TACKING LEFT: A RADICAL CRITIQUE OF *GRUTTER*

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[R]ace conscious policies must be limited in time . . . We expect that twenty-five years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Justice O'Connor in *Grutter v. Bollinger*[1]

INTRODUCTION

In *Grutter v. Bollinger*, the Supreme Court announced its expectation that twenty-five years from now, U.S. educational institutions will no longer need to use racial conscious affirmative action in admissions to admit a racially diverse class. Of course, time will tell whether Justice O'Connor's expectation will be given the force of law or regarded as dicta.[2] But dicta or not, law schools are highly unlikely in the next twenty-five years to be able to admit diverse classes without using race-conscious affirmative action. Racial inequality at all levels—education, housing, income and wealth—has become a remarkably stable feature of racial hierarchy in the U.S.[3]

Certainly with regard to conventional measures of merit for law school admission (i.e., grades and standardized test scores),

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1. Grutter v. Bollinger, 539 U.S. 306, 342-43 (2003).

2. *See* Vikram Amar & Evan Caminker, *Constitutional Sunsetting? Justice O'Connor's Closing Comments in* Grutter, 30 HASTINGS CONST. L.Q. 541 (2003) (discussing the question of whether the sunset clause was dicta or to be given force of law).

3. MICHAEL BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 12-15 (2003) (documenting black-white disparities in income, housing, and health care).

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racial disparities are as pervasive as they were when the Court decided *Bakke* twenty-five years ago. For the 2002-03 academic year, the median LSAT score for black applicants was 142.2, compared to a median white score of 153.9.[4] Thus, at present, black scores are about 19 percent lower than white scores. The differences at the top end of the scale are far more dramatic: blacks make up less than 1 percent of those scoring 165 or above on the LSAT.[5] By most accounts, the gap has persisted for the last twenty-five years, despite improvements in the economy and a growing black middle-class.[6] Moreover, the racial gap in LSAT scores may now be increasing. Over the past five years, the racial scoring gap has increased by 0.9 points, or 1.5 percent.[7]

For the last decade, the issue of affirmative action in higher education has bedeviled those of us on the left. Even the most radical of critical race theorists acknowledges that, in connection with *Grutter*, we needed to defend small-scale diversity-oriented programs in order to hold the line on affirmative action roll-backs. As a symbolic matter, affirmative action represented the most visible form of commitment to dismantling racial hierarchy. And, in the wake of Hopwood and Proposition 209, radical scholars had to acknowledge the very real possibility that an increasingly conservative Supreme Court would cut back even further on the vitality of race-conscious preferences. Holding the line in *Grutter* was of the essence in the battle with conservatives over affirmative action.

At the same time, as a practical matter, we recognized the limits of diversity-based affirmative action. The small-scale affirmative action programs adopted by law schools produced few material gains for most people in communities of color. We knew that in most elite schools, diversity programs admit rela-

4. *Latest News: A Widening Racial Gap in Law School Applications and Scores on the Law School Admission Test*, J. BLACKS IN HIGHER EDUC. *available at* http://www.jbhe.com/latest/052004_law-school_admissions.html (May 20, 2004).

5. *Latest News: Very Few Blacks Can Be Found at Top of LSAT Scoring Pyramid*, J. BLACKS IN HIGHER EDUC. *available at* www.jbhe.com/latest/052704_blacks_and_LSAT.html (May 27, 2004).

6. *See* LINDA WIGHTMAN, BEYOND FYA: AN ANALYSIS OF THE UTILITY OF LSAT SCORES AND UNDERGRADUATE GPA FOR PREDICTING ACADEMIC SUCCESS IN LAW SCHOOL 8-14 (2000). *See also The Persisting Racial Scoring Gap in Graduate and Professional School Admissions Tests*, 38 J. BLACKS HIGHER EDUC. (Winter 2002/2003) (documenting a persistent 18% gap). *See also Special Report: Confronting the Widening Racial Scoring Gap on the SAT*, 41 J. BLACKS HIGHER EDUC. (Autumn, 2003); THE BLACK WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998).

7. In 1997-98, the median black LSAT score was 142.7. The median white score was 153.5. *See Latest News*, *supra* note 4.

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tively small numbers of students.[8] We acknowledged that diversity-oriented programs concealed the racial bias of ostensibly race-neutral standards.[9] And from experience within our own institutions, we were painfully aware that the diversity rationale permitted institutions to claim that they were "for affirmative action," without having to make a commitment to eliminating the legacy of past discrimination.[10]

Ultimately, in the period leading up to the Court's decision in *Grutter*, many of us committed ourselves and our scholarship (despite our ambivalence) to the very pragmatic task of defending diversity-based affirmative action. But now that the Court has approved some form of race-conscious affirmative action, the time may have come for the left to tack left again: to strongly reassert the far more expansive view of racial equality, and to argue for a much larger-scale, much more robust form of affirmative action to accompany that view.

In that spirit, this article advances three central critiques of the Court's decision in *Grutter*—one pragmatic, one utopian and the last deeply cynical. *First*, I will argue that Justice O'Connor's timetable for eliminating race-conscious affirmative action is unrealistic. Racial inequality in conventional measures of merit will persist into the foreseeable future, because this inequality is part of a much larger dynamic process that produces persistent racial inequality in many areas.

I describe this process using what I have come to call the "lock-in" model of racial inequality.[11] The lock-in model compares persistent racial disparity to persistent monopoly power that continues long after the original anti-competitive conduct has ceased. Just as a monopoly can become institutionally self-reinforcing over time, so too can racial monopoly reproduce itself over time via institutional processes.

