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### Diversity and the Practice of Interest Assessment

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## Essay

# DIVERSITY AND THE PRACTICE OF INTEREST ASSESSMENT

ROBERT F. NAGEL†

### INTRODUCTION

When enforcing the Constitution, courts frequently assess and even rank the importance of governmental interests.<sup>1</sup> The associated terminology—invidious, legitimate, important, substantial, compelling—is a familiar part of the doctrinal landscape. Despite some controversies about specifics, the practice itself is usually accepted as a normal, perhaps, unavoidable part of constitutional interpretation.<sup>2</sup> Most observers, then, take it for granted that the boundaries of governmental power should be located in a way that takes into account the importance of the state's regulatory purpose. As a result, there is often only a thin line between asking whether a law is constitutional and asking whether it is justified.

As congenial as this state of affairs may be to the pragmatic American mind, it is not inevitable. For instance, the Court's

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1. Among the provisions interpreted to require judicial inquiry into the validity and importance of the government's purpose are the Free Speech Clause, the religion clauses, the Takings Clause, the Due Process Clause, the Privileges and Immunities Clause of Article IV, the "dormant" Commerce Clause, and the Uniformity Clause of Article I, Section 8. Several representative doctrines are laid out in Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 166–68 nn.3–18 (1985).

2. One account describes the practice of taking social need into consideration when defining rights as one of America's "shared constitutional first principles." H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 205, 207 (2002).

determination that regulation of guns in public schools is beyond the commerce power rests on grounds that are entirely independent of whether it is a good thing to keep guns out of the hands of school children.<sup>3</sup> Nor is judicial inquiry into the importance of the governmental interest self-evidently desirable. Indeed, it is easy to characterize the practice in a way that is disturbing, at least to some sensibilities. Suppose that, rather than saying that Constitutional meaning takes into account the importance of state objectives, courts said that the importance of these objectives justifies something less than a full realization of the Constitution. A society given to reverence for “permanent” and “fundamental” constitutional values might be expected to object to open acknowledgement that the government can diminish or ignore constitutional requirements simply because legislators and judges think a violation warranted. No doubt this is why courts usually prefer to treat the importance of the governmental interest as a factor relevant to the meaning of the document rather than as a justification for making exceptions to that meaning.<sup>4</sup>

However, in upholding the University of Michigan Law School’s use of racial preferences in its admissions program, the Supreme Court in *Grutter v. Bollinger*<sup>5</sup> came very close to saying that the importance of the state’s interest justifies an exception to or a suspension of correct constitutional meaning.<sup>6</sup> Despite acknowledging that “there are serious problems of justice connected with the idea of [racial] preference”<sup>7</sup> and, indeed, that a “core purpose of the Fourteenth Amendment was to do away with all governmentally

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3. See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (basing its holding on the fact that “[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce”).

4. An extreme example is *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934), in which the Court relied on “a growing appreciation of public needs” to eviscerate the Contracts Clause even while insisting that “[e]mergency does not create power.” *Id.* at 442, 425. There are, however, some counterexamples. For instance, when first approving busing as a remedy for racially segregated schools, the Court observed that district courts would exceed their authority to remedy constitutional violations if they required bus rides that were so long as to threaten students’ health. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30–31 (1971).

5. 123 S. Ct. 2325, 2346 (2003).

6. See *id.* at 2346 (holding that “race-conscious admissions policies must be limited in time” because a “permanent justification for racial preferences would offend... equal protection”).

7. *Id.* at 2345 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978)).

imposed discrimination based on race,”<sup>8</sup> the majority concluded that the racial discrimination practiced by the law school was carefully aimed at achieving a compelling purpose, namely diversity. The Court therefore found no constitutional violation.<sup>9</sup> If in twenty-five years, as the Justices expected, the use of racial preferences becomes unnecessary to achieve “the interest approved [in *Grutter*],” the same racial discrimination will, it appears, become a constitutional violation.<sup>10</sup>

In this essay, I begin by discussing what it means to assert, as the Court did in *Grutter*, that the government’s interest in diversity is compelling. Before proceeding, I want to say a personal word about that topic, which I approach with considerable reluctance. This reluctance is based in part on my long-held sense that everything that can be said about affirmative action has been said many times over. It is also based on the knowledge that the subject of diversity in educational institutions is highly sensitive. Moreover, I am intimidated by the distance between the opposing positions on this issue. For most, the word “diversity” self-evidently encompasses large and noble goals—a “dream” as Justice O’Connor put it in *Grutter*.<sup>11</sup> But for some others, the whole idea is just as plainly hypocritical, empty, and pernicious. In my professional experience, the depth and power of this disagreement leads people to avoid the subject, a tendency that is encouraged by the fact that, in most universities, diversity programs are a solidly established fact of life. Consequently, although the word “diversity” and the issues it presents are widely and passionately discussed in journals and judicial opinions, I have seldom seen it seriously discussed in person among educators, even (or especially) while they are making real-life, professional judgments about admissions, curriculum, or hiring. So, for all these reasons, I enter this terrain reluctantly.

Nevertheless, inasmuch as the Supreme Court has declared that deference to educators’ judgments about the importance of diversity<sup>12</sup> justifies governmental preferences that are at odds with “a core purpose of the Fourteenth Amendment,”<sup>13</sup> those of us who have been

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8. *Id.* at 2346 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

9. *Id.* at 2347.

10. *Id.* at 2347.

11. *Id.* at 2341.

