at 239 (Murphy, J., dissenting) ("The main reasons relied upon by those responsible for the forced evacuation... do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear... to be... misinformation, half-truths and insinuations... by people with racial and economic prejudices... ") (emphasis added). See generally GARY Y. OKIHIRO, THE COLUMBIA GUIDE TO ASIAN AMERICAN HISTORY 23, 30 (2001) (summarizing the context and legal aftermath of the case, leading to the vindication of the petitioner). In 1942, President Roosevelt signed Executive Order 9066, authorizing the military to exclude and detain all people of Japanese ancestry from designated areas in western states and Hawaii. This resulted in the mass internment of approximately 120,000 Japanese Americans into camps throughout the United States. Fred Korematsu challenged the constitutionality of the exclusion order but the Supreme Court upheld it based on military necessity. Ironically, the same year the Court decided this case, the military drafted Japanese Americans from the internment camps, while others from the camps voluntarily enlisted, to help fight the war overseas. In 1976, President Ford rescinded Executive Order 9066. In 1983, President Carter's Commission on the Wartime Relocation and Internment of Civilians recommended that Congress make a formal apology, the President pardon all who were convicted of violating the exclusion order, and reparations of $20,000 be paid to each surviving internee. In 1988, President Reagan signed the civil rights bill adopting these recommendations. Forty years after the Supreme Court's decision, a writ of coram nobis reopened his case due to the suppression
they are narrowly tailored to further compelling governmental interests. The Court’s decision in Grutter v. Bollinger in 2003, represented a further refinement of the government’s compelling interests and permissible means of achieving those ends, where racial classifications are a factor in the context of higher education admissions.

In Grutter, the Court held that the University of Michigan School of Law may consider an applicant’s race in its admissions decisions, to enroll a “critical mass of underrepresented minority students,” as a means “in obtaining the educational benefits that flow from a diverse student body.” The Court, by a 5-4 decision written by Justice O’Connor, upheld the Law School’s admissions plan as narrowly tailored to achieve a compelling governmental interest, notwithstanding the application of strict scrutiny.

Some affirmative action proponents celebrated the holding as a victory. But was it really a victory for stakeholders of affirmative action programs? In his book, Silent Covenants, Derrick Bell wrote: “The Michigan Law School victory primarily aided the corporate entities and colleges who find diversity, as they earlier found affirmative action, a less disruptive means of gaining a minority presence without abandoning comfortable policies of hiring and admission that benefit themselves.” Although the Michigan Law School’s admissions plan was ultimately deemed constitutional, “the importance and the sincerity of the reasons advanced by the [Law School] for the use of race,” bear closer examination than conducted by the

8. Grutter v. Bollinger, 539 U.S. 306, 326 (2003). Traditionally, strict scrutiny review involves the treatment of compelling interests (ends) and narrow tailoring (means) as two distinct inquiries, both required for a governmental regulation that interferes with some fundamental right to be held constitutional. The Supreme Court has adopted different approaches (in different cases) for determining what constitutes a compelling governmental interest. The narrow tailoring requirement follows the identification of the government’s interest, where the governmental regulation “must be necessary or the least restrictive alternative” to achieve the compelling interest. Narrowly tailored regulation is neither under- nor over-inclusive: it cannot restrict some fundamental rights without sufficiently addressing the government’s objective, nor can it be overly broad, meeting the government’s objective, but infringing on the rights of too many other people in the process. Frequently, the narrow tailoring prong of the strict scrutiny standard has been an integral, rather than separate, analysis in reaching a decision on the constitutionality of a challenged governmental regulation. Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1321-29, 1332-33 (2007); see also Robert C. Post, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 Harv. L. Rev. 4, 58 (2003) (“The Court can shape the intense controversies about affirmative action by manipulating the definition of a ‘compelling’ state interest or by construing the meaning of ‘narrow tailoring.’”).


11. Id. at 334 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)). This bonus conferred upon some racial minority groups is commonly referred to as a “plus factor.”

12. Id. at 343-44.


The approved compelling interest of the University of Michigan School of Law was framed as “obtaining the educational benefits that flow from a diverse student body.” From a cursory reading, it may appear that the Law School’s objective was to achieve general diversity in the student body, for the benefit of all students. However, the Law School defended the use of race in admissions based solely on its asserted compelling interest in diversity, claiming a flow of educational benefits to justify its affirmative action policy. Although the Law School made an argument for “diversity” in general, the legal issue in *Grutter* concerned “racial diversity” in particular.

A closer reading of the compelling interest in terms of the prospective educational rewards derived from racial diversity at the Law School, is to examine which students actually stand to gain from this enhanced educational benefit. In contrast, whether a student admitted with race as a factor gains the basic benefit of access to a college or graduate education, is not the concern of the Law School’s compelling interest. Besides, in asserting that students of color unfairly benefit from affirmative action policies by gaining admission only at the expense of “innocent white victims,” who in turn are denied access to a particular college or university, critics of preferential programs neglect to discuss the de facto affirmative action for wealthy and well-connected white students, in legacy-, celebrity- and donor-based preferential admissions. As the focus of the Law School’s approved compelling

16. *Id.* at 317-18.
17. *Id.* at 327-28.
18. *Id.* at 316, 322 (“The [admissions] policy does not define diversity ‘solely in terms of racial and ethnic status.’” But the Court was asked to decide, “Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.”).
19. Thomas Ross described a “rhetoric of innocence” used by opponents of affirmative action, as having two forms: (1) the white applicant claims to be “innocent” (not guilty) of any conduct that has personally hindered the applicant of color from gaining admission, and (2) the status of the applicant of color as an “actual victim” of a “particular and proven [act of] racial discrimination” is questioned. Ross noted, as to (1) since “white people generally have benefited from the oppression of people of color,” and “if innocence is defined as the absence of advantage at the expense of others,” there is a question as to whether white people are really “innocent;” as to (2) since societal “discrimination against people of color is pervasive,” whether a given black person is not an “actual victim” is questionable. THOMAS ROSS, *Innocence and Affirmative Action, in Critical Race Theory: The Cutting Edge* 635, 636 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000). The first time the concept of the “innocent” white applicant appeared in an affirmative action case was in Justice Powell’s opinion in *Bakke*. *Id.* at 637 (quoting *Bakke*, 438 U.S. at 294 n.34, 298).
20. DANIEL GOLDEN, *The Price of Admission: How America’s Ruling Class Buys Its Way Into Elite Colleges—and Who Gets Left Outside the Gates* (2006). Golden exposes the practice at top colleges and universities of admitting children of alumni, wealthy donors, celebrities and politicians, some with substandard academic credentials, over applicants with higher SAT scores or grades, but without wealthy parents or political connections. The overwhelming proportion of these preferential admissions benefits well-to-do white applicants, and the number trumps students of color admitted under affirmative action programs. Examples of preferential treatment include Al Gore’s son admitted to Harvard with a lackluster record, President George W. Bush’s niece accepted at Princeton after submitting her application a month late, and a real estate developer’s son accepted at Harvard with numbers below the school’s standard, after his father pledged $2.5 million. Other schools engaged in this practice include Duke, Brown, Notre Dame, the University of Virginia, Stanford and Amherst. See also Onwuachi-Willig et al., *supra* note 2, at 1345 n.134, 1346 (noting that Professor Lani Guinier made the observation that legacy-admitted students, who are mostly white, generate less “stigma” claims than race-based preferences, which account for fewer admitted students at selective colleges (citing Lani Guinier,
interest is on the enhanced educational benefit from racial diversity, analyzing who gains more of the basic educational benefit of access to an institution due to preferential treatment is beyond the scope of this article.\footnote{2010} 

The enhanced educational benefit from racial diversity can be illustrated by an imaginary affirmative action light switch: toggle "on" to add racial diversity, toggle "off" to remove it.\footnote{2010} In the "off" position, without such diversity, the purported enhanced educational benefits flow to no one, and students are admitted under an admissions policy without consideration of any applicant's race as a plus factor. Their educational benefits would mainly derive from academic pursuits and other indices of diversity, and would not include the benefit of exposure to a racially diverse student body. Toggle to the "on" position, adding racial diversity to the student body (by adding students of color), for the educational benefits derived from such diversity to begin to flow. This racially diverse student body would then include the purported enhanced educational benefit. But the students admitted with a plus-factor consideration of their race, are not the students for whom exposure to these same students (themselves or each other) constitute the compelling interest. The Law School's own expert for the litigation, Patricia Gurin, found that Latinos at the University of Michigan mostly come from racially diverse neighborhoods or schools, and African Americans arrive equipped with knowledge of issues surrounding race.\footnote{2010} 

Toggle "off" again, and the students of color who disappear lose the basic benefit of the academic pursuit, and not the enhanced educational benefit from racial diversity. Students of color have such pre-exposure to racial diversity that the enhanced benefit is really not an enhanced benefit for them. The one constant in this illustration is the non-diverse (mostly white) student body. The variables are the students of color admitted under the Law School's affirmative action plan, and the enhanced educational benefit of their presence to the non-diverse student body. The

\footnote{Comment, Admissions Rituals As Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 HARV. L. REV. 113, 186-87, 190 (2003)).}

\footnote{21. See generally Onwuachi-Willig et al., supra note 2, at 1345 n.133 ("[I]n 2002 at Texas A&M . . . legacy preferences allowed for the enrollment of 321 white students . . . but only three Blacks and twenty-five Latinos in this category." (citation omitted)).}

\footnote{22. See Joshua M. Levine, Stigma's Opening: Grutter's Diversity Interest(s) and the New Calculus For Affirmative Action In Higher Education, 94 CAL. L. REV. 457, 462 (2006). Levine used a different analogy to make the same point:}

To illustrate this argument, imagine two portraits of a classroom on a selective university's campus. The first portrait—"Before"—is of a classroom without affirmative action, and the second portrait—"After"—is the same classroom with affirmative action. In the "After" portrait, which has far more people of color than "Before," the students who actually encounter this change and now benefit from the more "robust" learning environment (which to [Justice] Powell [in Bakke] was affirmative action's only permissible rationale) are the (mostly) white students who were in the first picture.

compelling interest, focused on obtaining these educational benefits, is therefore mainly concerned with the non-diverse student body’s diminished educational experience when the toggle is in the “off” position.

Perhaps even more troubling than this view of the compelling interest, during the litigation of this case and the companion case, Gratz v. Bollinger, Patricia Gurin’s Expert Report was used to tout the educational benefits of racial diversity. This claim is problematic when one considers that Gurin concluded that exposure to other races enhances the education of students so exposed, based on studies showing only marginal educational benefits, if any, for students of color, compared with appreciable positive correlations between racial diversity and learning and democracy outcomes for white students. Justice O’Connor’s opinion in Grutter, approving the ill-conceived compelling interest claim of the Michigan Law School while relying on Gurin’s Expert Report, effectively established affirmative action for students of color to enhance the education of white students.