This Essay proposes that disparities in performance on admissions criteria persist because whites have created a self-reinforcing monopoly on those educational resources that are needed to achieve high GPAs and standardized test scores. If so,

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8. *See infra* Part III.
9. *See id.*
10. *See id.*
11. For a full description of the lock-in model of racial inequality, see Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000). *See also* Daria Roithmayr, *Locked In Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE AND L. 31 (2003); Daria Roithmayr, Locked In Segregation (unpublished draft, on file with author).

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racial disparities likely will continue, as will the need for some form of affirmative action, until that monopoly is dismantled,

Second, I will argue that diversity-based affirmative action does little to address what may well be locked-in disparities. Experts insist that, to dismantle the self-reinforcing cycle, massive affirmative action is needed. Unfortunately, *Grutter* is the last in a long line of cases that forecloses the very sort of large-scale affirmative action programs in education that could assist in creating change.

Third, I will argue that, although *Grutter* provides little material benefit for communities of color, the decision materially and symbolically privileges white interests. The opinion prioritizes the interests of white students in breaking down their stereotypes about minorities and in adding diverse perspectives to classroom conversations. In addition, the Court's opinion allows institutions to conceal the bias of conventional admissions standards. Last but not least, the Court's opinion constitutionally protects elite meritocracy, in a way that further privileges white interests.

Part I provides a brief primer on the self-reinforcing lock-in model of inequality, which I have developed in previous work. Part II applies the lock-in model to the problem of persistent racial disparities in education. This section focuses on the broad self-reinforcing dynamic process that links a neighborhood's assets to those of families within the neighborhood. Drawing from the insights developed from the lock-in model, Part III fully fleshes out the three critiques of *Grutter* described above.

I. A PRIMER ON THE LOCK-IN MODEL OF INEQUALITY

In previous work, I have developed the lock-in model of racial inequality to explain the dynamics of racial inequality.[12] Drawing from recent work in economics and antitrust, the lock-in model is designed to explain how monopolies can become self-reinforcing over time to become a permanent part of the economic landscape. More specifically, the model demonstrates

12. *See* Roithmayr, *Barriers to Entry*, *supra* note 11 (developing the lock-in model and arguing that the use of conventional law school admissions standards constitutes a locked-in network standard that favors whites). *See also* Roithmayr, *Locked In Inequality*, *supra* note 11 (arguing that the South African government chose to retain educational user fees despite their disproportionate racial impact because the government would incur high switching costs to equalize expenditures across racial lines).

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how monopolies can persist even in the absence of intentional anti-competitive conduct.

Locked-in monopolies can be produced in a variety of settings. In certain markets that are characterized by "increasing returns," a firm can acquire an early competitive advantage, which then becomes self-reinforcing over time. For example, some commentators argue that Microsoft engaged in exclusive contracts with suppliers and in other conduct designed to prevent the distribution of competitor technology.[13] This anti-competitive conduct created (and reinforced) a self-reinforcing advantage that linked software developers and consumers. Windows' popularity induced more software authors to write software, which in turn triggered an increase in consumers. The increase in consumers thereby induced even more software authors to write for Windows, and so on.[14] Thus, Microsoft's advantage became locked-in because of the positive feedback loop that permitted the advantage to reproduce itself.

Beyond increasing returns markets, a market might become locked-in when consumers face high costs to switch ("switching costs") from the market incumbent to a more innovative competitor.[15] If consumers cannot make the switch easily, then their unwillingness to move may lock in the incumbent's early advantage. For example, when consumers choose to switch from a VCR to a DVD player, they must pay not only the cost of the new product but also the cost to recreate their library in DVD format and the cost of lost access to their video network—the group of friends, family, video stores and other sources of videos who may not yet have made the switch.[16] These additional switching costs may prolong the initial competitive advantage that the VCR technology has over the more innovative DVD technology.[17]

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13. *See* Declaration of Prof. Franklin M. Fisher in Support of Plaintiff, USA v. Microsoft (147 F.3d 935) *available at* http://www.usdoj.gov/atr/cases/f1700/1766.htm.

14. *See, e.g.*, BRIAN W. ARTHUR, INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY 102 (1994) (explaining the self-reinforcing process of increasing returns generally); Lemley & McGowan, *supra* note 13 (using the Microsoft example).

15. For a discussion of switching costs in the market context, see A. Douglas Melamed, *Network Industries and Antitrust*, 23 HARV. J. L. & PUB. POL'Y 147, 150 (1999). For a discussion of the role of switching costs in the lock-in model of inequality, *see* Roithmayr, *Locked In Inequality*, *supra* note 11, at 61-65.

16. *See* Roithmayr, *Locked In Inequality*, *supra* note 11 at 39.

17. *See id.*

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Finally, "path-dependent" markets will also produce locked-in monopolies.[18] In path dependent markets, small historical events that happen early in the formation of the industry may explain a great deal about subsequent market outcomes.[19] In the most oft-cited example, Paul David asserts that a typing contest held in 1874 ultimately produced the monopoly position of a particular keyboard arrangement in the typewriter market.[20] Because the winning typist had used a QWERTY keyboard, the victory produced a small competitive lead over other keyboards.[21]

This "early-mover" advantage then became institutionally self-reinforcing because of the "network" relationship between typists, employers and keyboards. Typists wanted to train on the most popular keyboard, and, in turn, employers wanted to adopt the keyboard on which most typists were trained.[22] Each increase in typists produced an increase in employers who adopted the keyboard, thereby triggering another increase in typists, and so on.[23] Ultimately, QWERTY came to dominate the field based on the self-reinforcing effects of the early victory.[24]

As this example demonstrates, institutionally self-reinforcing processes may become locked in if they create barriers to entry that prevent competitors from catching up. In the QWERTY example, the early winner's competitive advantage may have become locked in place because an employer who wanted to switch to an alternative faced significant switching costs—namely, the loss of a ready-trained labor pool.[25] Switching costs can create barriers to entry for a competitor, and even for

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18. For a full discussion of path dependence, see Stan J. Liebowitz & Stephen H. Margolis, *Path Dependence, Lock-In and History*, 11 J. L. ECON & ORG. 205 (1995). *See* ARTHUR, *supra* note 14, at 102. *See also* Roithmayr, *Barriers to Entry*, *supra* note 11, at 742-49.