12. *Id.* at 2339.

13. See also *supra* text accompanying note 8 (quoting *Palmore*, 466 U.S. at 432).

reluctant ought to face up to the issue more than we have. This discussion, as I have stated, begins with my effort to understand what it means to say that diversity is a compelling purpose. It then proceeds to the more important question of what that understanding might reveal about the practice of interest assessment generally.

### I. ASSESSING DIVERSITY

Taken at face value, the *Grutter* Court's depiction of the values served by diversity in higher education is certainly attractive. Justice O'Connor's majority opinion began by adverting to Justice Powell's idea that judicial respect for educational judgments about how best to achieve "a robust exchange of ideas" is grounded in notions of academic freedom and free speech.<sup>14</sup> She then described the range of educational advantages achieved through a racially diverse student body. Not only is classroom discussion "livelier, more spirited, and simply more enlightening,"<sup>15</sup> but students learn about members of other races and, in the process, become skeptical of racial stereotypes. Justice O'Connor recognized these effects as important educational benefits in their own right. She also said that they prepare students for later interactions in "an increasingly diverse workforce and society."<sup>16</sup> Her opinion went on to underscore that the ability to operate in an interracial society is important to the functioning of major organizations, including businesses and the military.<sup>17</sup> Indeed, having people of diverse ethnicities participate in such organizations and in "civic life" more generally "is essential," according to Justice O'Connor if the dream of one Nation, indivisible, is to be realized.<sup>18</sup> This dream "of one Nation" is no idle abstraction, for the opinion went on to claim that the "legitimacy" of this Nation's social and governmental leadership requires that members of every race be represented in elite positions.<sup>19</sup>

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14. *Grutter*, 123 S. Ct. at 2336 (quoting Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (plurality opinion)).

15. *Id.* at 2340 (quoting App. to Pet. for Cert. at 244a).

16. *Id.* (quoting Brief of Amici Curiae American Educational Research Association et al. at 3).

17. *Id.* at 2340.

18. *Id.* at 2340-41.

19. *See id.* at 2341 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.").

Thus, diversity in higher education serves not only specific educational purposes but also some of the same political purposes that the Supreme Court has on occasion claimed for its own work. Diversity, like certain constitutional decisions of the Court,<sup>20</sup> is thought to stand as a bulwark against illegitimacy and fragmentation—or, put more affirmatively, as an embodiment of aspirations for a just society. Although the O'Connor opinion adhered to Justice Powell's earlier rejection of the claim that making up for a diffuse history of racial discrimination is adequate to justify racial preferences in higher education, it ended up embracing a more affirmative version of that goal. Society is not permitted to look back to correct a history of hatred and inequality, but it may look forward to the achievement of harmony, cohesion, and evident fairness.<sup>21</sup> How, one might ask, could anyone doubt that all this represents a compelling public purpose?

The answer, of course, is that critics do not take these purposes at face value. They begin by denying that these are the actual purposes of the affirmative action program at the Michigan Law School. As the *Grutter* dissenters pointed out, racial preferences at Michigan seem to have counted just about enough to generate admission rates equivalent to the percentages in the applicant pool and, therefore, to generate attendance rates close to the same proportion.<sup>22</sup> This proportion, the dissenters charged, bore no relationship to the laudable objectives asserted by the University. How could it be, for example, that a critical mass of 1 percent Native Americans reflected the number necessary to vitalize class discussions and break down discredited stereotypes, whereas 9 percent was the critical mass of African Americans necessary to achieve the same result?<sup>23</sup> Similarly, how could the necessity for lessons on how to interact with a particular race depend more on that race's proportion in the applicant pool than on its relative isolation in society or the degree of prejudice held against it? Although the goal of political

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20. See *Planned Parenthood v. Casey*, 505 U.S. 833, 865–69 (1992) (discussing the Court's role in preserving governmental legitimacy); *Texas v. Johnson*, 491 U.S. 397, 419 (1989) (discussing the Court's role in preserving loyalty and national unity).

21. This shift in perspective was proposed as early as 1986 by Kathleen M. Sullivan in Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

22. *Grutter*, 123 S.Ct. at 2368 (Rehnquist, C.J., dissenting).

23. See *id.* (reporting the admission rates for different each racial minority).

legitimacy might be achieved by (among other things) effective representation of the various races in leadership positions, effectiveness is not guaranteed by, or even necessarily related to, proportionality. More subtle preconditions for legitimacy—for example, Professor Robert Post's suggestion that a democratic culture requires leaders who can both represent and transcend racial groups<sup>24</sup>—have to do with attitudes and predispositions that, even if furthered in some subtle way through preferential admissions practices, are surely not related to proportionality. In short, the criticism is that the racial proportionality of programs like the one at the Michigan Law School reveals that they cannot, in fact, be aimed at their announced purposes.

Different critics see different purposes behind the design of affirmative action programs like Michigan's. One obvious possibility is that racial proportionality is a rough measure of what is necessary to redress a history of racial discrimination. Indeed, the objective of correcting prior injustices makes some sense of the goal of racial proportionality. At one time proponents of affirmative action forthrightly argued that members of disadvantaged races should be represented in the classroom, in social intercourse, and in leadership positions in roughly the same ratio as their percentage in the whole population because that is an approximation of the likely distribution that would have existed in the absence of a history of racial prejudice and discrimination.<sup>25</sup> At least arguably, the percentage of each race in the applicant pool may be the closest practical approximation of its percentage in the general population. However—so goes the argument—because the purpose of correcting historical inequities has been legally insufficient to justify racial preferences since 1977, when *Bakke* was decided, schools have had to conceal their true objectives.