The thesis of this article is that the Grutter opinion upheld a constitutional admissions program of the University of Michigan School of Law, based on constitutionally suspect reasons. While ostensibly benefiting underrepresented racial minority groups by keeping the door ajar for their admission in critical masses, the opinion objectifies qualified students of color, whereby their individualized value as prospective students is held to be a measure of the degree to which each adds to the racial diversity of a school, and the corresponding educational benefits to fellow students, by virtue of his or her presence there. While Part II addresses the means approved by the Court for the Law School to achieve its stated goal, and Part III deals with the Court’s twenty-five-year sunset announcement, the focus of this article is on the Law School’s compelling interest in order to examine who benefits from exposure to a racially diverse student body.

“You mean, let me understand this cause, ya know maybe it’s me,
I’m a little fucked up maybe, but I’m funny how,
I mean funny like I’m a clown, I amuse you? I make you laugh,
I’m here to fuckin’ amuse you?”

—Joe Pesci as Tommy DeVito, GOODFELLAS (Warner Bros. 1990)

I. GRUTTER’S DIVERSITY RATIONALE: BENEFICIAL, COMPPELLING AND EXPLOITATIVE

As the Grutter and Gratz cases rose through the Michigan federal courts to national prominence before the United States Supreme Court, the fate of affirmative action programs in higher education rested in the hands of an increasingly conservative Court on issues related to race. The last time the Supreme Court had decided a higher education affirmative action case prior to 2003, was twenty-five

25. Gurin, supra note 23; see generally Pidot, supra note 23 (analyzing Gurin’s methodology along with other studies, and surveying general and specific critiques of the Expert Report by multiple researchers).
26. See Naff, supra note 6, at 419.
years earlier in *Regents of Univ. of Cal. v. Bakke*. In a six-opinion plurality, the *Bakke* Court struck down a minority set-aside in admissions, but upheld as constitutional, the consideration of race as a "plus" factor in admissions generally. In her *Grutter* opinion, Justice O'Connor gave full weight to the single opinion of Justice Powell in *Bakke*, as his was the opinion on narrowest grounds, partially agreeing with each of two opposing four-Justice pluralities. Although this article focuses on the *Grutter* opinion, the analysis is therefore applicable to the diversity rationale extended from Justice Powell's opinion in *Bakke*, and embraced by the University of Michigan School of Law.

"[T]he Law School's asserted interest in obtaining the educational benefits that flow from a diverse student body was [held to be] compelling." Its admissions criteria included an assessment of the potential of each applicant "to contribute to the learning" of others. Along with an evaluation of applicants based on grades and test scores, "soft variables" contributing to overall diversity could be given "substantial weight." At the heart of the litigation in *Grutter* was the Law School's initiative to enroll "a critical mass of underrepresented minority students," in order to achieve racial and ethnic diversity. The Law School's reason for targeting a "critical mass" of these students was "to ensure their ability to make unique contributions to the character of the Law School."

The plain meaning of the approved compelling interest actually suggests an unwritten agenda of the Law School. If there are educational benefits that flow from diversity, then one must ask for whom the benefits flow. Do they flow for everyone, from everyone, as a function of a diverse student body? To pose the same question in the negative: Without student diversity, who is deprived of the educational benefits that would otherwise flow from a diverse student body? If the brand of diversity sought was eliminated along with any corresponding educational benefit, those students who would remain appear to be the intended primary educational beneficiaries of enrolling would-be students with the targeted characteristics. To be certain, students of color who would be enrolled under affirmative action admissions policies, like the Law School's plan, do stand to benefit. However, the benefit to these students is not the enhanced educational benefit as proffered by the compelling

28. *Id.* at 317.
29. *Grutter*, 539 U.S. at 323, 325 ("Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies."). Justice O'Connor not only cited his opinion several times, faithfully following his reasoning, but went a step further by announcing a twenty-five-year sunset expectation for the use of race to achieve student diversity.
30. *Id.* at 314; see generally Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 856 (1995) (describing the diversity rationale as focused on the benefit to others of a particular "candidate's presence within the school").
32. *Id.* at 315.
33. *Id.* at 315-16. "Soft variables" include non-numerical factors, like quality of the personal essay and recommendations.
34. *Id.* at 318. The petitioner, Barbara Grutter, filed suit under the 14th Amendment and Title VI of the Civil Rights Act of 1964, alleging that the University of Michigan School of Law discriminated against her on the basis of race, and rejected her because she is White.
35. *Id.* at 316.
interest; it is basically a benefit of access to an education in exchange for serving as a source of enrichment to fellow students.\textsuperscript{36} Despite the well-meaning pronouncements of the Michigan law school’s affirmative action program, testimony presented by the University of Michigan School of Law at trial raises troubling questions about the exploitative view towards the same underrepresented minority students whom the admissions policy had been purported to benefit.\textsuperscript{37} Erika Dowdell, a supporter of affirmative action who graduated from Michigan in 2002, disagreed with the diversity rationale.\textsuperscript{38} She told a reporter that it “is not a good move for students of color. . . . It sounds as if we’re just in college to enrich the education of white students.”\textsuperscript{39} Moreover, the presentation of the findings of the Expert Report by Patricia Gurin, which the Court relied heavily upon in its opinion, is more telling for what was overlooked than for what was cited.\textsuperscript{40}

A. Standardizing View from the Law School

The Chair of the faculty committee that drafted the 1992 admissions policy, Professor Richard Lempert, stated that “the Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom.”\textsuperscript{41} He testified that “the inclusion of students from groups which have been historically discriminated against” was for the purpose of “bring[ing] to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination.”\textsuperscript{42} Granted, classroom discussions may be more colorful when a mix of historically victimized students are recruited to study among students who have not been victimized by discrimination.\textsuperscript{43} But the benefit of this “different” perspective is by point of reference, targeted towards a standardized perspective of the non-victimized student. Since the value-added learning is a product of being exposed to victims of discrimination and therefore unidirectional by design, it cannot be that this

\textsuperscript{36} See, e.g., Jacques Steinberg, \textit{University of Vermont Builds Pool of Recruits in the Bronx}, N.Y. Times, Dec. 26, 2001, at A1 (“When we went to visit, the campus was all white, so I know they’re getting something out of us,' said Akosua Asor Yeboah, 18, a Columbus senior and native of Ghana whose parents did not attend college. ‘I’m getting something out of it, too – a scholarship.’”); see also Levine, supra note 22, at 463 (“The rationale, by not addressing the benefits to racial minorities, seems to allow universities to invite in certain students not (mainly) to study medicine or law but with an ulterior motive: to educate their fellow students.”).

\textsuperscript{37} See Levine, supra note 22, at 464 (“Schools may believe quite altruistically that they want their students not only to see difference but also to learn from those with whom – due to ‘white flight,’ self-segregation, or other reasons – they interact less and less in their formative years.”).


\textsuperscript{39} Id.


\textsuperscript{41} Grutter, 539 U.S. at 319.

\textsuperscript{42} Id.

\textsuperscript{43} Id. at 330 (quoting from the Petition for Certiorari, the Court agreed that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” with a diverse student body).
educational enhancement is also intended to benefit the recruited victims.\textsuperscript{44} After all, they already know the victim’s perspective first hand.

Likewise, the victim-non-victim mutual exposure does not yield an equivalent benefit for the incoming victim group. People of color who have faced racial discrimination for instance, generally live with the specter of it every single day.\textsuperscript{45} It ranges from overt acts of racism\textsuperscript{46} to what Peggy Davis referred to as “microaggression,” involving “subtle, stunning, often automatic, and non-verbal exchanges.”\textsuperscript{47} As such, would-be students who have experienced racial discrimination have been pre-exposed to perpetrators of the discriminatory conduct, whether overtly or subtly.\textsuperscript{48} Since the perpetrators possess the opposite view of the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{44} See, e.g., Pidot, supra note 23, at 763 (“Since many white students have little experience with historically disadvantaged (and currently underrepresented) minorities, exposure to any student of color could provide equivalent benefit. However, many more students of color have grown up interacting with whites, at least in some capacity.”).\end{enumerate}

\begin{enumerate}
\item \textsuperscript{45} See Camille A. Nelson, \textit{Considering Tortious Racism}, 9 DEPAUL J. HEALTH CARE L. 905, 930 n.116 (2005) (“[D]iscrimination is a structured part of everyday experiences and includes not only major stressful life experiences but recurrent indignities and irritations in everyday situations.” (citing Philomena Essed, \textit{Understanding Everyday Racism: An Interdisciplinary Theory} (1991)); see also id. at 922 (“Recent studies of people of color in the United States have found that the experience of discrimination is linked to higher levels of stress and psychological suffering, including depression and lower levels of life satisfaction.”).\end{enumerate}

\begin{enumerate}

\begin{enumerate}
\item \textsuperscript{47} Peggy C. Davis, \textit{Law As Microaggression}, 98 YALE L.J. 1559, 1560, 1565 (1989) (quoting C. Pierce & W. Profit, Homoracial Behavior in the U.S.A. 2-3 (1986) (unpublished manuscript) and Chester M. Pierce et al., \textit{An Experiment in Racism: TV Commercials}, EDUC. & URB. SOC’Y 61, 66 (1977)). These are “incessant, often gratuitous and subtle offenses,” which manifest a negative opinion of people of color as subordinate. Such conduct might include moving to pay for an item ahead of a person of color first to arrive at the cashier’s counter, allowing a person of color to hold the door open while walking through without acknowledging words or gesture the person holding the door, changing directions or crossing the street upon seeing an approaching person of color, or not yielding on a crowded sidewalk and forcing the person of color to step aside. See id. at 1567, 1569; see also Charles R. Lawrence III, \textit{The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism}, 39 STAN. L. REV. 317, 356 (1987) (“The unconscious racial attitudes of individuals manifest themselves in the cultural meaning that society gives their actions in the following way: In a society that no longer condones overt racist attitudes and behavior, many of these attitudes will be repressed and prevented from reaching awareness in an undisguised form.”); Nelson, supra note 45, at 916 (“Accordingly, the impact must be the starting point – unintentional racism does not hurt less. The consequences of racial abuses persist even in the absence of intention.”).\end{enumerate}

\begin{enumerate}
\item \textsuperscript{48} See, e.g., \textit{Selected Highlights of the Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling}, in \textit{STATISTICS IN THE LAW} 159, 162 (Joseph B. Kadane ed., 2008) (“recognizing that one need not be a racist to be influenced by stereotypes that might lead an officer to treat minority motorists differently during the course of a traffic stop” and that “the phenomenon of racial profiling and other forms of disparate treatment of minorities is real”); Anne-Marie G. Harris, \textit{Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling}, 23 B.C. THIRD WORLD L.J. 1, 2 n.3, 4 (2003). Harris drew parallels between racial profiling by law enforcement in traffic stops (known as “driving while black” or “DWB”) and “Consumer Racial Profiling (CRP) [which]
discrimination experience, that is, the non-victimized perspective, recruited students who have faced discrimination are also familiar with this perspective. Therefore, since recruited victims of racial discrimination have already had at least some exposure to a non-victimized perspective before enrolling at the Law School, to the extent white law students have not faced racial discrimination nor perpetrated such acts, the benefit of exposure to a “different” perspective inures mainly to the non-victimized white students. 49

is defined as any type of differential treatment of consumers in the marketplace based on race or ethnicity that constitutes a denial or degradation in the product or service offered to the consumer":

Shoppers of color are viewed with suspicion and, as a result, they are more likely to be watched, followed, harassed, and even denied service in the course of their daily roles as consumers.