19. *See* Stanley M. Besen & Joseph Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, 8 J. ECON. PERSP. 117, 118 (1994); Nicholas Economides, *The Economics of Networks*, 14 INT'L J. INDUS. ORG 673, 694 (1996).

20. *See* PAUL A. DAVID, UNDERSTANDING THE ECONOMICS OF QWERTY: THE NECESSITY OF HISTORY IN ECONOMIC HISTORY AND MODERN ECONOMICS 30-49 (William N. Parker ed., 1986). *See also* Paul David, *Clio and the Economics of QWERTY*, 75 AMER. ECON. REV. 332 (1985); Paul David, Why Are Institutions the 'Carriers of History'? Notes on Path-Dependence and the Evolution of Conventions, Organizations and Institutions (October 1992) (unpublished paper).

21. The QWERTY keyboard begins with those letters on the upper row. *See* David, *Clio and the Economics of QWERTY*, *supra* note 20, at 334.

22. *See id.* at 335.

23. *See id.*

24. *See id.*

25. *See id.*

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those competitors who offer consumers a more "efficient" product, like a more innovative keyboard arrangement.[26]

Just as a firm's early monopoly advantage can become locked into the market over time, so too can a racial cartel's early monopoly advantage become institutionally impossible to dismantle, even in the absence of continuing intentional discrimination. In the same way that a monopoly advantage can become self-reinforcing because of institutional structures, institutional racism can also reproduce inequality indefinitely.

The lock-in model puts forward three central claims about the nature of racial inequality. First, early racial history matters. Persistent racial inequality can be traced to earlier events that have charted a particular course of history for different racial groups.[27] As is true with the QWERTY example, the effect of early monopoly efforts by white racial cartels may help to explain far more about contemporary outcomes than conventional theory would predict.[28]

Second, whites' early anti-competitive advantage may now have become self-reinforcing.[29] As with economic markets, in race relations, early anti-competitive conduct can produce increasing returns for the early mover. In the context of residential segregation, for example, early monopoly advantage can reproduce itself through a variety of mechanisms, including schooling and networks of access to employment.[30]

Third, in the absence of some intervening event, racial disparities may persist indefinitely.[31] Any policy looking to remedy locked-in racial inequality would have to consider the structural

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26. *See id.* at 332. Developed in the 1920s by August Dvorak, the Dvorak keyboard arrangement is, according to some, a vastly superior keyboard arrangement when compared to QWERTY. *See* R.C. CASSINGHAM, THE DVORAK KEYBOARD 21-16, 41-43 (1986). For an argument that the two keyboards are at best equally efficient, *see* Stan J. Liebowitz & Steven E. Margolis, *Should Technology Choice be a Concern Antitrust Policy?*, 9 HARV. J. L. & TECH. 283, 312-14 (1996); STAN J. LIEBOWITZ & STEVEN E. MARGOLIS, WINNERS, LOSERS AND MICROSOFT (1999).

27. Borrowed from evolutionary theory, the concept of path dependence makes the claim that early events can chart the evolutionary path of subsequent conditions for a long time to come. *See, e.g.*, Liebowitz & Margolis, *supra* note 18; Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 634-52 (1996). *See also* Roithmayr, *Barriers to Entry*, *supra* note 11, at 752; Roithmayr, *Locked In Inequality*, *supra* note 11, at 66.

28. *See id.* In this project, I discussed the self-reinforcing impact of early decisions to exclude people of color from legal education, and to develop admissions standards that disproportionately excluded candidates of color. *See id.*

29. *See id.* at 65.

30. *See* Roithmayr, Locked In Segregation, *supra* note 11.

31. *See* Roithmayr, *Locked In Inequality*, *supra* note 11, at 61-64.

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and political switching costs of restructuring or modifying routine institutional practices.[32] If switching costs increase as time passes, these costs may help to further cement in racial inequality as part of the U.S. social landscape.[33]

II. LOCKED-IN EDUCATIONAL INEQUALITY

A. EARLY ANTI-COMPETITIVE CONDUCT IN EDUCATION

This section argues that whites engaged in anti-competitive activities and secured an early mover advantage in education resources, housing and other neighborhood-based assets. Other scholars have documented the history of Jim Crow segregation in public education.[34] This discussion concentrates more narrowly on cartel-like activities by a particular set of institutional organizations in monopolizing education.

Economists use the concept of cartels to explain how groups of people who might otherwise act individually to pursue their own self-interest might nevertheless collaborate to exclude others from competition.[35] Robert Cooter and others have described how racial cartels worked to create and to maintain racial and economic exclusion, by: (i) agreeing on a collective purpose to drive out competitors, (ii) constructing a complex set

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32. In the law school admissions context, any law school contemplating a move to reduce its reliance on the LSAT (e.g., to shift to a process that focuses on the student's performance within a band of achievement) must face significant potential switching costs in doing so. In particular, a school risks a potentially significant drop in its rankings (by way of the U.S. News and World Report system, which prioritizes LSAT scores). In addition, a school risks a corresponding loss of reputation, drop in enrollments, reduced employability of graduates and reduced funding from alumni donors. Moreover, a law school choosing to abandon the test altogether would have to incur the cost of developing and administering its own admissions test—the LSAT is currently administered for all law schools by the centralized Law School Admissions Council. *See* Roithmayr, *Barriers to Entry*, *supra* note 11.