This criticism has considerable power. There can be no doubt that many affirmative action programs were originally undertaken to compensate for past discrimination; indeed, there are still outspoken

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24. See Robert Post, *Introduction* to RACE AND REPRESENTATION: AFFIRMATIVE ACTION 13, 22 (Robert Post & Michael Rogin eds., 1998) ("Democracy . . . entails the perpetual process of reconciling the self-determination of autonomous wills with the *collective* self-determination of a polity.").

25. Justice Brennan went so far as to argue that it was reasonable to conclude that, but for pervasive racial discrimination, identified minority applicants would have been more qualified than Bakke himself for admission to the Davis Medical School even in the absence of that school's special admissions program. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 365–66 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).



voices in the academy insisting that this is their proper purpose.<sup>26</sup> That purpose would also explain why diversity proponents are intensely worried about racial imbalances but often seem unconcerned about the absence from the classroom of other kinds of groups. (If advocates of racial diversity have ever pushed for admission of a critical mass of pro-life students or religious fundamentalists or, for that matter, anarchists, I, like many other observers,<sup>27</sup> must have been absent that day.) The objective of making up for past discrimination would explain why, as I observed earlier, faculties devote so little time and attention to discussing or studying the actual effects of racial diversity on classroom discussion. And it also could help explain the anomaly that the diversity movement, along with its ideal of robust interchange, should have come into full flower during approximately the same period when many universities have undertaken strenuous efforts to sanitize discourse.

Still, even on the assumption that one main objective of most affirmative action admissions programs is the unspoken one of compensating for historical injustices, it does not follow that the articulated objectives are less than compelling. If for some reason it is true that correcting a history of racial discrimination is not a “compelling” purpose, the objective is not for that reason illegitimate. Programs motivated by remedial aims can also serve the kinds of purposes that the *Grutter* opinion endorsed. In fact, although it makes for some awkwardness and complexity, a program designed to achieve both a “compelling” purpose (like educational vigor) and a merely desirable purpose (like overcoming historical inequities) would seem, all other things being equal, not less but more justified than one unequivocally aimed only at a single compelling objective. If a governmental interest is truly important morally or politically, I

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26. See, e.g., SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* 46 (2003) (reporting Professor Jack Balkin’s views); Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 765 (1997) (calling “freedom fighting” the primary reason for seeking racial diversity in schools); James Boyd White, *What’s Wrong with Our Talk about Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1949 (2002) (describing “past or present deprivation, discrimination, or oppression” as the primary purpose for affirmative action).

27. See, e.g., LEVINSON, *supra* note 26, at 36–37, 47–48 (setting forth a variety of examples to show that “the arguments that universities offer with regard to ostensibly diversity-oriented admissions policies are underinclusive”); Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105, 1106 (“What the *Diversity!* movement seeks is a payment made by educational institutions, at the expense of individuals seeking admission or employment, to compensate members of groups said to be disadvantaged by historic injustices to their ancestors.”).

cannot see why it should become less so because it was not the proponents' original purpose or is not now their only purpose.<sup>28</sup> Nor should it matter that it is not their primary purpose or even their real purpose. In such circumstances, the proponents might, to their critics, seem annoyingly opportunistic—perhaps even devious or hypocritical<sup>29</sup>—but the moral worth of the government's interest is independent of the tactics or character of those who favor the interest.

Of course, this rather abstract response is persuasive only if the educational benefits of racial diversity are real and substantial. This the critics deny, and it must be acknowledged that the nature and extent of these benefits are highly questionable. The problem is not merely that empirical studies are provisional and, in any event, less than clear-cut. The problem is that, as Professors Peter Schuck<sup>30</sup> and Peter Wood<sup>31</sup> (among others<sup>32</sup>) have argued, government programs aimed at generating diversity may undermine real diversity by making differences seem inauthentic and denatured. The problem goes further yet, for, as the *Grutter* opinion demonstrates, the idealistic purposes thought to justify racial preferences seem wholly independent of measurable outcomes. To begin with, consider the immediate educational benefits. Justice O'Connor contended that these include a robust exchange of ideas, but she also insisted that a robust exchange of ideas does not entail any assumption that minority students "always (or even consistently) express some characteristic minority viewpoint."<sup>33</sup> In fact, another educational benefit is that students discover that "such stereotypes" are untrue or at least that

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28. For a patient exploration of the possibility—indeed, the unavoidability—of understanding diversity programs as serving multiple purposes, see LEVINSON, *supra* note 26, at 46.

29. Professor Carrington, for instance, gives voice to this understandable sense of exasperation when he writes, "By borrowing Justice Powell's term for appropriate race consciousness, the current [diversity] movement is, not to mince words, a fraud." Carrington, *supra* note 27, at 1106.

30. See PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 165 (2003) (arguing that affirmative action programs "may in fact be pursuing a spurious or formalistic kind of diversity").

31. See PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 292 (2003) ("*Diversity* itself can pose as a form of equality, at least in imagining an ideal of equalized groups.").

32. See, e.g., Carrington, *supra* note 27, at 1143 ("[T]o treat a personal characteristic alone . . . as a measure of one's capacity to contribute to intellectual exchange may actually reduce that capacity.").

33. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2341 (2003) (quoting Respondents' Brief at 30).

they have “diminish[ed] force.”<sup>34</sup> In a few highly nuanced sentences, then, the Court veered cheerfully from one possibility to another: (1) that minority group members have different enough experiences that they are more likely than others to provide certain ideas or perspectives that will be useful to classroom discussion, (2) that minority group members do not have identifiable viewpoints and that the elimination of such stereotypes is what makes their participation in classroom discussion so useful, and (3) that minority group members do have distinctive viewpoints—but only some of the time—and that the discovery that this is true is valuable because it reduces (or, one assumes, fine-tunes) racial stereotypes. In short, no matter what students learn from a racially diverse class, it is valuable.

This rather flexible line of thought could be extended. The Court, for example, suggested that racial diversity is educationally beneficial because it elicits strong exchanges of views, increasing the energy level of the discussion.<sup>35</sup> But, if studies were to conclude that racial diversity in the classroom actually inhibits discussion (on, perhaps, at least some sensitive issues), then this very sense of inhibition could be called a valuable indicator of deep feelings and racial insecurities. Similarly, the Court alluded to the improved relationships among students of different races. But, if studies were to show that relationships (presumably, under certain conditions) actually become more competitive and hostile, then this very hostility might be deemed an important cautionary lesson.

Much the same is true of the more remote objectives approved in *Grutter*. Students, the Court claimed, must be prepared for interacting in a multiracial society.<sup>36</sup> Such preparation would be necessary if American institutions and organizations in fact turn out to be populated by many races and if the members of those races interact a great deal rather than self-segregate. In this instance, the benefit would arise because interracial understanding would allow participants to adjust to the happy circumstance of racial intermingling. But the same preparation would also be necessary if some races were not proportionately represented in institutions and organizations or if the members tended toward noncooperation and self-segregation. The benefit in this circumstance would arise because

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34. *Id.* at 2341.

35. *Id.* at 2339–40.

36. *Id.*

interracial understanding would allow participants to ameliorate or even overcome the unfortunate circumstance of racial isolation. Finally, it might be true that racial proportionality tends to increase the legitimacy of society's leadership by creating an impression that representation is fair and effective. But if people do not see racially proportional representation as fair and effective—if some see it as a spoils system and others as a sign of the impossibility of achieving true political responsiveness—then proponents of affirmative action still could construe the resulting dissatisfaction as a pressing reason for diversity programs. After all, if legitimacy is in doubt under patterns of racially proportionate leadership, how much worse might the situation become under racially disproportionate patterns? The reality of racial participation at least holds the potential, over time, of convincing people that the system is, or is becoming, legitimate.

At first glance, this imperviousness to falsification would seem a crushing problem. It suggests that proponents want affirmative action programs whether or not the programs produce real diversity, indeed, no matter what their consequences. But wait. Supporting a program regardless of what happens is not so strange as it first sounds. To take a famous and influential example, John Stuart Mill argued that unwelcome opinions should not be silenced whether those opinions are wholly true, partly true, or entirely false.<sup>37</sup> He argued that if wholly true, the expression of unwelcome opinions might help truth to emerge; if partly true, they can refine our understanding of what is true; and if false, they help prevent truth from becoming dead dogma. Note that Mill's argument still has force even if a true opinion is never accepted because his argument is only that tolerance makes the emergence of truth or partial truth *possible*.<sup>38</sup> Similarly, the argument that without exposure to dissent truth will become dead dogma does not require that every unwelcome opinion have the effect of making truth more vivid. It only requires that without continuing examination truth will eventually become stale. Thus, Mill's argument holds without regard to either the truth of the unwelcome opinion or the actual outcome of debate. The general conviction that untrammelled debate is good no matter what its immediate consequences is carried

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37. See JOHN STUART MILL, ON LIBERTY 19-46 (E. Haldeman-Julius ed., Haldeman-Julius Co. 1925) (1859) (“[S]ilencing the expression of an opinion is . . . robbing the human race.”).

38. Mill wrote, “[W]e may hope that if there be a better truth, it will be found when the human mind is capable of receiving it.” *Id.* at 23.

forward to the present day in highly respected and influential arguments for the open marketplace of ideas.

Mill's argument works independently of the immediate consequences of tolerance because ultimately it presents an aspiration more than a prediction. The human capacity to reason about truth is mysterious; in some individuals and in some circumstances it is weak or nonexistent, but in others it is astonishingly potent. Mill's argument rests on the conjecture or the hope that the capacity for truth is sufficiently available that it is worth preserving the necessary preconditions for its attainment. Even if, under a given set of conditions, no human were rational enough either to communicate or appreciate truth, a Millian might entertain the hope that conditions might change or even that treating people as rational agents might help transform them into rational agents. If faced with the radical claim that no human in any circumstance can appreciate truth, a determined Millian might reply that this radical claim itself could eventually turn out to be false and it is on this hope that dissenting opinions should be tolerated. The conjectural, aspirational character of Mill's argument is a reflection of its scale and profundity, not a sign that its objective is unimportant.

Something similar, I think, can be said of the goals of racial diversity programs. It does not matter what specific lessons are learned from members of other races or—in particular circumstances—whether any lessons are learned at all, because without diversity there is less chance of learning anything from members of other races. It is not dispositive that the patterns of interaction in society at large are uncertain because it is at least possible that these patterns, whether benign or hostile, will be improved by interracial experience at the university level. And, yes, the sources of political legitimacy are psychological and highly conjectural, but the importance of legitimacy is not for that reason diminished. In the end, diversity is a compelling interest because of the ideals and hopes that it represents. Independent of its immediate consequences, racial proportionality is a tangible sign of inclusion, an expression of good faith, an embodiment of the desire for racial understanding and harmony. Diversity, then, is compelling to the extent that it expresses shared moral norms thought essential to a decent society.