In a retail environment, CRP can take many forms, ranging from overt or outright confrontation to very subtle differences in treatment, often manifested in forms of harassment. Overt confrontation includes verbal attacks, such as shouting racial epithets, and physical attacks, such as removing customers from the store. Customer harassment includes slow or rude service, required prepayment, surveillance, searches of belongings, and neglect, such as refusing to serve African-American customers.

Although individual CRP incidents may appear benign, consumer discrimination is pervasive, affecting most-if not all-people of color on a regular basis.

ld. at 2-4, 55 (citations and footnotes omitted). Harris cited specific cases of various forms of consumer discrimination, filed against many well-known businesses:

- Footaction (refusal to help Spanish-speaking family)
- Eddie Bauer (false imprisonment for shoplifting)
- Dillard Department Stores (refusal to honor coupon; search of belongings)
- Denny’s Restaurants (refusal to seat and/or serve African Americans; requiring prepayment of meals, cover charge, and presentation of identification before service; denial of promotional meals; forcible removal)
- Cloverland Farms Dairy (verbal and physical attack)
- Wal-Mart Stores (removal)
- Shell Oil (pre-payment requirement for black customers)
- Hillcrest Foods (refusal to serve African Americans)
- Waffle House (refusal to serve African Americans)
- Shoney’s (corporate policy of racial discrimination against customers and employees)
- Key Bank (restriction of credit and seizure of assets without notice)
- Hyatt (denial of access to Spanish-speaking visitors)
- Dave and Busters (hostile treatment)
- Pizza Hut (withholding full amenities of service offered to white customers)

ld. at 2 n.2, 3 nn.7-9, 4 nn.13-16, 8 n.33, 18 n.90, 42 n.195, 43 n.201, 46 nn.217-18 & 221. The particular case against Cracker Barrel Old Country Store, Inc. was brought by “the National Association for the Advancement of Colored People (NAACP) and forty-two African-American, West Indian-American, and white individuals.” ld. at 15. They claimed that “Cracker Barrel denied, or effectively denied, service to . . . [s]eated . . . in a segregated area, . . . [and] allowed white servers to refuse service to . . . African-American customers and their non-African-American associates; and required [them] to wait longer to be seated or served than white customers not in the company of African Americans.” ld. at 16 (citation omitted).

49. See, e.g., Gurin, supra note 23, app. E, available at http://www.vpcomm.umich.edu/admissions/legal/expert/gurintoc.html (“White students come from the most segregated backgrounds and hence have the most to learn from the racial/ethnic diversity they find at Michigan. Ninety-two percent of Michigan’s white students grew up in neighborhoods that were predominantly white.”); Pidot, supra note
Ironically, by specifically recruiting for the victim-perspective, the Law School itself re-victimizes the recruited student under a discriminatory policy – creating an enhanced educational experience intended for the benefit of a select group – by exploiting the student’s victim-status as a teaching tool. Although Professor Lempert recognized that “Asians and Jews [as groups] have [also] experienced discrimination,” there is no mention of their contribution to the learning of fellow students by way of their victim-perspective, despite their admission “to the Law School in significant numbers.”

While some racial minority students are recruited on the basis of the ostensible “victimized viewpoint,” Professor Lempert failed to reconcile why such targeting should take place when the victim-perspective is presumably well represented in each admitted class, by Asians and Jews.

What makes the rationale behind the admissions policy (and not necessarily the policy itself) exploitative is the expectation that underrepresented students of color from groups which have been historically discriminated against, will necessarily bring a perspective of victimization to the Law School, and that the value in this perspective is as a counterpoint to a non-victimized racial perspective of white students. The result is a Court-approved admissions strategy that seeks to admit racial minority applicants in order to bring different viewpoints to the Law School. Yet in order to comply with the Court’s holding, racial minority applicants may only be recruited by first selecting for other traits besides race. In other words, while race is believed (by the Court and the Law School) to be a legitimate proxy for viewpoint diversity, race-neutral traits are required proxies to achieve racial diversity. However, “[r]acial diversity is not required to foster a full discussion of issues and viewpoints in the classroom,’ nor does it guarantee such a result.”

23, at 766 (“Whites, particularly youth, are unlikely to have any sustained or serious contact with African Americans, Hispanics, or Native Americans.”); see also Tim Wise, Motive and Opportunity: Power, Prejudice, and the Uniqueness of White Racism, ZNET Daily Commentary 1, 2 (Feb. 17, 2001), available at http://www.uccs.edu--wpc-files-motive.pdf. Wise explained how Whites have resources available to them to avoid interactions with people of color:

Even if people of color despise whites and seek to avoid us, their ability to do so will be directly constrained by the larger opportunity structure that has skewed power and resources in our direction. Whites seeking to avoid blacks and Latinos on the other hand, can do so readily, with the help of mortgage discrimination, redlining, zoning laws and so-called “market forces” pricing many blacks out of the better housing markets (even though we only got into those markets because of government subsidies and preferences, both private and public).

51. See Lawrence Blum, “I’m Not a Racist, But . . .”: The Moral Quandary of Race 103 (2002) (“This racial homogenizing leads us to overlook or accord insufficient weight to differences—for example, of family background, class position, profession, religion, gender, personal interests, region—within a racial group. Related to this, it invites stereotyping and overgeneralizing about other racial groups.”).
52. See infra Part II.
53. See generally Girardeau A. Spann, The Dark Side of Grutter, 21 CONST. COMMENT. 221, 233 (2004) (“The Court’s position is . . . constitutionally suspect, because it seems to be motivated by a desire to ensure that racial minorities continue to occupy their traditional social status as subordinate to whites. Despite the lofty rhetoric that is typically used to advocate it, there is nothing noble about contemporary race neutrality.”).
The only way the Law School can reliably meet its goal of achieving the desired brands of student diversity is to recruit different viewpoints to achieve viewpoint diversity, racial minority applicants to achieve racial diversity, etc. After all, applying the existential logic of Chief Justice Roberts, the way to achieve diversity on the basis of race is to diversify on the basis of race. To rely on proxies to create a racially diverse student body is to perpetuate the very stereotypes the Law School seeks to dispel. The Court’s approval of the Law School’s means (relying on and requiring proxies) as narrowly tailored to achieve the asserted compelling interest, is rooted in the stereotype that Whites and people of color maintain certain viewpoints linked to a racialized perspective.

Kent Syverud, who was on the faculty when the admissions policy was adopted, also testified on behalf of the respondent Law School, but rejected the stereotype of racially-linked viewpoints. “Syverud’s testimony indicated that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.” This begs the question: What is the benefit of this revelation to the minority student? “[T]he critical mass concept is one that, paradoxically, appears to prioritize white interests. In the Court’s view, admitting a critical mass of students of color is desirable primarily because critical mass breaks down stereotypes for those who believe that minorities espouse a monolithic viewpoint.” “[D]iminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers.”

Perhaps the most revealing of the Law School’s contradictory objectives behind its admissions plan are statements by then-Dean Jeffrey Lehman. On the one hand, in his testimony, Lehman “indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.” On the other hand, in an interview for an October 2000 broadcast of the CBS news program 60 Minutes, before Grutter made its way up to the Supreme Court, Lehman stated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.

Armstrong advocates a purely race-neutral admissions scheme, in order to avoid the exploitation of favored groups from “more tension, stigmatization, hostility, and discrimination” as a result of “preferential treatment.” This is a distinctly different view of the exploitation theory from the one offered by this article. While both camps identify potential exploitation of the targeted racial minority groups, this article advocates a more enlightened rationale to recruiting underrepresented students of color for their own sake, not for the educational benefit of others, and the other view advocates a meritocratic approach, all things being equal. Compare Daria Roithmayr, Tacking Left: A Radical Critique of Grutter, 21 Const. Comment. 191 (2004) (arguing that the Court in Grutter “focuses on the value that students of color add to the existing merit-admitted (and predominantly white) classroom”), with Grutter, 539 U.S. at 373 (Thomas, J., dissenting) (“[B]ecause of this policy all [admitted black students] are tarred as undeserving.”).
Court, Lehman told Ed Bradley:

When we teach our students about difficult issues such as whether it’s appropriate for police to be able to use race profiles when you stop people in traffic stops, when we ask our students whether it’s appropriate to decriminalize crack cocaine, the discussion, the analysis, the learning that takes place is better in a racially diverse classroom.\(^6\)

If minority students were never intended to be spokespersons for their race, what difference would it make if there was one or two, or a numerical critical mass of minority students in that hypothetical Criminal Procedure class? Or maybe that was an actual class, where the professor looked to elicit the “minority viewpoint” that, according to Kent Syverud, does not exist.

\[B. \text{ The Expert Report: A False Positive from the “Gurin-alysis”}\]

The Expert Report of Patricia Gurin served as the foundation of the Law School’s argument that since racial diversity had been shown to result in positive educational outcomes, obtaining the educational benefits that flow from such diversity is a compelling interest.\(^6\) However, in order to determine “whether educational diversity is a ‘compelling interest’” the question of “whether, as a factual matter, a university’s stated interest in diversity is genuine,” must be answered based on “an elaboration of evidentiary criteria.”\(^6\)

1. Methodology

Gurin analyzed data from three different studies: (1) A sample of 9,316 college students at 184 schools, from a national survey database administered by the Cooperative Institutional Research Program (CIRP) and the UCLA Higher Education Research Institute; (2) a group of 1,321 students from a survey of undergraduates at the University of Michigan, from when they arrived as freshman to the end of their senior year at the university, known as the Michigan Student Study (MSS); and (3) a study of students enrolled in a program at the University of Michigan, specifically focusing on diversity issues, the Intergroup Relations, Community, and Conflict

\(^{62}\) Transcript of Interview by Ed Bradley with Jeffrey Lehman, Dean, University of Michigan School of Law, Negative About Affirmative Action?, for 60 Minutes (CBS News broadcast, Oct. 29, 2000), available at http://www.cir-usa.org/articles/64.html.

\(^{63}\) See Gurin, supra note 23; Pidot, supra note 23, at 763 (“The University’s case relied most heavily on a lengthy expert report filed by Michigan Professor of Psychology and Women’s Studies Patricia Gurin.”); Paul N. Courant, Provost, University of Michigan, Letter to the Editor: Racial Diversity Report of 1994 Wasn’t ’Hidden’, Wall St. J., June 9, 2003, available at http://www.vpcomm.umich.edu/admissions/statements/courant.html (arguing that the work of Patricia Gurin focused on “how actual experience with diversity affected students’ own educational outcomes” and that this relationship “is central to the issue of ‘compelling state interest’ before the Supreme Court”).