33. Charles Tilly describes the concept of switching costs in his discussion of durable inequality.

> Existing social arrangements have enduring advantages because their theoretical alternatives always entail the costs of movement away from the present situation; change therefore occurs under conditions that reduce returns from existing arrangements, raise their current operating costs, lower the costs of transition to alternative arrangements or (much more rarely) increase expected returns from alternative sufficiently to overcome the transitions costs.

CHARLES TILLY, DURABLE INEQUALITY 192 (1998).

34. *See, e.g.*, C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed., Oxford Univ. Press 1974).

35. *See, e.g.*, GEORGE W. STOCKING & MYRON W. WATKINS, CARTELS IN ACTION 167 (1946). For an excellent discussion of cartels in game theory and complex systems theory, see Christopher Leslie, *Trust, Distrust and Antitrust*, 82 TEX. L. REV. 515 (2004).

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of informal and formal norms to coordinate collective conduct, and (iii) imposing measures to punish members who defect and/or violate collective norms.[36] As the following discussion illustrates, whites were able to coordinate their anti-competitive behavior more efficiently by forming cartel-like organizations.[37]

By 1920, whites in the Northern cities had begun to perceive black migration into the cities as a significant threat to their way of life. In those cities, school segregation followed closely from neighborhood segregation. School officials in Northern cities often maintained school segregation by redrawing feeder zones for schools where the racial demographics were changing, and by permitting white students to transfer out of mixed school populations.[38]

By comparison, in the South, whites focused more directly on school segregation than on separation of residential location.[39] Some southern cities passed segregation codes requiring separate schools and separate buildings within the same school.[40] Southern school officials also acted informally and without authorization to separate schools, and continued to do so even after segregation codes were declared unconstitutional.[41]

In the Southwest, whites perceived the rapid influx of Mexicans to be as much a social and economic threat as newly freed blacks were in the North and South. Mexicans had migrated to work on railroads and in agribusiness, and between 1920 and 1930, the Mexican population in California tripled.[42] From the beginning, schools kept Mexican children separate, arguing that separation was necessary to Americanize these students, and re-

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36. *See* Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 150 (1994). *See also* Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1046-48 (1995) (arguing that coercive social norms served to suppress defection and free-riders).

37. For a detailed account of cartel activities to secure neighborhood monopolies, *see* Roithmayr, Locked In Segregation, *supra* note 11.

38. *See* Expert Report of Thomas J. Sugrue, Gratz v. Bollinger, (E.D. Mich.) (No. 97-75321); Grutter v. Bollinger (E.D. Mich.) (No. 97-75928).

39. In Southern cities, whites could not easily divide up the city by race—the creation of a ghetto was limited by spatial, technical and economic constraints. As in slavery, blacks lived in close proximity to sources of work and economic support. *See* WOODWARD, *supra* note 34.

40. For example, Louisville, Kentucky imposed a statutory requirement that blacks and whites live in separate sections of the city. *See* Buchanan v. Warley, 245 U.S. 60 (1917) (holding the Louisville statute unconstitutional).

41. *See* Cartwright v. Bd. of Educ. of the City of Coffeyville, 73 Kan. 32, 34 (boards cannot act in the absence of a statute). *But see* 1909 Kan. Laws 525 (statute overturning earlier statute that had prohibited segregation).

42. *See* CHARLES WOLLENBERG, ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION, 1855-1975 111 (1976).

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lying on stereotypes about health and morals.[43] Corporate ranches in the Southwest created separate company towns, which included schools for the children of laborers.[44] Some states in the Southwest, including California, passed segregation laws to authorize separate classrooms and buildings.[45]

In all areas of the country, school boards effectively acted as racial cartels, to coordinate school segregation across communities. School boards opened separate schools for black students at the turn of the century, sometimes in separate buildings outside of the main school and sometimes within the same building.[46] In some states, members of the school board were also members of white racist organizations, including the Ku Klux Klan, and they coordinated school segregation with these other segregation efforts.[47] For Mexican-Americans in California, school boards also played a central role in keeping white and Mexican children in separate classrooms.[48]

In addition to school boards, parents' groups also worked in cartel-like ways to monopolize access to good schools. Parents' groups worked collectively to intimidate any black families seeking to integrate public schools. They also mobilized effectively against those few school boards that argued to desegregate school systems. For example, when a Detroit school board proposed an open schools plan that permitted blacks children to attend all-white schools, white parents' groups organized to petition the recall of elected school board members. They also organized a school boycott, in which students boycotted classes for several days.[49] In addition, parent organizations pressured school officials to revise feeder district boundaries to keep schools segregated, and lobbied for the passage of segregation codes to keep schools separate.[50]

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43. *See id.*

44. *See id.*

45. *See, e.g.*, CAL. EDUC. CODE §§ 8003-04.

46. *See* Board of Educ. of Ottawa v. Tinnon, 26 Kan. 1 (1881), Knox v. Bd. of Educ. of Ind., 45 Kan. 152 (1891) (moving from segregation inside the building—hiring special educator—to segregation outside the school), Reynolds v. Bd. of Educ. of Topeka, 66 Kan. 672 (1903) (separate building outside school). Rowles v. Bd. of Educ. of Wichita, 76 Kan. 361 (1907) (board passes a resolution to segregate "in keeping with the ideals and wishes of a majority of patrons").