Some of the most potent criticisms of affirmative action in university admissions concede—even celebrate—the attractiveness of

diversity as a societal aspiration. Professor Schuck, for example, perceptively describes how cultural and attitudinal variety can make individual choices richer and social decisions more adaptive.<sup>39</sup> Similarly, Professor Wood's colorful diatribe concedes (indeed, revels in) the excitement and usefulness of real diversity. Wood writes, "I don't know of anyone who argues that social 'uniformity' or ethnic 'homogeneity' make for a better education or a more just society."<sup>40</sup>

Professors Schuck and Wood are nevertheless critics of government-imposed racial diversity, arguing that it has significant costs, such as degraded discourse and individual unfairness, and that it actually undermines the attractive values of real (nonengineered) diversity. Now, it might be tempting to jump from the claim that a government program entails great cost and risk to the conclusion that its purpose cannot be "compelling" in the doctrinal sense. However, efforts to implement truly great public purposes will often involve both high cost and risk because it is precisely the great governmental objectives that are considered important enough to justify large burdens and uncertainties. History, needless to say, is replete with various kinds of profoundly significant governmental initiatives—for example, strategies of military deterrence, educational reform measures, the imposition of the *New York Times*<sup>41</sup> malice standard—that have been both burdensome and uncertain. Those who oppose racial preference programs on instrumental grounds may well be right in their bleak observations and dire predictions; they may be wiser or more prudent, at least in the short run, than those who support such programs. But even valid instrumental objections concern the best method for achieving a set of goals. They do not establish that the goals themselves are politically unimportant or morally weak.

Nevertheless, it might seem that engineered diversity cannot be a compelling purpose in the doctrinal sense if there is a less risky, less

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39. See SCHUCK, *supra* note 30, at 56–72 (using four different political-social theories to demonstrate the values that diversity implicates).

40. WOOD, *supra* note 31, at 135; see also LEVINSON, *supra* note 26, at 17 ("[I]t is becoming ever more difficult to find anyone who is willing to say... that institutional or social homogeneity is a positive good and diversity a substantive harm."); Carrington, *supra* note 27, at 1110 ("[F]ew question the value of diverse literary, artistic, religious, or other traditions that may be a source of comfort, satisfaction, or pride to any group, or that contribute to the richness of our shared American culture.").

41. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

costly way to achieve the desired objectives.<sup>42</sup> In effect, the *Grutter* Court adopted this view when it asked whether racial diversity could be achieved without specific forms or degrees of racial preference. Surely, one might think, a program cannot have a compelling justification if its goals could be achieved in a different, less troublesome way. But, again, this argument has force only if the goals of diversity are understood as narrowly instrumental. It is true, of course, that some amount of racial diversity would exist in higher education without any racial preferences in admissions. It is also true, as the *Grutter* dissenters charged,<sup>43</sup> that students can and do learn about attitudes associated with minority experiences long before they come to law school. Even in law school, students can be assigned books about the minority experience and, indeed, whole courses can be designed to meet this need. Students can visit or work in minority neighborhoods. Later, racial harmony in the workplace can be achieved the same way most work-related skills are achieved—through on-the-job training and, assuming that racial animosities are costly and unpleasant, through the operation of ordinary incentives and experiences.<sup>44</sup> The moral and political legitimacy of society's leadership can be established in part through visibly fair competition and through responsive, transparent institutions. These suggestions for alternatives to racial proportionality are not trivial or artificial. In fact, against the great tides of practical experience, economic reality, and political life that move outside the law school, racial diversity in the classroom might well represent only a small eddy.

But none of the alternative methods for achieving racial understanding and harmony achieves the expressive purposes inherent in diversity programs based on racial preferences. For one thing, most of the alternative methods, even if effective in some ways, are not purposeful collective actions and therefore cannot embody shared moral commitments. Even purposeful alternatives, like

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42. I recognize, of course, that the Court's formulations separate under different "prongs" the issue of the importance of the purpose and the issue of "less drastic means," as if they were unrelated to one another.

43. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2349 (2003) (Scalia, J., dissenting) (asserting that cross-racial understanding can be learned by "people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens").

44. On market pressures as a cure for racial discrimination, see generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

courses designed to educate on racial history and experience, do not involve the same sacrifices as do diversity programs and so do not express the same level of moral conviction and determination.

To summarize, then, the criticisms leveled at diversity do establish that it is not a compelling public objective in any immediate, instrumental sense. But the importance and power of diversity do not depend on achieving specific, measurable consequences. Diversity is compelling because it represents and expresses a defining aspiration. It is defining in the sense that its pursuit is pivotal to a vast array of public choices and, ultimately, to society's fundamental conception of its own morality.

Acknowledging that diversity is a compelling purpose in this sense does not at all imply that it is beyond criticism even as an aspiration. Not only are some of its immediate effects objectionable and its long-run consequences speculative, but, more fundamentally its underlying moral vision is itself controversial if only for being premised on race consciousness. The dream of a color-blind society, in which every individual's value is independent of race, is (needless to say) also profoundly compelling. The very ambivalence in the Court's diversity opinions manifests a recognition that on the great questions of social and political direction, various goals, even opposite ones, can represent powerful moral commitments among which the public is entitled to choose.