\(^{64}\) Goodwin Liu, Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test, 33 HARV. C.R.-C.L. L. REV. 381, 410 (1998). Liu poses another question in that calculus: “whether, as a substantive matter, diversity is sufficiently important to justify the use of race.” He classifies this question as requiring a “policy argument,” which has been answered affirmatively by the Court in Grutter.
The Gurin Report measured "learning outcomes" and "democracy outcomes" along two types of diversity experiences: classroom and informal interactional. Gurin also measured "structural diversity" to assess any impact on the two types of diversity experiences, and found that the higher the percentage of minority student enrollment, the greater the likelihood of opportunities to interact between the races, with no demonstrable link to academic benefits per se.

In reviewing the Expert Report’s findings, critical research decisions in Gurin’s methods of analysis of the data collected from the three studies must be examined when evaluating the validity of the report’s conclusions. Although “[t]he data were not collected specifically for th[e] litigation,” Gurin’s analyses were “developed specifically for this [purpose].” In her analyses of the three independent studies, Gurin processed student responses to disparate questionnaires to gauge the predicted influence of diversity experiences on personal and academic development.

Gurin did not analyze data for all student respondents from each of the three studies. The students whom she did sample were overwhelmingly White: the MSS survey included 1,134 white students and only 187 African American students, and the IGRCC study consisted of 85 percent white students. The final count of sampled students from the CIRP dataset was 9,316 students in a 1994 follow-up survey, of the student data from those who answered a questionnaire in 1985 as entering students and who were also surveyed as fourth-year students in 1989. Gurin and colleagues replicated the analyses on the 9,316-student dataset for the same three time periods (1985, 1989 and 1994), but on 11,383 students (with the same data used from the larger CIRP national study database). These findings, which confirmed Gurin’s conclusions in the Expert Report, were published in 2002.

66. Id. at 383. Gurin measured “learning outcomes” in terms of:
   * growth in active thinking processes that reflect a more complex, less automatic mode of thought
   * engagement and motivation
   * learning of a broad range of intellectual and academic skills
   * value placed on these skills in the post-college years
She measured “democracy outcomes” in terms of:
   * citizenship engagement
   * racial/cultural engagement
   * compatibility of differences
67. Id. at 384-88.
68. Id. at 378, 422.
69. Id. at 378-84 (“[N]ot all of the elements [of the research approach] were available in each of the three sets of studies. Although the studies were designed to be as parallel as possible, differences in questions asked and in research design made identical analyses impossible.”).
71. Id.
72. Id. at 425 n.2.
and submitted as part of an amicus curiae brief to the Supreme Court in support of the respondents.\[^{75}\] In this second analysis of essentially the same data, Gurin et al. published the racial composition: "216 African American, 496 Asian American, 206 Latino/a, and 10,465 White students."\[^{76}\]

The lopsided racial composition of these samples can only serve to distort any findings with respect to measured outcomes for the non-white students, when the dataset is taken as a whole to draw conclusions about the influence of select variables of diversity. To account for this, Gurin applied two different standards of probability for statistical significance in her analyses: (1) when analyzing the "total or white student samples" the probability used was .05 (5%) and (2) when analyzing the samples for African American and Latino students the probability used was .10 (10%).\[^{77}\] For any link in the Expert Report between a diversity variable and a measured outcome considered to be statistically significant (or valid), there is a probability that the link (positive or negative) occurs merely due to chance, with no real correlation. The probabilities used by Gurin mean that for white students, the acceptable random chance was within 1 in 20, and for Latino and African American students, that chance was within 1 in 10.\[^{78}\] When the analyses were for students in general, the white student standard was applied.\[^{79}\]

Gurin's decision to use a 10% probability for students of color compromised the reliability of her findings for Latino and African American students.\[^{80}\] The probability of a random occurrence is too high for any definitive

---

\[^{75}\] Id. at 330; Brief Amicus Curiae of the American Psychological Association in Support of Respondents in Grutter v. Bollinger & Gratz v. Bollinger, Nos. 02-241 & 02-516.

\[^{76}\] Gurin et al., supra note 74, at 330. Gurin et al. offer no explanation for resampling from the CIRP dataset and give no reason for publishing the racial makeup of the second sample, when the same information for the first sample was not made available. But see FRANKLIN M. FISHER, Statisticians, Econometricians, and Adversary Proceedings, in STATISTICS IN THE LAW 20, 24 (Joseph B. Kadane ed., 2008). Fisher described the protocol when reanalyzing the same dataset:

> [T]he statistician may have the luxury of sufficient data with which to explore different possibilities while reserving other data for confirmatory testing. . . . Writing the alternatives thought most plausible in advance becomes part of the necessary practice of creating a retrievable record of what decisions were taken and the reasons for them. When data are used for exploration, the reasons for changing or abandoning a model and for following up or not following up some alternative must be set forth.

\[^{77}\] Id. at 425 n.1.

\[^{78}\] Id. at 425 n.1.

\[^{79}\] See Statistical Assessment Service, http://stats.org/faq_significance.htm (last visited May 2, 2010). The Statistical Assessment Service provides a clear reason not to use a probability of ten percent:

> Measuring the likelihood that an event occurs by chance . . . is the idea behind "statistical significance." If there is, at most, a 5 percent chance of two events would happen [sic] together by coincidence, we may legitimately infer that there is a reason that the events occurred together. . . . Such results are called statistically significant. If the chance of occurring randomly is not small, the possibility that the events occurred together just by luck is too high to dismiss, and we conclude nothing. Small is relative, but many scientific disciplines use 5 percent (.05) as the border between small and not small. The 5 percent line is arbitrary, but has become standard in the field of biomedical research; statistical significance is the golden measuring stick for evaluating data. Why 5 percent and not ten?
conclusion of a link between select diversity variables and learning or democracy outcomes. “The cutoff probability used in most industrial and scientific applications is 5%.”81 Aside from explaining that “probability levels are related to sample size,” Gurin mentioned no particular science or math behind her specific choice of probability.82 She did mention however, that “[w]hereas in baseball a tie always goes to the runner, in these analyses a ‘tie’ always goes against the diversity explanation.”83 It would not be overstating her research integrity, except that she has an oversimplified definition of a “tie.” While she stated what happens in a statistical tie between diversity and non-diversity variables linked to a particular outcome, Gurin vitiates the “tie” effect for students of color as compared to white students, by allowing for twice the chance for irrelevance in identified correlations for Latinos and African Americans, possibly overstating positive relationships. At the same time, she applied the generally accepted probability level (5%) when analyzing data for Whites, for more accurate results. Moreover, given the two different standards, it would be more statistically accurate for Gurin to use a probability between .05 and .10 when analyzing the general student sample, accounting for both levels of chance. Instead, by using the white-student standard for analyzing correlations on all the students, the Expert Report standardizes the white student’s experience with diversity as the one that really matters.

The Expert Report’s results are even murkier for Latino students than for African American students. For starters, “[t]he MSS analyses do not include Latino/a students because their numbers at the University of Michigan [were] not large enough to permit reliable results in the regression analyses.”84 Without such analysis, there is no valid way to represent the experience of Latinos with diversity at the University of Michigan, over time and across different activities on campus. It should be self-evident that no valid proxy exists for this group’s missing analysis—not the same data for African American students, nor for white students. More troubling however, are data collection techniques in the CIRP study. The questionnaire used in the survey at the starting point of the subset of longitudinal data analyzed in the Expert Report, asked the first-year college students in 1985 to identify their race according to one of the following categories: White, Black, American Indian, Asian-American, Mexican-American, Puerto Rican-American, or other.85 This leaves out a significant group of students with ancestral roots in Central

---

If \( p \) had been .1, then \( .1 \times 100 \) there would be a 10 percent chance that by choosing a random sample of people [associated with a given variable] we would see [an observed] benefit, even though there really isn’t one in the whole population. Since this is not so unlikely, we would have less confidence that the [variable] played a role, and the result would be inconclusive. It does not mean that the [variable] does not [have an effect], but that it has not been proven to [have an effect].

For the sake of having a standard of some kind, scientists have agreed on \( p = .05 \).

83. Id. at 379.
84. Id. at 425 n.3.
85. Inter-University Consortium for Political and Social Research, Cooperative Institutional Research Program (CIRP) [United States]: Freshman Survey, 1985 (1st ICPSR Ver. 2003), available at
and South America, for whom "other" may not have been an obvious (or sufficiently delineated) option. Without a way of knowing which category, if any, they selected on the questionnaire, the Expert Report's analyses of CIRP study data for Latinos are less statistical than they are anecdotal.

The way Native American students experience diversity was not discussed in the Expert Report, and remains unexamined by the Law School and the Court. Although collected in the three studies, none of their data was separately analyzed, probably due to low relative enrollment across the board. But without explaining this, any diversity correlations for Native American students appear to be impliedly reflected in the composite results for students of color. For instance, the MSS "focus was not only on the attitudes and experiences of students of color (Asian American, Latino/Hispanic, African American and Native American students) but on the contribution of diversity to the broader intellectual experiences of White students as well." However, "[c]ontemporary Indian citizens and tribes are richly diverse in background and experience with differing historical and legal relationships with the United States." No other group is more underrepresented in the Expert Report's findings than Asian American students. These students were represented in the numerical and anecdotal data for the individual studies, but not in a single regression analysis of the collective data for Gurin's report. Moreover, Asian American students were included in every analysis of exposure to variables of diversity, whether in the classroom or by "informal interactional" encounters, as well as in the measures of "structural diversity," described as "the degree to which students of color are represented in the student body of a college."

While the use of statistics for Asian American students were crucial for linking exposure to racial diversity with outcomes for other groups, their own experiences with diversity were silenced. Gurin's neglect to individually analyze this group cannot be for the same reason Native American students were not analyzed, since response numbers for Asian American students in the individual studies would reach statistical significance when compared to the analyzed racial groups. In fact, Gurin offers no explanation for the exclusion of Asian American students from her analyses. Gurin et al. however, did specifically include Asian


86. See Lerner & Nagai, supra note 73, at 24.
87. See, e.g., John Matlock et al., The Michigan Student Study: Students' Expectations of and Experiences with Racial/Ethnic Diversity 6 (1994), available at http://www.icpsr.umich.edu/ cocoons/ICPSR/STUDY/04027.xml ("[T]he number of Native American students in our survey cohort is too small to present reliable estimates for these comparative analyses, and thus have [sic] not been included here.").
89. Rennard Strickland, Knight Prof. of Law, Univ. of Or., Life Ain't Like In the Movies: Or Ten Things Candidates (and the rest of us) Need to Understand About Twenty-First Century Native American People and Policy, Address at the Univ. of Miami Presidential Debate Issues Forum (Mar. 9, 2004).
91. See Lerner & Nagai, supra note 73, at 35.
American students in their analyses published in 2002, which revealed mixed results for this group, but consistent positive effects of diversity for white students (essentially replicating the Expert Report's findings for Whites versus students of color). As an integral part of the diversity calculus, and the only racial minority

92. Perhaps this was done in response to criticism of her methodology in the 1999 Expert Report. See Gurin et al., supra note 74, at 330 ("[E]ducators have been challenged to articulate clearly the educational purposes and benefits of diversity."). But see James H. Kuklinski, Review: The Scientific Study of Campus Diversity and Students' Educational Outcomes, 70 Pub. Op. Q. 99, 119 (2006) ("Assuming that Gurin et al. have set the standard for research on campus diversity, should future investigators willingly accept it? No. Scholars must raise the standard . . . . Part of this task entails addressing the weaknesses identified . . . . Until this happens, declaring campus diversity a success or failure will be premature.").