47. *See* Thurman-Watts v. Bd. of Educ. of the City of Coffeyville, 115 Kan. 328 (1924) (president of the board admits membership).

48. *See also* WOLLENBERG, *supra* note 42, at 127.

49. *See* Expert Report, *supra* note 38; JEFFREY MIREL, THE RISE AND FALL OF AN URBAN SCHOOL SYSTEM: DETROIT, 1907-81 188-93, 258-61 (1999).

50. *See* Expert Report, *supra* note 38.

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The rhetoric surrounding school segregation drew in large part on ideas about the potential competitiveness of blacks as labor. Whites wanted to monopolize education resources for themselves in order to keep blacks from posing an economic threat to white industry. In a speech to the Southern Education Association justifying segregation in education, Professor Paul Barringer invoked the idea of spending school resources only for those who might move into skilled or professional labor: "The Negro race is essentially a race of peasant farmers and laborers... As a source of cheap labor for a warm climate he is beyond competition."[51]

Motivated by the desire to exclude non-whites both economically and socially, white cartels thus secured a monopoly on access to education resources As the next section discusses, these resources are essential to producing the particular social skills, high test scores and GPAs that law schools (and employers) have come to value.

B. THE SELF-REINFORCING NATURE OF EDUCATION MONOPOLY

This section argues that the white monopoly advantage in education produced by these cartels may have become institutionally self-reinforcing over time. Historical segregation produced geographic pockets of people with better tax bases. Neighborhoods with more educational resources have produced neighbors with more wealth. In turn, neighbors with more wealth have produced neighborhoods with more educational resources. In this way, white advantages in education reproduce themselves over time.

According to recent research in complex systems theory and economics, persistent racial inequality in education can be explained by the existence of "neighborhood effects" or "network effects." Neighborhood effects are the self-reinforcing effects of institutional relationships that link a family's well-being to that of its neighborhood, and the neighborhood's status, in turn, to that of the resident neighbor families.[52] Neighborhood effects explain why neighborhood characteristics can become persistent over time—the neighborhood affects the status of families, and

51. *Id.* at 95 (citing to speech before the Southern Education Association in 1900).

52. For a general overview of neighborhood effects, see Xavier de Sousa Briggs, *Moving Up Versus Moving Out: Neighborhood Effects in Housing Mobility Programs*, 8 HOUSING POL'Y DEBATE 195 (1997).

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families affect the status of the neighborhood.[53] Leonard Rubinowitz and James Rosenbaum have used the term "geography of opportunity" to describe the idea that social capital is derived from living in particular neighborhoods, and that neighborhoods in turn benefit from particular kinds of people.[54]

The effect of public school finance on neighborhood families constitutes a neighborhood effect that structures group wealth and income. The school finance feedback loop consists of two parts: (i) the way in which family wealth, and relatedly property values, feed forward to affect neighborhood educational resources (because property taxes are used to fund public schools); and (ii) the way in which neighborhood educational resources feed back to affect family wealth and property values.[55]

As an aside, it is important to note here that the lock-in model does not assume that educational resources affect a family's status by increasing cognitive skills in any intrinsically valuable way. Rather, the model merely assumes that education functions to socialize children to perform in certain ways that are valued by standardized tests and future employers.[56] Indeed, the

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53. Much of this work on neighborhood effects and racial inequality focuses on the self-reinforcing effects of "culture." *See id.* In contrast, this project focuses more on resource effects—the relatively more hard-edged constraints created by collective resources family and individual outcomes. Although psycho-social behaviors in neighborhoods may have important self-reinforcing effects via collective socialization, contagion or relative deprivation, the research indicates that these behaviors ultimately are connected to the availability or lack of resources within a neighborhood. *See, e.g.*, DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH AND SOCIAL POLICY IN AMERICA 23 (1999) ("[c]ultural practices constitute the manifestation of and reaction to economic class conditions in which blacks and whites tend to find themselves").

54. Rubinowitz and Rosenbaum documented the results from the Gautreaux Assisted Housing Program, a program that moved over 7100 black families to the Chicago suburbs as part of a consent decree. These scholars found that for those families who moved to the suburbs, 54% of children from those families enrolled in college, versus 21% of a control group who used their Section 8 benefits to move within the city. Of the mothers who moved to the suburbs, 75% were working versus 41% of those who moved to the city. Recent follow-up research has confirmed that these differences have persisted over time. LEONARD RUBINOWITZ AND JAMES ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA (2000). To be sure, there are difficulties with this data. Researchers could not disentangle the effects of self-selection—the families who chose to use their Section 8 certificates to move to white suburbs may have already represented a particular cross-section of the population. Relatedly, the comparison reference group (families who had not participated in the MTO program counseling, and who used their Section 8 certificates to move to black neighborhoods) may not have represented a true control group because they also represent a particular cross-section of the population. *See id.*

55. This process has become racialized because segregation created racially homogenous neighborhoods with significant differences in income, wealth, property values and educational spending per pupil. *See infra* Part IIa.

56. Sociologists have long put forward the notion that schools select and then so-

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model acknowledges that social preferences for particular kinds of performances drive what is valued in economic, and therefore educational, performance.[57]

In the public school finance feedback loop, non-white neighborhoods with poor tax bases produce under-funded schools. In turn, underfunded schools produce non-white neighborhoods with poor tax bases, because poorer schools produce graduates with less income and wealth. Likewise, white neighborhoods with good tax bases produce schools with good funding, which in turn produce a good tax base. In addition, because property with good schools costs more than property without, non-white residents are less able to move to a neighborhood with good schools.