## II. ASSESSING MORAL REGULATION

I suspect that some who strongly approve of the Court's decision in *Grutter* will nevertheless be uneasy with my account of why diversity is a compelling public interest. The reason for this unease is not hard to identify. If an interest as diffuse, costly, uncertain, and controversial as diversity is important enough to permit the government to override an individual's liberty interest, there may be a very broad range of objectives that justify restrictions on liberty. Indeed, the whole enterprise of interest assessment may be in jeopardy. This possibility, it seems to me, is not a reason to simplify or distort one's understanding of why diversity is a compelling interest. Rather, it is a reason to think further about the practice of interest assessment in constitutional cases.

Consider the nature of the states' interest in regulating private sexual conduct, an issue that the Supreme Court happened to have taken up at almost the same time that it was assessing the importance



of racial diversity at the University of Michigan Law School. In *Lawrence v. Texas*,<sup>45</sup> the Court concluded that a criminal prohibition on private homosexual conduct “furthers no legitimate state interest which can justify . . . intrusion into the personal and private life of the individual.”<sup>46</sup> A cursory reading of this sentence might leave the impression that the Justices were asserting that the state had no legitimate interest in regulating private sexual conduct. However, the phrasing actually suggests that Texas did have such an interest but that its interest, though legitimate, was not strong enough to justify a particular degree of intrusions into the right of privacy. Elsewhere the opinion acknowledged the nature of the state’s legitimate interest:

[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.<sup>47</sup>

The Court quickly proceeded to say that “[t]hese considerations [did] not answer the question [in *Lawrence*,]” which was whether this moral position may be enforced “on the whole society through operation of the criminal law.”<sup>48</sup>

In other words, although it is true that the legitimacy of the state’s moral position was not dispositive in *Lawrence*—because it had to be balanced against the state’s interference with the right to privacy—it is equally true that the importance of that moral interest was not wholly irrelevant. As *Grutter* made quite clear, even core constitutional interests of an individual can be sacrificed for a sufficiently important governmental purpose. So, the question is unavoidable: If diversity in higher education is a compelling governmental interest, is there any basis for denying that status to the moral objectives that animate prohibitions against homosexual conduct?

The *Lawrence* majority suggested one answer even as it described Texas’s moral position respectfully. Note again its words:

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45. 123 S. Ct. 2472 (2003).

46. *Id.* at 2484.

47. *Id.* at 2480.

48. *Id.*

“For many persons, . . . [the state’s moral position reflects] profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.”<sup>49</sup> This phrasing suggests that the moral principles animating the Texas prohibition are entitled to respect because their proponents use them in shaping their own hopes and choices. They are, the phrasing implies, important expressions of morality for the private domain but not for the public arena. Thus, if the Court had felt called upon to reconcile its assessment of the moral interest in suppressing homosexual behavior with its assessment of the government’s interest in racial diversity, it could have noted that those who support diversity in higher education are pursuing a moral vision of public life—a vision of how law school classes should function, of how the races should interact in businesses and other organizations, and of how society’s leadership can earn legitimacy.

The decisive answer to this distinction between private and public spheres was provided long ago in Professor Ronald Dworkin’s “reconstruction,” as he called it, of Lord Devlin’s argument in favor of moral regulation.<sup>50</sup> Professor Dworkin’s interpretation of Devlin is worth reading:

If those who have homosexual desires freely indulged them, our social environment would change. What the changes would be cannot be calculated with any precision, but it is plausible to suppose . . . that the position of the family, as the assumed and natural institution around which the educational, economic and recreational arrangements of men center, would be undermined . . . . We are too sophisticated to suppose that the effects of an increase in homosexuality would be confined to those who participate in the practice . . . just as we are too sophisticated to suppose that prices and wages affect only those who negotiate them. The environment in which we and our children must live is determined . . . by patterns and relationships formed privately by others than ourselves.<sup>51</sup>

Notice that this version of Lord Devlin’s argument does not depend on any demonstration that homosexual conduct is in itself immoral. It could be, as the *Lawrence* Court repeatedly asserted, that judgments about private sexual morality must be made by individuals or even

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49. *Id.* at 2480.

50. Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986 (1966).

51. *Id.* at 992–93.

that homosexual conduct is at least sometimes a moral good; nevertheless Devlin would still be right that permitting this conduct could lead to public harms. The right to negotiate a twelve-hour workday—or, for that matter, to gain admission to the Michigan Law School on a race-neutral basis—is not in itself immoral, yet the exercise of these private rights can frustrate legitimate public purposes.

Professor Dworkin's sympathetic account of Lord Devlin's argument does not mean that he accepts Devlin's conclusions. Dworkin attempts to rebut Devlin's argument on its own terms.<sup>52</sup> He claims that Devlin recognizes that the legislator's decision to protect social institutions from private conduct is a difficult one, because the legislator must decide "whether the institutions which seem threatened are sufficiently valuable to protect at the cost of human freedom."<sup>53</sup> The legislator, however, can proceed with some confidence when the private behavior is immoral because in that case there is less need for a strong public justification. Dworkin, with characteristic self-assurance, proceeds to argue that the moral position condemning private homosexuality does not meet minimal social standards regarding moral reasoning.