93. Gurin et al., supra note 74, at 330. In the second analysis of data from the CIRP national study, Gurin et al. found mixed results for Asian American students:

We conducted regression analyses on the multi-institutional CIRP data to explore the relationships between two types of diversity (classroom and informal interactional diversity) and the four dependent variables (intellectual engagement, academic skills, citizenship engagement, and racial/cultural engagement). Separate regressions were fit for African American, Asian American, Latino/a, and White students in the national study. Regressions were also conducted on the MSS data to explore the relationships between three types of diversity experiences (interactional diversity, classroom diversity, and events/dialogues) and the five dependent variables (active thinking, intellectual engagement, compatibility of differences, perspective-taking, and racial/cultural engagement). Again, separate regressions were run for three student groups in the MSS: African American, Asian American, and White.

In the national study, the effects of classroom diversity disappeared for Asian American students when we examined the net effect, controlling for the simultaneous effect of informal interaction.

In the Michigan study, all three kinds of diversity experiences were influential for at least one of the groups, and for at least one measure of learning outcomes. This may simply indicate that students of color respond differently to opportunities for diversity experiences and have distinct interaction patterns that affect different outcomes. The most consistent effects were found for White students. All three kinds of diversity experiences were significantly related to higher levels of active thinking scores in the senior year, controlling for levels of active thinking in the freshman year among White students. In addition, both classroom diversity and events/dialogues were significantly related to intellectual engagement for this group. The results show clearly that the largest effects came from campus-facilitated diversity activities, namely classroom diversity and multicultural events, and intergroup dialogues held on campus (the dialogues facilitate interaction among an equal number of diverse peers). For Asian American students, classroom diversity also fostered both of the learning outcomes.

In the national study, informal interactional diversity was significantly related to both citizenship engagement and racial/cultural engagement for all four groups. This was also true of the effect of classroom diversity on democracy outcomes for White students. In contrast, the effects of classroom diversity were more group-specific for students of color and, on the whole, classroom diversity had less consistent effects for these students.

In the Michigan study all three types of diversity experiences had significant positive effects on the compatibility of difference and the racial/cultural engagement outcomes for White students. White students who had the greatest amount of informal interactional diversity and experience with diversity in the classroom most frequently believed that difference is compatible with democracy.
group who “have experienced discrimination” yet are excluded from affirmative action consideration at the Law School, Asian Americans occupy a precarious position within Grutter’s diversity rationale. Although the University of Michigan

and were the most engaged with racial/cultural issues. These two diversity experiences also significantly affected White students’ perspective-taking.

For African American and Asian American students in the Michigan study, the impact of the three diversity experiences was less consistent.

Id. at 346-49.

94. Grutter, 539 U.S. at 319; see Stacey J. Lee & Kevin K. Kumashiro, A Report on the Status of Asian Americans and Pacific Islanders in Education: Beyond the “Model Minority” Stereotype xi-xii (2005), available at http://www.nea.org/assets/docs/mfaapireport.pdf. Lee and Kumashiro present findings that debunk the image of Asian Americans as successful overachievers, which obscures the social, economic and educational challenges faced by members of this group:

According to the model minority stereotype, Asian Americans have achieved academic, social, and economic success through hard work and adherence to Asian cultural norms. Asian American students are depicted as valedictorians, violin prodigies, and computer geniuses. Unlike many racial stereotypes, the model minority designation seems at first to be flattering and even positive. A closer examination, however, reveals its damaging effects for both Asian American and Pacific Islander students and for other students of color. The model minority stereotype hides the diverse and complex experiences of Asian American and Pacific Islander students. It erases significant differences related to ethnicity, social class, language, generation, history, gender, sexual orientation, disability, religion, immigration status, and region. It obscures the fact that some AAPI students are not doing well in school. AAPIs, for example, are almost two times as likely to have less than a 9th grade education than whites.

The model minority stereotype also diverts attention away from the racial inequities faced by Asian Americans and Pacific Islanders. It suggests that AAPIs have overcome racial barriers to achieve success. Furthermore, the stereotype has been used as a political weapon against other marginalized groups of color. Critics of the model minority stereotype point out that the model minority stereotype gained widespread popularity during the Civil Rights Era of the 1960s in order to silence charges of racial inequality. The supposed success of Chinese and Japanese Americans during this period was used as evidence that equal opportunity existed for all races. African Americans and other people of color were implicitly told that they should emulate Asian Americans.

The model minority stereotype has a profound impact on how educators and educational policy makers view Asian American and Pacific Islander students. It influences what they do and do not do to serve AAPI students. In particular, aggregate data on AAPI students appear to confirm the model minority image, and educational policy makers who rely on such data often fail to create policies that attend to the needs of AAPI students or fail to intervene when problems arise.

Teachers and other education professionals in schools also commonly evaluate Asian American and Pacific Islander students according to the standards of the model minority. Students able to live up to the standards are held up as examples for others to follow, and those unable to meet them are deemed failures or substandard for their race. In general, the model minority stereotype leads educators to overlook the unique educational needs of AAPI students.

(footnotes omitted); Harold Hongju Koh, Dean, Yale Law School, Yellow In a White World, 2004 Yung Wing Lecture (Oct. 1, 2004). Dean Koh drew parallels between the history of struggle for Asians and the plight of Haitian refugees helped by his clinic students in seeking asylum:

Do you mean to say that in the Haitian exclusion, you don’t see the Chinese exclusion? In the Haitian internment, you don’t see the Japanese internment? In
School of Law does not include "Asians" in the admissions policy at issue, Gurin nonetheless should have conducted and published the analysis for these students in the original Expert Report, in order to test her hypothesis of "significant benefits for all students." In 2004, citing Grutter, the Ninth Circuit Court of Appeals upheld a law school's inclusion of Asian American students for affirmative action consideration.

2. Findings

At best, Gurin's findings were mixed; at worst, they showed an appreciable benefit to white students as compared with minimal benefit and some detriment for students of color. If there is any consistency in the Expert Report's findings, it is

the Haitian boat people, you don't see the Vietnamese boat people? In the Haitian refugees, don't you see Cambodian refugees? In the quest for Haitian democracy, don't you see Korean democracy? If you don't see the principle, then you don't understand the point--that maybe we all came in different boats, but we're all in the same boat now.

95. See Smith v. Univ. of Wash., 392 F.3d 367, 378 n.8 (9th Cir. 2004) ("We use the Law School's 'Asian American' terminology, but note that this group included nationals of other, Asian countries as well as American nationals.").


97. Smith, 392 F.3d at 367. The opinion explained why even under Grutter, a law school could admit Asians and Asian Americans under affirmative action:

This argument suffers from several problems. As an initial matter, it assumes that the category "Asian American" is homogenous. In reality, applicants whose families or who themselves originated from the Philippines, Viet Nam, Cambodia, Taiwan and the People's Republic of China -- to name a few countries of origin from which the Law School specifically sought applicants -- have different cultures, backgrounds and languages, and thus would bring different experiences to the educational environment.

For the same reasons, we reject the plaintiffs' broader contention that the Law School failed to demonstrate "why the benefits of diversity required such a high proportion of the class to be racial and ethnic minorities." The combined total of the racial and ethnic minorities is well within the critical mass deemed acceptable in Grutter, where UMLS provided a plus only to African Americans, Native Americans and Hispanics.

We note that the Law School estimated that if race had been eliminated as a factor in admission, and if application and enrollment rates had remained the same, entering classes would have been 1 to 3 percent Hispanic (2 to 5 students), 0 to 2 percent African American (0 to 3 students), 0 to 1 percent Native American (0 to 2 students) and 0 to 1 percent Filipino (0 to 2 students).

In sum, the Law School program was not unconstitutional simply because Asian Americans might have comprised 7 to 9 percent of the class in the relevant years in the absence of a racial or ethnic plus. Grutter explicitly refrained from setting a cap on what could constitute a critical mass, and we defer to the Law School's educational decision to award a racial or ethnic plus to Asian Americans in order to enroll a sufficiently large and diverse group of Asian Americans.

Id. at 378, 379 nn.10-11, 379 (citation omitted).

98. Gurin, supra note 23, at 388-91, 399-401, 409-10, 420-21; see also Pidot, supra note 23, at 775 ("While she demonstrates consistent (yet small) positive impacts for white students, diversity experiences appear to correlate negatively with some of her outcomes for students of color.").
that the majority of white students benefited in both learning and democracy outcomes with an increase in racial diversity experiences, in and out of the classroom.\footnote{Gurin, supra note 23, at 388-408; see also Pidot, supra note 23, at 774. The percentage of regression models tested with positive correlations for white students:

- learning outcomes – enrollment in an ethnic studies class = 62%
- learning outcomes – informal interactional diversity = nearly 69%
- democracy outcomes – enrollment in an ethnic studies class = nearly 99%
- democracy outcomes – informal interactional diversity = nearly 91%}

According to the Expert Report, the results for learning outcomes linked to experiences with diversity “are especially impressive for white students.”\footnote{Id.} “Virtually all of the relationships between classroom diversity and learning outcomes, and between informal interactional diversity and learning outcomes, in the CIRP and IRGCC [sic] studies were positive and significant.”\footnote{Id.} “Almost half of the relationships in the MSS were also positive and significant, and none was negative.”\footnote{Id.} “White students with the most experience with diversity during college demonstrated the greatest growth in active thinking processes as indicated by increased scores on the measures of complex thinking and social/historical thinking (confirmed in the MSS and IRGCC [sic] studies).”\footnote{Id.}

The results for democracy outcomes linked to experiences with diversity are also especially salient for white students. “Virtually all types of racial/ethnic diversity experiences in college had a positive influence on white students [sic] citizenship engagement and racial/cultural engagement four years and nine years after college entry.”\footnote{Id.} “Classroom diversity was associated with every form of citizenship engagement and racial/cultural engagement among white students (confirmed in all three studies . . .).”\footnote{Id.} “[W]hite students who had [informal interactions with diverse peers] demonstrated greater understanding that group differences are compatible with societal unity (confirmed in both Michigan studies), greater citizenship engagement (confirmed in all three studies), and greater racial/cultural engagement (confirmed in CIRP and MSS studies).”\footnote{Id.}

The results for African American and Latino students are mixed, with only a modest benefit for a minority of these students, and some negative correlation for both racial groups, with an increase in racial diversity experiences.\footnote{Id.} Despite some

---

99. Gurin, supra note 23, at 388-408; see also Pidot, supra note 23, at 774. The percentage of regression models tested with positive correlations for white students:

- learning outcomes – enrollment in an ethnic studies class = 62%
- learning outcomes – informal interactional diversity = nearly 69%
- democracy outcomes – enrollment in an ethnic studies class = nearly 99%
- democracy outcomes – informal interactional diversity = nearly 91%

100. Gurin, supra note 23, at 389.
101. Id.
102. Id.
103. Id.
104. Id. at 399.
105. Id.
106. Id.
107. Id. at 389-98, 400-08; see also Pidot, supra note 23, at 775-76. The percentage of regression models tested with positive correlations for African American students:

- learning outcomes – informal interactional diversity = nearly 17%
- democracy outcomes – enrollment in an ethnic studies class = nearly 14%
- democracy outcomes – informal interactional diversity = 28%

The percentage of regression models tested with positive correlations for Latino students:

- learning outcomes – enrollment in an ethnic studies class = nearly 26%
- learning outcomes – informal interactional diversity = 6%
- democracy outcomes – enrollment in an ethnic studies class = 23%
- democracy outcomes – informal interactional diversity = 20%
positive links between diversity and both learning and democracy outcomes, "[f]ewer effects were significant for African American and Latino students." 108

One significant result is a negative effect of classroom diversity for African American students, who "earned somewhat lower grades" when taking more diversity courses. 109 The opposite was observed for Latino students, whose grades improved with more diversity courses. 110 Gurin concluded "that these different results ... come from the ambiguity in the meaning of grades in various disciplines and schools." 111

More significant correlations were found for "interaction with diverse peers" than for classroom diversity, linked to "learning outcomes of African American students." 112 These interactions were also associated with "[a]n increased sense of commonality with other ethnic groups among white and African American students at the University of Michigan." 113 Gurin explained this weaker influence of classroom diversity on learning outcomes as "the importance of peer interaction but also probably reflect[ing] the fact that for African American students, classroom content on issues of race and ethnicity provides a less novel perspective." 114

In the CIRP study data on informal interactional diversity and learning outcomes for Latino students, the results were mixed over time. 115 After four years, "Writing [ability]" and "Creat[ing] artistic works (painting, sculpture, decorating, etc.)" were positively associated with informal interactional diversity, in two models and one model of regression respectively. 116 After nine years, "Writing [ability]" was linked to only one model in a positive way, but "Creat[ing] artistic works" along with "Writ[ing] original works (poems, novels, short stories, etc.)" were negatively linked to one model of regression: having close college friends of the same race. 117

The most controversial of Gurin's findings involves her analyses of positive outcomes related to "having close friends of the same race" for students of color. 118 The Expert Report concluded that "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." 119 However, Gurin also found that "[t]hose African American students whose close friends were also African American felt that education at Michigan had been more intellectually engaging." 120

This belies her generalized conclusion that exposure to racial diversity, including interactions with diverse peers, returns the highest intellectual growth for

108. Gurin, supra note 23, at 390; see also id. at 400.
109. Id. at 391.
110. Id.
111. Id.
112. Id. at 390.
113. Id. at 400.
114. Id. at 390.
115. Gurin, supra note 23, at 394, Table C2.
116. Id.
117. Id.
118. Id. at 390, 400.
119. Id. at 365.
120. Id. at 390.
all students. First of all, the negative effect of classroom diversity for African American students had to be reconciled by Gurin as a weaker influence of classroom diversity on learning outcomes for African Americans. Secondly, either Gurin counts close friendships of the same race as interactions with racially diverse peers, or she discounts the impact of these friendships in drawing her conclusion. To the extent that the former is true, no measure of benefits of exposure to racial diversity can legitimately include exposure to one’s own race.

It should be obvious that people of any given race are diverse in numerous ways, such as by class, geography, language, gender, religion, sexual orientation, national origin, immigration status, genealogy, occupation, hobbies, interests, and social and political views. While two people of the same race but from different backgrounds may mutually benefit by associating together, this would not be a benefit of exposure to racial diversity, since these associates would not be racially diverse from each other. If friendships between African American students can be included among racial diversity experiences, an all-White university could also be seen as part of a larger multiracial universe.

The only way same-race friendships could be deemed to confer a benefit flowing from racial diversity per se (as opposed to exposure to racial diversity) is if a multiracial environment is the accepted baseline. However, the Expert Report measures benefits of racial diversity from a baseline of a lack of racial diversity, or racial segregation. It relies on cross-racial encounters, allowing for same-race friendships between students of color, but not between white students, in order to draw a general conclusion about benefits of exposure to racial diversity.

Gurin’s examination of racial diversity experiences assumes White pervasiveness, and not multiracialism, as a starting point. As such, racial diversity counts only where white students have access to non-Whites. If Blacks happen to befriend other Blacks, and Latinos happen to befriend other Latinos, in that context, Gurin expects us to embrace these same-race friendships as part of the many benefits of exposure to racial diversity.

These are simply not experiences with racial diversity, unless we apply Gurin’s definition of “structural diversity” as “the degree to which students of color are represented in the student body of a college.” If this is Gurin’s operational meaning of “diversity,” then it would not matter that some students of color choose to interact with and befriend students of the same race while also experiencing the most intellectual growth, since these interactions would also register as interactions with racially diverse peers. If “diverse” is meant as the functional equivalent of “non-White,” then as long as there are some students of color for all students to interact with, diversity experiences could be measured.

Gurin also noted the importance of close friendships of the same race/ethnicity “for some democracy outcomes for students of color.” “Nine years after college entry, African American and Latino students who reported having close friends of the same racial/ethnic background during college tended to participate in community service because they wished to improve their community.”

122. Id. at 400.
123. Id.
American students who reported having close friends of the same race during college also reported growth in racial/cultural engagement after four years, and various citizenship engagement activities and values after nine years. However, the same caveat applies to democracy outcomes as to learning outcomes: no measure of benefits of exposure to racial diversity can legitimately include exposure to one's own race.

These findings militate against Grutter's diversity rationale, for some students of color along certain measures of learning and democracy outcomes. The full impact on educational benefits of African American students associating with and befriending other African Americans, cannot be sufficiently analyzed with the data Gurin sampled from the CIRP national study. Although Gurin concedes "that peer interaction must be considered in more complex ways for African American students," she made a conscious decision to exclude available data from historically black colleges and universities. This renders her analyses of the presence of students of color juxtaposed with the opportunities to interact with them, a one-sided view of obtaining benefits that flow from racial diversity, through the lens of white students.

3. The Court's Reliance on the Expert Report's Bias

The inherent bias of the Expert Report is the fact that Gurin defines "structural diversity" as "the degree to which students of color are represented in the student body of a college." The focus of this "numeric diversity [is] on the percentage enrollment of students of color" in general. By drawing conclusions about diversity based on a composite number of students of color, the privileged vantage point becomes that of white students.

If, for example, the racial classification chosen to analyze the educational impact of diversity was the percentage of Latinos compared to non-Latinos, the data would not yield much useful information about the experience of diversity for the individual racial groups in the non-Latino dataset. That is, if the exposure of white students to other non-Latinos (i.e. African Americans, Asian Americans, Native Americans and other Whites) was subsumed in the measure of the degree to which non-Latinos are represented in the student body, little data from that analysis would be useful for capturing the true impact of racial diversity on Whites (or other non-Latinos).

"There are better measures of diversity, called indices of dissimilarity, dispersion, or heterogeneity, that allow one to treat each racial or ethnic group as a separate component of the more complex measure." While all African American and some Latino students were analyzed separately from white students and each other, their respective numbers were of no consequence to Gurin, except when their

124. Id.
125. Id. at 390.
126. Id. at app. C ("Specifically, I excluded historically Black colleges and universities as well as community colleges from the analysis since I believe that both campus diversity issues and educational processes differ dramatically from those found at predominantly white four-year colleges and universities.").
127. Id. at 384.
129. Lerner & Nagai, supra note 73, at 14.
numbers were too low to be analyzed as a separate racial group. "Does it matter if there are more Asians, more Hispanics, or more blacks? Gurin’s measure is unable to inform us." The percentage approach, "used in much of the literature available to the courts in the University of Michigan cases, suggests that the diversity rationale predominantly concerns itself with the experience of white students interacting with the unfamiliar." Notwithstanding the weakness in Gurin’s research methodology, critiqued by her fellow social scientists, proof of the Law School’s bias lies in its reliance on its own expert’s findings of skewed benefits in favor of white students, to make the case for a compelling interest generally in student body diversity. The important point to bear in mind is that the Expert Report was used by the Law School as its strongest piece of evidence in the litigation, to make the argument for its compelling interest claim. By doing so, the Law School standardized the experience of white students as the only measure of educational benefits that matters.

Instead of addressing the question of “whether, as a factual matter, a university’s stated interest in diversity is genuine,” the majority of the Court in Grutter engaged in what amounted to an abdication of its judicial responsibilities on this question, holding that the Law School sufficiently established its compelling interest claim, which was founded on the suspect results of the Gurin Report. The opinion mentions the “searching judicial inquiry into the justification for such race-based measures” under strict scrutiny, in order to find a governmental compelling interest. Instead, the Court deferred to the “Law School’s educational judgment that such diversity is essential to its educational mission,” and announced that the Law School’s “good faith” would be “presumed.” The Court quoted Justice Powell in Bakke, and recognized “[t]he freedom of a university to make its own judgments as to education.” In a grand display of irony, the Court effectively “insulated” the Law School from an individualized review of its asserted compelling interest “in obtaining the educational benefits that flow from a diverse student body.”

130. Gurin, supra note 23, at 425 n.3.
131. Lerner & Nagai, supra note 73, at 14.
132. Pidot, supra note 23, at 766; see Gurin, supra note 23, at 365. Gurin described the benefit of interaction with unfamiliar situations, provided by a racially diverse student body:

Complex thinking occurs when people encounter a novel situation for which, by definition, they have no script, or when the environment demands more than their current scripts provide. Racial diversity in a college or university student body provides the very features that research has determined are central to producing the conscious mode of thought educators demand from their students.

134. Liu, supra note 64, at 410.
135. Grutter, 539 U.S. at 328.
136. Id. at 326 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).
137. Id. at 328-29 (citing Bakke, 438 U.S. at 318-19); see R. Richard Banks, The Benign-Invidious Asymmetry In Equal Protection Analysis, 31 HASTINGS CONST. L.Q. 573, 584 (2003) (“The diversity policy in Grutter was subject to an especially relaxed form of strict scrutiny.”).
139. Id. at 317, 334 (The Court’s narrow tailoring prong of strict scrutiny requires that any
C. Elementary Alternative

The University of Michigan School of Law crafted its compelling interest claim based on the Gurin Report’s findings, which showed racial diversity is a mixed bag for students of color but produces benefits for white students. The testimony of the representatives from the Law School revealed a latent objective to maximize educational benefits for its white students. Even if the Justices had “presumed” the “good faith” of the Law School, and failed to analyze the results of Patricia Gurin’s report carefully, approving the affirmative recruitment of underrepresented minority students in order to enhance the learning environment for “everyone,” inherently casts upon those students a pall of novelty, subjugation and ultimately, inferiority. This sentiment is best captured by the title of James Blumstein’s op-ed piece, Guess Who’s Coming To Study, a play on the title of the 1967 film, Guess Who’s Coming To Dinner, about a woman who introduces her black fiancé to her white parents by bringing him home for dinner. The Court’s approval of the Law School’s interest in ensuring racial diversity for this purpose, serves to objectify otherwise qualified students of color.