A number of scholars have formally modeled this public school finance neighborhood effect and its connection to residential segregation.[58] According to this research, the "neighborhood effects" of public school finance appear sufficiently strong that, in otherwise economically mixed neighborhoods, small differences in public school financing will cause the neighborhoods to become segregated by income, even in the absence of previous segregation.[59]

Economist Roland Benabou's theoretical work illustrates the dynamics of this process.[60] Benabou's model begins with two neighborhoods that contain an equal mix of rich and poor families. If education spending per pupil in one neighborhood becomes slightly higher than the other, the land in the neighborhood with better schools becomes more valuable, and rich families are more able to purchase the property. In turn, families in neighborhoods with higher education spending become even wealthier, and accordingly are able to devote even more of their income to school finance (which in turn makes the property even more expensive). Because the improvement in income becomes self reinforcing by way of school funding, even minor differences

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cialize students for future employment. *See, e.g.*, Talcott Parsons, *The School Class as a Social System*, 29 HARV. EDUC. REV. 297 (1959).

57. *See* Daria Roithmayr, *Deconstructing the Distinction Between Merit and Bias*, 85 CAL. L. REV. 1449 (1997) (arguing that social norms produce notions of what constitutes merit).

58. Roland Benabou, *Equity and Efficiency in Human Capital Investment: The Local Connection*, 63 REV. OF ECON. STUD. 237, 238 (1996); *see also* Shelley Lundberg and Richard Startz, *On the Persistence of Racial Inequality*, 16 J. LABOR ECON. 292 (1998).

59. *See id.*

60. *See* Benabou, *supra* note 58. *See also* Roland Benabou, *Human Capital, Inequality and Growth: A Local Perspective*, 38 EUR. ECON. REV. 817 (1994).

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in education spending can cause neighborhoods to segregate by income.[61] This is true even when the incomes for both groups are growing.[62]

Benabou's model demonstrates that the public school finance loop and its links to the tax base can transmit education inequality indefinitely over many generations.[63] Because of relative advantages in the tax base and per pupil expenditures, wealthy neighborhoods are more likely to sustain their affluence over time, and thus the superiority of their educational resources. Moreover, the gap between rich and poor can grow infinitely large, at least in theory.[64]

Most importantly for this project, Benabou concludes that racial disparities in education may now be locked in because of the self-reinforcing effects of historical segregation.[65] According to Benabou, historical segregation accomplished two important goals. First, segregation created a white neighborhood surplus by increasing the spending per pupil (and/or lowering tax rates), and thereby increasing the value of property in the neighborhood (which now reflected the availability of well-funded schools).[66] More importantly, segregation allowed whites to monopolize the benefit of the extra spending per pupil, and to avoid having to pay the higher land prices they would have to pay if blacks had been allowed to bid on the land.[67] Non-whites looking to move to white neighborhoods must pay the correlative value of the additional social capital.[68]

Thus, in Benabou's view, these advantages may now be locked in because blacks do not possess sufficient wealth to move into richer white neighborhoods with better schools.[69]

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61. In Benabou's model, the wealthy are more willing or more able to pay higher housing costs for three reasons. First, wealthy families as a matter of preference may be more sensitive to neighborhood quality. Second, capital market imperfections may disable the poor from borrowing to be able to move into the wealthier neighborhoods. Finally, differences in lifetime wealth can also explain the relatively greater ability of the wealthy to pay. *See* Benabou, *supra* note 58, at 233-43.

62. *See id.*

63. *See id. See also* Steven Durlauf, *Neighborhood Effects*, *in* 4 HANDBOOK OF REGIONAL AND URBAN ECONOMICS 2 (J.V. Henderson and J.F. Thisse eds., 2003).

64. *See id.* at 519. In addition, stratification of this type exerts maximum effect on inequality—that is, it maximizes the income of the wealthiest family, at the same time it minimizes the income of the lowest-income family. *See id.* at 516.

65. *See* Benabou, Local Connection, *supra* note 58, at 247.

66. *See id.*

67. *See id.*

68. *See id.*

69. It is important to note here the difference between wealth and income. Although a number of studies report that housing segregation cannot be explained by racial

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Blacks are no longer barred by law, but are now barred by the relatively more difficult time they have buying into an increasingly expensive white neighborhood.[70] Benabou concludes that remedies are unlikely to be effective if neighborhood differences already have become locked in. Equalizing school budgets is not likely to work because the cumulative disadvantage is now too great to overcome. Nor at this late stage would it be effective to increase incentives to lure rich families to poor communities.[71]

The public school finance loop also reproduces inequalities in access to higher education. People who attend underfunded public schools are less likely to earn the kind of income or acquire the kind of wealth necessary to pay for higher education.[72] Because of the substantial wealth gap between races, many if not most black and Latino/a parents cannot offer their children any significant assistance in attending college.[73]

Almost all scholars on the subject agree that a college degree, or any time spent in higher education, enables a person to get jobs that pay more, which in turn leads to greater income and greater wealth accumulation.[74] The net worth of graduates with college degrees is double that of those without degrees.[75] In turn, families with greater wealth are far more likely to be able to send children to college or university, owing to skyrocketing costs for tuition these days.[76] Racial disparities in wealth, not surprisingly, reproduce themselves via the opportunity to attend college.[77]

To be sure, the general question of whether increased funding per student corresponds to improved education and/or improved wealth is controversial. One of the earliest studies on the matter, the 1966 Coleman Report, found little association between funding

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differences in income, those studies do not take into account differences in accumulated wealth, which is more important in housing purchases. *See* MELVIN OLIVER & THOMAS SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY (1995).