This criticism, even if convincing as far as it goes, is plainly an incomplete reply to Lord Devlin's argument as Professor Dworkin himself describes that argument. Unaccountably, Dworkin loses sight

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52. Professor Dworkin's choice of counterargument does not mean, of course, that there are no other possible critiques of Lord Devlin's position. Dworkin mentions in passing several other possible lines of attack—that society is not at all entitled to protect itself from a change in social institutions, or (more modestly) that the threatened change must be imminent, or that the immorality of an act ought not to count "in determining whether to make it criminal," or that legislators must make the moral judgment for themselves and "not refer such issues to the community at large." *Id.* at 993–94. Given Dworkin's later writings, it is also worthwhile to mention the argument that moral condemnation cannot be based on religious conviction. See generally RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993). Only the first two of these claims could be dispositive of Devlin's argument (as Dworkin describes that argument), given that moral condemnation is only necessary as a justification when the value of the social institutions at risk is not clear. It is hard to imagine the basis for an argument that society is never entitled to protect itself from a destructive change in social institutions. It is possible to imagine an argument for the proposition that the change must be imminent, but surely such arguments lose force to the extent that the value of the endangered social institutions is great. The Court in *Grutter* imposed no requirement that serious risks, such as the gradual loss of governmental legitimacy, be imminent. The family, too, one would think, is a sufficiently valuable institution to warrant protection from remote risks. See *infra* text accompanying notes 53–55.

53. Dworkin, *supra* note 50, at 993.

of his own recognition that Devlin's position does not require that private conduct always be immoral to justify public regulation.<sup>54</sup> It follows from Dworkin's account of Devlin that it is possible for a legislator to be confident that threatened social institutions are highly valuable and that, in such circumstances, the cost in human freedom might be worthwhile whether or not the regulated behavior is immoral. Dworkin simply assumes that the institutions threatened by repealing antisodomy laws are not so clearly valuable as to make judgments about the morality of homosexuality unnecessary.

To summarize, Professor Dworkin's discussion shows that the question of whether there is a compelling public purpose in prohibiting private homosexual conduct is not answered by distinguishing between the private and public spheres and that it is logically separate from the question of whether the private conduct is moral. If the importance of the governmental interest is to be assessed,<sup>55</sup> there is simply no escaping the need to identify and evaluate the social institutions that may be threatened by legalizing homosexual acts.

The *Lawrence* Court, to its credit, made more of an effort at this essential inquiry than does Professor Dworkin. It pointed to various pieces of evidence suggesting that a strong social consensus in favor of outlawing private homosexual acts no longer exists.<sup>56</sup> This information is relevant to an assessment of the importance of the state's interest because, to the extent that a society does not aspire to the sorts of relationships, institutions, and ideals that would be undermined by legalized homosexuality, that society would not be threatened by such legalization. However, if one agrees with the Court that racial diversity in higher education is a compelling governmental interest, it is obvious that significant social dissensus

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54. Professor Dworkin's words are:

We do not need so strong a justification, in terms of the social importance of the institutions being protected, if we are confident that no one has a moral right to do what we want to prohibit . . . . This does not claim that immorality is sufficient to make conduct criminal; it argues, rather, that *on occasion* it is necessary.

*Id.* (emphasis added).

55. Professor Dworkin's argument against Lord Devlin's position is entirely addressed to moral assessment by legislators, not courts. Oddly, he adds a postscript on the question of moral regulation of pornography that simply assumes that the same argument applies to judicial decisionmaking. *See id.* at 1002-05.

56. *See Lawrence v. Texas*, 123 S. Ct. 2472, 2478-81 (2003) (noting, for example, that at the time of the Court's decision in *Lawrence*, only thirteen states prohibited sodomy, four of which enforced their laws only against homosexuals).

cannot, in itself, be sufficient to discredit a public purpose. After all, the value of diversity programs is hotly contested in the political arena, and, indeed, those programs are arguably incompatible with a powerful, authoritatively expressed political consensus in favor of nondiscrimination. *Grutter* is, I think, commonsensical on this point. Whatever the ultimate boundaries of Lord Devlin's argument for the right of societal self-definition, it cannot be that a state's purposes are compelling only when they are noncontroversial. The great issues of politics and morality are always controversial.

Fortunately, for present purposes it is not important to identify the degree of consensus that Lord Devlin's argument might require before the state undertakes moral regulation on profound and controversial issues. Whatever the abstract answer to that question, in *Lawrence* the Justices effectively conceded that there is sufficient social consensus about the importance of at least one of the institutions that legalized homosexuality might threaten. Both the majority opinion<sup>57</sup> and Justice O'Connor's concurring opinion<sup>58</sup> sharply distinguished criminal prohibitions against homosexuality from the validity of existing laws regulating marriage. And well they might, for marriage is the primary institution that has been used all over the world to tame the turbulent power of human sexuality, to raise psychologically healthy children, to instill moral values, and to provide for some degree of mutual protection and support. Whatever its variations and shortcomings, if there is not sufficient social consensus regarding the importance of the institution of heterosexual marriage, it is hard to imagine any social arrangement the protection of which could amount to a compelling interest. This is true notwithstanding the existence of alternative models to traditional marriage that are morally attractive and compatible with homosexuality. A public purpose does not cease to be compelling merely because deeply attractive alternatives exist, as *Grutter*'s acknowledgement of the dream of a color-blind society as an alternative to engineered diversity reminds us.