A more enlightened approach to promoting racial diversity in the student body, for the University of Michigan School of Law and the United States Supreme Court, can be learned from the example of an elementary school in Los Angeles, California. “The Corinne A. Seeds University Elementary School (“UES”), and its research and training mission is to help the State of California meet the needs of a dramatically changing public school population.” In Hunter ex rel. Brandt v. Regents of Univ. of Cal., the Ninth Circuit Court of Appeals in 1999, held that “California has a compelling interest in providing effective education to its diverse, multi-ethnic, public school population,” and “UES’s use of race/ethnicity in its admissions process is narrowly tailored” to meet that educational mission. In 2000, the Supreme Court denied certiorari, and let stand the constitutionality of the elementary school’s consideration of race and ethnicity, among several other factors of diversity, to create a dynamic learning environment that is representative of the community it serves.

The University of Michigan School of Law is halfway there. It already has race-conscious admissions plan subjects each applicant to an individualized assessment of “all pertinent elements of diversity,” and not “insular[e] the individual from comparison with all other candidates for the available seats.”.

140. James F. Blumstein, Op-Ed., Guess Who’s Coming To Study, Wall St. J., June 5, 2003. (“Michigan’s legal position ... rests on the benefits to nonminority students who receive a better education because there are more minority students in the milieu. ... Under the university’s theory, the education of black and Hispanic students is not an end in itself but instrumental to enhance educational experiences for white students.”).

141. GUESS WHO’S COMING TO DINNER (Columbia Pictures 1967); see SARAH PROJANSKY & KENT A. ONO, Strategic Whiteness as Cinematic Racial Politics, in WHITENESS: THE COMMUNICATION OF SOCIAL IDENTITY 149, 157 (Thomas K. Nakayama & Judith N. Martin eds., 1999) (“As the title implies, this film tells a story from, and invites the spectator who responds to the imperative ‘guess’ to take, the perspective of a white family, ultimately gathered around a dinner table.”).

142. Hunter ex rel. Brandt v. Regents of Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999), cert. denied, 531 U.S. 877 (2000).

143. Id. at 1062.

144. Id. at 1067.

an approved admissions program, which considers race as a "plus" factor among many other factors of diversity. The Court has accepted the Law School's method of achieving a racially diverse student body by enrolling "a critical mass of underrepresented minority students." It is the asserted compelling interest of the Law School that must be reformulated, and avoided by other schools.

One goal of this article is to examine how the articulated interest of "obtaining the educational benefits that flow from a diverse student body" is untenable, even according to the Court's own reasoning in Grutter. Quoting from Richmond v. J.A. Croson Co., the Court differentiated "'benign' or 'remedial'... classifications [from those that] are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." The Law School's articulated interest is predicated on enhanced educational benefits for white students, who otherwise may have only minimal personal interactions with students of color. The illegitimacy of the educational objective is in the priority placed on one group's experience at the subordination of other groups, in the cross-racial encounter. This policy violates the Equal Protection Clause by recruiting students with a motivation to not only preserve a racial imbalance (where "critical mass" represents a lower and upper limit), but also to exploit it.

The motivation for giving a minority student a seat in the entering class by way of the affirmative action plan, according to the articulated compelling interest, is to teach other students about this particular minority student's experience of being a member of an underrepresented racial group. This way of racially diversifying a school harms not only the incoming minority students, but also burdens the intended educational beneficiaries as well. The latter group learns early on that it should adopt a non-minority perspective in classroom discussions and informal interactions with minority students, in order to maximize the potential educational benefit

146. Grutter, 539 U.S. at 334.
147. Id. at 318.
148. Id. at 326-28.
149. Id. at 326 (quoting J.A. Croson Co., 488 U.S. at 493).
150. See Adeno Addis, The Concept of Critical Mass In Legal Discourse, 29 CARDOZO L. REV. 97, 139 (2007) (referring to Grutter, 539 U.S. at 378-86 (Rehnquist, Ch. J., dissenting)). Addis questioned the Court's different application of "critical mass" for different groups:

As to the issue of disparity in the number of students from underrepresented minority groups who were admitted under the theory of critical mass, the Chief Justice had reason to be suspicious about the validity of having different critical masses for the different groups. How can it be that the critical mass for African Americans is different from that for Hispanic Americans or for American Indians? Is the notion of critical mass simply being used as a code word for racial balancing. . . , reflecting the proportion of the various groups in the applicants' pool?

151. See id. at 137 n.176 ("Professor Richard Lempert, . . . who chaired the committee that drafted the . . . admissions policy 'testified that the "11% to 17%" figure, which is the range he believes constitutes critical mass, was omitted from the final version of the admissions policy because percentages were too rigid and could be misconstrued as a quota.'" (quoting Grutter, 137 F. Supp. 2d at 835)).

152. See Grutter, 539 U.S. at 318 ("At the height of the admissions season, [the Director of Admissions] would frequently consult the so-called 'daily reports' that kept track of the racial and ethnic composition of the class . . . . This was done, [he] testified, to ensure that a critical mass of underrepresented minority students would be reached . . . ."); see also id. at 389-92 (Kennedy, J., dissenting) (discussing the consistent narrow percentage range of minority student offers of admission and enrollment at the Law School).
flowing from the diversity-based exchanges. In other words, in the Law School's vision of a racially diverse student body, everyone plays a role in yielding the benefits of exposure to other racial groups. The Law School and the Supreme Court can and must do better than that.

"[O]ne cannot affirm another's presumed social value or worthiness of inclusion into a community without first investigating the conditions of the community that make inclusion possible." 153 For a truly inclusive community to exist at a school or other institution the dignity of people of color must be a factor in any consideration of an applicant's race. "If whites are to affirm the dignity of African Americans, a necessary precondition is that whites examine critically and self-consciously not only the effects of racial subordination on blacks, but the myriad ways in which the culture of subordination has distorted and disfigured majority society in general and white identities in particular."154

Taking the lead of that Los Angeles elementary school, perhaps the Law School should come up with a modified educational mission that embodies its goals for enrolling a diverse student body along multiple measures of diversity (viewpoint, race, etc.). Under one paradigm, the Law School may assert its interest in recruiting and educating students of diverse backgrounds in order to impart its unique educational philosophy of access and inclusion (or any other unique mission the Law School chooses) to as many different types of students as possible. After all, the Court itself made it clear that "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."155 Like the elementary school, the intrinsic value in all forms of diversity would be realized to enhance the learning environment for every student. The Court's deference to the Law School's educational judgment would sanction this approach, as long as the means of achieving diversity are essential to its educational mission.

D. Stigma

Social scientist Erving Goffman's description of "stigma" has been accepted by "virtually all social scientists," since he first published his book on the topic in 1963.157 R. A. Lenhardt adopted the definition that "stigmatized persons possess an attribute that is deeply discrediting and that they are viewed as less than fully human because of it."158 "Stigmatizing actions harm the individual in two ways: They inflict psychological injury by assaulting a person's self-respect and human dignity, and they brand the individual with a sign that signals her inferior status to others and designates her as an outcast."159
Critics of all types of affirmative action programs have argued that the stigma associated with preference-admitted students is harmful for three main reasons: (1) it exacts a demeaning and demoralizing psychological toll on these students, (2) they are unable to compete academically with their non-preference-admitted peers and so confirm stereotypes about their inferiority, and (3) students with the same preferred trait are seen by others as less-than-qualified regardless of whether affirmative action was a factor in their admission. The most vocal critic on the Court is Justice Thomas, who argued in dissent, “When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement.”

These arguments absolve the stigmatizing offender (the person or institution whose opinion concerns the critics) from culpability and appear to shift the focus onto the target of the stigmatized view. This occurred during the 2008 Democratic primary race for president, when former Democratic vice-presidential candidate Geraldine Ferraro offended many by crediting Barack Obama’s achievements to him being Black. Ferraro’s comments seemed to confirm Justice Thomas’ dissenting opinion. But with the spotlight on the tight race between Obama and Hillary Clinton, the focus was on what Ferraro said about Obama and not on why she said it, and on what basis; Ferraro simply resigned from Clinton’s campaign team following her remarks.

As to the three arguments about the harmful effects of stigma on preference-admitted students, the same critics do not apply these arguments to the (mostly white) students admitted under legacy-, celebrity- and donor-based preferences. Instead, they target race-conscious affirmative action programs, in the name of protecting vulnerable students of color from potential social stigma.

The first argument (demeaning and demoralizing psychological toll) takes for granted that students of color will have a diminished self-image due to affirmative action. But this argument fails because “stigma” only attaches as a secondary harm to institutionalized racism, if an admitted student of color actually internalizes “the idea that racial minorities are somehow inferior to Whites because of their skin color or heritage.” “There has, however, been no serious effort to show that [underrepresented minority students] do in fact suffer racial stigma because of affirmative action policies.” In contrast, a study undertaken by Onwuachi-Willig et al. on the Class of 2009 at seven public law schools, tested “how experiences of stigma and attitudes toward affirmative action varied between schools that did and did not have active affirmative action programs.” Although the findings “are not generalizable to all law schools,” the results revealed “no significant harms [of] internal stigma” (feeling inadequate) for students of color at

160. Lenhardt, supra note 157, at 902-04.
161. Grutter, 539 U.S. at 373 (Thomas, J., dissenting).
163. See GOLDEN, supra note 20.
164. Lenhardt, supra note 157, at 818.
165. Id. at 905.
166. Onwuachi-Willig et al., supra note 2, at 1304-05, 1330.
both affirmative action and non-affirmative action schools.167

The second argument (unable to compete academically) fails to connect a modest “gap in grades and test scores” with an actual experience of racial stigma.168 The discrepancy is suggested by opponents of affirmative action to be proof of “unsuitability for admission,” without linking this claim to any stigma.169

The third argument (seen by others as less-than-qualified regardless of whether affirmative action was a factor) falsely attributes the negative perception about students of color, to affirmative action. This argument makes Justice Thomas’ point that “because of this policy all are tarred as undeserving.”170 But there are “countless examples of situations in which the abilities or social status of racial minorities have been discounted or underestimated in the absence of preferential programs.”171 A study of the social atmosphere at the University of Michigan School of Law, published in 2001, found “that stigma felt by black and Latino students, to the extent it exists, is likely not the result of affirmative action . . . but of pre-existing, racially hostile climates” at the Law School and four “primary feeder undergraduate institutions.”172

The detrimental view towards students of color is rooted in encounters with everyday racism and not in the existence of affirmative action programs per se.