70. *See id. See also* Durlauf, *supra* note 63, at 520 (concluding that the possible permanence of inequality seems appropriate for analyzing the U.S. economy, where the economic status of blacks has been so strongly affected by historical factors).

71. *See* Benabou, *supra* note 58.

72. *See* Thomas J. Kane, *College Attendance By Blacks Since 1970: The Role of College Cost, Family Background and Returns to Education*, 102 J. POLIT. ECON. 878 (1994).

73. In Michigan, college attendance for four or more years differs between blacks and whites by a ratio of 56 to 1, and college degrees by a ratio of 85 to 1, both ratios having steadily increased over the last thirty years. Expert Report, *supra* note 39 tbl. 10 (figures for 1990).

74. *See* OLIVER & SHAPIRO, *supra* note 69, at 81.

75. *Id.* at 82.

76. *See* Kane, *supra* note 72.

77. *See* OLIVER & SHAPIRO, *supra* note 69.

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per student and educational performance.[78] However, more recent studies prove that certain kinds of expenditure are strongly correlated with achievement, and with subsequent income and wealth. Many of the relevant studies on the spending-achievement correlation do not differentiate in *how* money is spent in school districts, and simply look at the levels of overall spending by school districts. More precise studies demonstrate that when money is spent on cutting class size and reducing the student-teacher ratio, improving instructional materials and improving central office administration, student achievement goes up significantly.[79]

The lock-in model of inequality in education provides a possible explanation for why GPAs and LSAT scores continue to vary dramatically between whites and certain non-white groups. To be sure, LSAT scores are strongly correlated with family assets and neighborhood educational resources. Indeed, it is remarkable to note that the correlation between family income and the SAT scores for college freshman is stronger than the link between the test score and college grades.[80]

The lock-in model suggests that these disparities may well be locked in permanently, or at least for the long-term future. Without significant intervention to dismantle the institutional feedback loops between income, neighborhood, school resources and conventional measures of merit, institutions of higher learning will continue to need some race-conscious form of affirmative action to create diverse student populations.

III. *GRUTTER* FROM THE LEFT

What are the implications of this lock-in model for the Court's decision in *Grutter*? This section draws on the foregoing description of the lock-in model to develop three critiques of

78. *See* JAMES S. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY, (U.S. Dept. of Health, Educ. & Welfare,1966).

79. Harold H. Weglinsky, *How Money Matters: Models of the Effect of School District Spending on Academic Achievement*, 70 J. EDUC. SOC. 3 (1997). *See also* Linda Darling-Hammond, *Teacher Policy and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES (Jan. 1, 2000), *at* http://epaa.asu.edu/epaa/v8n1/ (recent research demonstrates that school size, class size, curriculum and teacher qualifications make a significant difference to performance).

80. *See* Lani Guinier & Susan Sturm, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 988 nn.148-52 (citing to statistics showing that the correlation between the SAT and income was 0.4 compared to a correlation of between 0.29 and 0.37 for SAT scores and freshman grades). Likely the correlation with accumulated wealth and standardized test scores is significantly higher. *See* OLIVER & SHAPIRO, *supra* note 69.

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Grutter. First, Justice O'Connor's aspirational time frame of twenty-five years is unrealistic. To the extent that racial disparities are locked-in, these disparities are unlikely to disappear by the year 2028. Second, *Grutter* produces no real material gains for communities of color. Small-scale diversity-based programs admit few students, and the Court's opinion further forecloses the kind of large-scale affirmative action necessary to dismantle lock-in.

Finally, the decision in *Grutter* appears to serve white interests more than it does the interests of communities of color. The diversity rationale itself symbolically reproduces racial inequality by prioritizing white interests. In addition, the Court's opinion endorses meritocracy as a compelling government interest, notwithstanding the fact that conventional meritocratic standards privilege white applicants and exclude people of color. Diversity-oriented affirmative action also conceals the racially disparate impact of conventional admissions standards, and permits institutions to represent such a process as neutral and fair.

A. TWENTY-FIVE YEARS AND COUNTING: THE ARTIFICIAL SUNSET CLAUSE

Given the locked-in nature of inequality, Justice O'Connor's twenty-five year aspirational pronouncement in *Grutter* seems at best naively optimistic and at worst dangerously indifferent to the self-reinforcing dynamics of racial inequality (even if it is dicta). No evidence exists to support O'Connor's expectation that the wide racial gaps in LSAT scores or GPAs will disappear before the year 2025. Indeed, most available evidence points to the contrary.[81]

One wonders why Justice O'Connor chose to set a twenty-five year deadline in *Grutter*. Justice O'Connor may merely have been offering a concession to her more conservative colleagues, proposing a time limit in order to make upholding affirmative action programs more palatable. The duration of programs is a factor the Court must consider in assessing whether an affirmative action program is sufficiently narrowly tailored to pass constitutional muster.[82] From the context of her pronouncement, one might guess that O'Connor was setting an artificial deadline in order to render such programs constitutional.[83] (Or perhaps

81. *See* Trial Transcript, Testimony of David White, Director of Public Testing, Grutter v. Bollinger, Civ. Action No. 97-75928 (E.D. Mich.) 137 (testifying the racial gap in LSAT scores has persisted for the past twenty-five years). *See also* WIGHTMAN, *supra* note 6, at 8-14; THE BLACK WHITE TEST SCORE GAP, *supra* note 6.

82. *See* Grutter v. Bollinger, 539 U.S. 306, 341-42 (2003).