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57. *See id.* at 2478 (distinguishing antisodomy laws from efforts by the state to define personal relationships when there is "injury to a person or abuse of an institution the law protects"); *id.* at 2484 ("[This] case does not . . . involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

58. *See id.* at 2488 (O'Connor, J., concurring) ("Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

*Lawrence* might seem to rest on the belief that the state's interest in protecting the institution of marriage, although morally compelling, is only tenuously connected to the prohibited conduct. Many have argued—and the Court seems to have been sure—that legalizing homosexual sodomy will not lead to any destructive consequences for family life. Indeed, arguments are available for the proposition that even extending the right to marry to homosexuals (let alone decriminalizing homosexual conduct) would be compatible with wholesome family life. Once again, however, this explanation for *Lawrence* is undermined by the *Grutter* Court's determination that racial diversity in higher education is a compelling public purpose. Recall that every aspect of that purpose—the invigoration of classroom discussion, the improvement of racial attitudes, the achievement of harmony in the workplace, the legitimation of the leadership class—is highly conjectural and, indeed, that diversity can be and is viewed as a compelling interest no matter what the immediate consequences. The *Grutter* opinion rested on the proposition that great dreams, like the aspiration for racial harmony and fairness, are sufficiently crucial to a society's self-definition that they can be worth expressing and pursuing despite the uncertainties attending social causation in a complex and subtle world.

Even if legalized homosexuality might have some effect on social climate that could indirectly undermine marriage, it is, obviously, possible to protect marriage by more direct means than through the regulation of homosexual behavior. However, *Grutter* also reminds us that the fact that certain tangible objectives might be achieved by more direct or limited means does not make the expressive functions of public laws any less crucial to a society that ultimately reflects the character and attitudes of those who comprise it.

#### CONCLUSION

The Court's determination that racial diversity in higher education is a compelling interest is, I have tried to demonstrate, persuasive, but it is persuasive only on terms that confirm what should have been obvious from the beginning. What should have been obvious is that the nature of great social purposes is such that they cannot be authoritatively ranked by judges or, for that matter, by anyone else. They are the appropriate subject matter of continuing

disagreement.<sup>59</sup> Controversy, uncertainty, speculation, sacrifice—these do not make purposes unimportant. They identify ideals, they characterize dreams. American citizens have become inured to a practice that is, I think, beyond justification. Much more is at stake in recognizing this than the decisions on racial diversity and private homosexual conduct. The practice of interest assessment reaches very far; it constrains collective decisionmaking on moral issues that are fundamental to society—establishing decent public dialogue, fostering respect for human life, redressing a history of racial discrimination, and fostering a minimal sense of respect for the country.

Recognizing that courts cannot rank a society's aspirations for itself does not mean that all laws are constitutional. It means that when courts invalidate a law, they should do so on some basis other than interest assessment.<sup>60</sup> But it must be acknowledged that, depending on what inquiries are substituted for the royal prerogative of interest deprecation, it is certainly possible that most laws would survive constitutional review. This leads us back to the question that I started with: How should one understand cases like *Grutter* in which the Court validates a law on the ground that the public's judgment about the importance of a public purpose is entitled to judicial respect? In such cases, should we understand the Court to be authorizing the government to limit or amend the Constitution merely because that seems justified to those in power? Or is the better understanding that the Court is somehow allowing the importance of governmental interests to define the meaning of our Constitution?

As *Grutter* made explicit, there has always been a certain implausibility in the common claim that a court does not qualify or undermine constitutional limits when it validates a law on the ground that the governmental interest is compelling. However, if we see the Constitution not only as a legal document but also as a set of political practices and understandings, this implausibility recedes. From this perspective, it is the people's judgment about the importance of their

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59. See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

60. There may be exceptions, of course; for example, the text of the Fourth Amendment, referring to "unreasonable searches and seizures," may direct a court to evaluate society's interests.

objectives that informs and qualifies constitutional meaning.<sup>61</sup> The courts, in this circumstance, are not deferring to extraneous judgments about social utility and moral aspiration. They are making room for an aspect of constitutional self-definition that is inherently political and cultural. This distinction is not at all a scholastic subterfuge. It is realistic and accurate to describe the American Constitution both as a legal document and as a set of political understandings and arrangements.<sup>62</sup> It follows from this recognition that, insofar as the constitutionality of laws is thought to depend on the legitimacy and importance of the public's purposes, this aspect of constitutional decisionmaking belongs to the public at large. For the Court to understand this would not be abdication.

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61. Unfortunately, the *Grutter* Court's deference to university faculties and other elite groups provides only limited evidence that it appreciates this possibility. The opinions of these groups are not broadly representative of the whole population; moreover, their opinions on diversity adopt the position taken by one of the Court's own members years earlier in *Bakke*. To the extent that Justice Powell's opinion shaped subsequent policies and opinions on diversity, the Court in *Grutter* is, in effect, deferring to itself. On the way in which *Bakke* shaped public discourse on the issue of diversity, see LEVINSON, *supra* note 26, at 16.

62. Even the Court sometimes acknowledges the political nature of constitutional law, as when it relies on the continuing repudiation of the Sedition Act as a basis for the conclusion that defamations of public officials enjoy a partial First Amendment privilege, see *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964), or when it looks to sustained political traditions as a way of defining "liberty" in the Due Process Clause, see *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). The extensive scholarly writings on this subject include: NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENTS, THE SUPREME COURT, AND THE ABORTION DEBATE* (1996); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988); POWELL, *supra* note 2; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).