The experience of Eric Brooks, the only African American enrolled in his 1997 entering class of 270 students, at the University of California’s Boalt Hall School of Law, illustrates another possible cause of stigma.173 He was admitted before the law school’s affirmative action policy ended, but deferred his enrollment for one year, and started with the first year of students admitted without affirmative action.174 Despite his successes, which included his election as Third-Year Class President, Brooks “sense[d] that animosity, and not circumstance, created the situation” of him being the only African American student.175 According to Brooks, “I found it ironic that one of the arguments for the elimination of affirmative action was that it harmed minority students by stigmatizing them as inferior.”176 The environment created without an affirmative action policy was nonetheless alienating and possibly stigmatizing for Brooks, who mentioned that “[t]he isolation was severe.”177 “[B]ecause people had consciously closed the door to other people of color, I could not help but feel that those same people (who were not necessarily my

---

167. Id. at 1302, 1330.
168. Lenhardt, supra note 157, at 905.
169. Id. at 905.
170. Grutter, 539 U.S. at 373 (Thomas, J., dissenting).
171. Lenhardt, supra note 157, at 911 (citing Jennifer Crocker et al., Social Stigma, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 504, 517 (Gilbert et al. eds., 4th ed. 1998)).
174. Id. at 9.
175. Id.
176. Id.
177. Id. at 10; see Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 357 (D. Mass. 2003), aff’d, 418 F.3d 1 (1st Cir. 2005), abrogated by 551 U.S. 701 (2007) (presenting expert testimony from developmental psychologist, Melanie Killen, where “she cited studies describing a 20% figure below which members of a racial minority in a given setting feel isolated or stigmatized”).
classmates) did not want me there," Brooks wrote. The animosity sensed by Brooks was institutional in nature and not created by fellow students. It appears that if he experienced a stigma, it was of being made to feel unwelcome, and not of being seen by others as less-than-qualified — affirmative action was clearly not the culprit.

The harm suffered by students of color admitted under the Grutter Court's diversity rationale is directly created by the rationale itself and those who espouse it, and not necessarily by the admissions policy based on that rationale. At the Michigan Law School, the source of the stereotyping of students of color is the institutional bias supporting the diversity rationale. Whether or not white students actually benefit from the presence of students of color is beside the point; the harm comes from the Law School's views that students of color can benefit white students merely by being there, and that its affirmative action plan should include their recruitment for that reason. If fellow students adopt these views of students of color, they assume the role of the stigmatizing offender, yet none of the culpability. Rather, this type of racial stereotyping is a harm directed at students of color, where the burden should be borne by the offender and not blamed on the affirmative action policy itself.

"The argument for racial diversity cannot in the end rest only upon a university's choice to expose its students to a more colorful, more culturally diverse universe, or on a cost-benefit analysis of the need for an integrated elite in a soon-to-be majority non-white nation . . .". We can do better than objectifying students into their discreet components of diversity, and assigning to those traits an educational value in the academic marketplace. The strength of a school's academic reputation rests upon the enrichment of all of its students, not just the majority at the subordination of a few.

II. IF RACE 'PLUS' X = RACIAL DIVERSITY, SOLVE FOR X

The means approved by the majority of the Court, as narrowly tailored to achieve the law school's compelling interest, also warrants a closer look. The University of Michigan School of Law implemented its admissions plan by considering race as a factor in enrolling a "critical mass of underrepresented minority students," in order to achieve its goal of "obtaining the educational benefits that flow from a diverse student body." The Court held that the only way race could be considered a factor in admissions, would be after the Law School makes a "serious, good faith" attempt to use "race-neutral alternatives." While stating that "context matters when reviewing race-based governmental action under the Equal Protection Clause," the Court held that race may only be a "plus factor" among many other factors relating to diversity, within an individualized consideration of each applicant

179. Lenhardt, supra note 157, at 911 ("The question the Court should have taken up is not whether stigma attaches at some level, but whether the effects of racial stigma can be linked to Michigan Law School's admissions policy.").
182. Id. at 339.
in comparison with the rest of the applicant pool. 183

If enrolling a "critical mass of underrepresented minority students" is the approved means of achieving racial diversity in the student body, race is the only relevant factor for achieving such diversity, when considering an otherwise qualified applicant for admission to the Law School. 184 If so-called "race-neutral alternatives" are true alternatives, that is, where racial diversity remains the focus, use of the proxy of another desired diversity trait in each qualified applicant from an underrepresented racial minority group, in order to admit such an applicant, is under-inclusive and poses an undue burden upon each such applicant. Students of color must not only be black or brown and academically qualified, but must also play the piano, or be a star athlete, or have interesting work experience, in order to have the factor of their race considered towards achieving racial diversity. To the extent that "race-neutral alternatives" fail, that is, while racial diversity remains the compelling interest, but the focus shifts to race-neutrality or diversity based on a trait other than race, the use of the proxy is over-inclusive. 185 For example, racial diversity cannot be achieved by casting a wider net and incidentally recruiting bilingual white students by pursuing applicants who speak a language other than English. The fact that the Court approved a focus on race (the educational benefits derived from racial diversity), yet would not allow a focus on race to get there (race-neutral means must be attempted), reflects its reticent approval of the use of race.

III. 'NECESSARY' IS THE NEW TWENTY-FIVE

The controversy over race-based or race-conscious policies will not end with the twenty-five-year sunset expectation announced by Justice O'Connor at the end of the opinion. This statement that the Court "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today," was not grounded in any empirical data. 186 In fact, an assessment of the enrollment rates of underrepresented racial minority students reveals a disturbing trend downward. 187 Reports find societal inequalities between Whites and non-Whites persist, and that the racial divide has in fact, widened since the inception of government-sanctioned affirmative action programs. 188

---

183. Id. at 327, 334-35.
184. See Post, supra note 8, at 72 ("It does not seem that universities can assemble a critical mass of minority students unless race is the defining factor in a student's application, even if it is 'decisive' only at the margins."); see also Abigail Thernstrom & Stephan Thernstrom, Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education, 21 CONST. COMMENT. 251, 252-53 (2004) ("If race was in the mix, then race was inevitably decisive. . . . 'Admission . . . is what computer types call a 'binary' decision. It's yes or no. You're in or you're out. . . . The effect of any factor in that decision is also binary. It either changes the result or it doesn't.'" (quoting Michael Kinsley, Want Diversity? Think Fuzzy, WASH. POST, June 25, 2003, at A23)).
185. See Ian Ayres, Narrow Tailoring, 43 UCLA L. REV. 1781, 1784 (1996) ("The Court's preference for 'race-neutral means to increase minority participation' is inconsistent with narrow tailoring and may not be a less restrictive alternative than explicit racial classifications. Extending affirmative action subsidies to non-victim whites produces less-tailored, overinclusive programs.").
186. Grutter, 539 U.S. at 343.
188. See, e.g., The Eisenhower Foundation, What Together We Can Do: A Forty Year Update of the National Advisory Commission on Civil Disorders – Executive Summary. Preliminary Findings and
The almost whimsical announcement by Justice O'Connor, setting an arbitrary limit to such programs, serves no one's interests. Whether those students who benefit from exposure to racially diverse fellow students would no longer be assured of such benefit, or those underrepresented minority students who gain admission as a by-product of obtaining the educational benefits from a diverse student body would no longer be admitted, the twenty-five-year sunset expectation caps the Court's own approval of the narrowly tailored use of race. If a race-conscious approach to student body racial diversity is deemed necessary today, it should remain available even twenty-five years after the opinion.\textsuperscript{189} Since the Court determined that the Law School's admissions plan included merely a "flexible" consideration of race,\textsuperscript{190} there is no reason to judicially terminate such a program that would evolve with societal need. As long as student body racial diversity is a component of the compelling interest, the only logical means to assure such racial diversity is a race-based or race-conscious approach. Any other way would either be under-inclusive or over-inclusive, and therefore not narrowly tailored.

CONCLUSION

The University of Michigan School of Law made its case to the U.S. Supreme Court and won. The Law School's admissions policy was upheld, as narrowly tailored to achieve a compelling interest. The majority opinion relied heavily upon the social science studies presented by the respondent Law School and other amici. The most cited report was that of the university's own expert, Patricia Gurin. Unfortunately, her findings were inconclusive as to the benefits of diversity for students of color, but she found substantial positive correlations between diversity-based experiences and learning and democracy outcomes for white students. Based on these lopsided results, Gurin concluded generally that there are definite educational benefits that derive from interactions with racially diverse peers. In reality, aside from white students who would be provided with the opportunity for safe close-up interactions with a hand-picked multi-diverse crop of students of color, no one else stands to gain per se under the Law School's compelling interest and its Court-approved diversity rationale.\textsuperscript{191}

Those in academia, regardless of their position on the larger affirmative action issue, are left without a clear directive for recruiting students. The


\textsuperscript{189} See Vikram David Amar & Evan Caminker, \textit{Constitutional Sunsetting?: Justice O'Connor's Closing Comments In Grutter}, 30 HASTINGS CONST. L.Q. 541, 546 (2003) ("If race consciousness is permissible now, why not forever; and if not permissible later, why is it OK to use now? . . . [A]ssuming that the key facts remain unchanged, why should Justice O'Connor's or anyone else's reading or application of the Fourteenth Amendment change over the next 25 years?").

\textsuperscript{190} Grutter, 539 U.S. at 334.

\textsuperscript{191} See, e.g., Bryan K. Fair, \textit{No Matter Ruling, Victory Will Elude All in Cases on Affirmative Action}, B'HAM NEWS, June 22, 2003, at 1C.
requirement of attempting race-neutral alternatives before any consideration of race is allowed, makes the administration of an effective admissions plan that is also constitutional, extremely difficult.

Rejected applicants who perceive themselves, like the petitioner Barbara Grutter, to have been the innocent victims of "reverse discrimination," face an uphill battle in future litigation. Since admissions plans that are compliant with Grutter's requirements cannot actually say how much race is a factor, aggrieved white applicants who fail to gain admission will find it nearly impossible to make a case for racial discrimination.

Admitted students of color do not gain the enhanced educational benefit from diversity the way their white counterparts do, whether or not their offer of admission was partially a race-conscious decision. The Court in Grutter sanctioned the admission of students of color for the purpose of serving them up as live subjects of educational value to other (mostly white) students, thereby objectifying these otherwise qualified applicants. This is the (un)compelling interest for underrepresented minority students, whom the Michigan Law School's admissions policy had been purported to benefit. University of Alabama Professor of Law, Bryan K. Fair, described the lack of a clear benefit to students of color, resulting from the Court's opinion:

*Grutter* maintains the status quo primarily benefiting whites, and rests on an empty idea of equality. It accomplishes no substantive improvement in the elimination of educational caste. It does not open the schoolhouse door. *Grutter* treats all racial classifications as presumptively invidious, even those designed to restore people of color to the position they would have occupied absent so much discrimination favoring whites.

"[O]btaining the educational benefits that flow from a diverse student body" was determined by the Court to be the compelling interest of the Law School. For students of color, who are valued for the novelty their race presents to white students underexposed to racial diversity, the compelling interest provides little to no direct benefit. A more enlightened approach would replace the standardized perspective of any one group, by cultivating an environment where the intrinsic value in all forms of diversity would be realized, to enhance the educational experience of everyone.

---