83. *See* Amar & Caminker, *supra* note 2, at 542 (suggesting that O'Connor included

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her pronouncement was meant simply to compel policymakers to put far more energy into reducing test score and GPA gaps.)[84]

The lock-in model suggests that, until policymakers address the more general problem of lock-in, the test score and educational achievement gap may persist or even widen. As a result, setting a twenty-five year deadline for diversity-oriented affirmative action might well put communities of color in a no-win position. On the one hand, Justice O'Connor's opinion announces an artificially limited sunset clause for diversity-oriented affirmative action programs. On the other, anti-discrimination law requires that affirmative action be limited in scope. As the next section will discuss, these small-scale, limited programs can do nothing to eliminate locked-in racial disparities in meritocratic measures of admission.

B. "NO PAIN, NO GAIN:" THE NEED FOR LARGE-SCALE AFFIRMATIVE ACTION AND WEALTH REDISTRIBUTION

The lock-in model also suggests that, although the Court's decision in *Grutter* is important for symbolic reasons, small scale affirmative action will produce very little material gain for most people of color. To be sure, affirmative action in higher education provides great benefits for the limited number of students who gain admission under such programs. The *Grutter* decision is also symbolically very important, because the Court's holding for the moment stems the neo-conservative effort to completely eliminate race-conscious preferences.

At the same time, at a material level, small-scale affirmative action does little for communities of color.[85] The number of students admitted through such programs is small, relative to the number of minority students enrolled in four-year colleges and universities.[86] Only 20-30% of the institutions of higher learning

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the expectation to render affirmative action necessarily limited in duration).

84. *See id.* (suggesting that O'Connor may have been signaling to policymakers to prioritize the issue of disparities).

85. Small scale affirmative action programs might have constituted an opportunity for law schools and undergraduate institutions to experiment with alternative conceptualizations of merit and revisions to the law school curriculum, if not its mission. I have argued elsewhere that affirmative action programs might also be valuable to the extent that they put into place leaders of tomorrow who will re-evaluate the concept of merit and the racialized nature of that concept. *See* Roithmayr, *supra* note 57.

86. For example, in the fall of 2000, about a million African-American and "Hispanic" students enrolled in public four year institutions. *See* AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, FALL 1990- FALL 2000 ENROLMENT REPORT 6 (2000).

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are sufficiently selective that they use race to admit applicants.[87] And in those institutions, affirmative action is responsible for a relatively small (albeit symbolically very important) number of applicants of color. For example, in 1989, affirmative action facilitated the admission of black applicants to at most an additional 5-6% of an entering class for most selective institutions.[88] Moreover, for the majority in communities of color who will not apply to college or professional school, affirmative action in elite law schools does little to improve their relative material position.

In addition, the lock-in model of inequality suggests that small-scale programs of the sort endorsed in *Grutter* can do very little to reduce disparities. Instead, the model suggests that large-scale affirmative action and redistribution of wealth (perhaps via reparations) is necessary to reduce racial differences in GPAs and standardized test scores. First, the lock-in model suggests that affirmative action needs to be quite massive in magnitude to overcome the self-reinforcing effects of earlier monopoly conduct. For example, Shelly Lundberg and Richard Startz point out that, under a lock-in model of persistent inequality, the self-reinforcing nature of early advantage may require a large temporary intervention—large enough to jump start a reversal of self-reinforcing advantage.[89]

Second, the lock-in model suggests that massive affirmative action is needed on multiple fronts, in order to dismantle the institutional web of structures that reproduces disparity. If educational inequality is irrevocably linked to housing and employment, then policymakers cannot address educational disparity without also simultaneously addressing housing, employment, public services and finance.[90] Finally, the lock-in model emphasizes the need for wealth redistribution and reparations, to com-

87. *See* Gary Orfield, *Campus Resegregation and Its Alternatives*, *in* CHILLING ADMISSIONS 7 (Gary Orfield & Edward Miller eds., 1998). *See also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS xxxviii (1998) (300 institutions).

88. *See id.* at 41 fig. 2.11 (showing actual and hypothetical black matriculants as a percentage of all College and Beyond matriculants, demonstrating the difference between race-conscious and race-neutral admissions policies, for the year 1989).

89. According to Lundberg and Startz, in the area of residential segregation, the self-reinforcing nature of neighborhood capital on segregation means that even small differences will still induce wealthier whites to move out of the neighborhoods. To reverse outmigration, neighborhood subsidies would need to be sufficiently large to overcome the self-reinforcing differences between white and non-white neighborhood capital. *See* Lundberg & Startz, *supra* note 58.

90. *See id.*

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pensate for the cumulative effects of self-reinforcing advantage in terms of assets.[91]

Unfortunately, *Grutter* and a long line of previous cases effectively foreclose the sort of large-scale affirmative action necessary to dismantle lock-in. Affirmative action programs are subject to strict scrutiny and must be narrowly tailored to achieve a compelling government interest.[92] Neither automatic point awards nor quotas based on race are permitted, even on a temporary basis.[93] Affirmative action to remedy past discrimination is too narrowly circumscribed in employment and education to serve as the foundation for large-scale policy interventions.[94]

Perhaps most importantly, affirmative action programs cannot be used to remedy "societal discrimination."[95] Because locked-in discrimination cannot be traced to a contemporary individual who intentionally discriminates, locked-in disparities are likely to be classified as "societal discrimination."[96] But in the Court's view, permitting affirmative action programs to remedy societal discrimination would justify too much in the way of government intervention.[97]

Under *Grutter*, diversity programs are likewise just as circumscribed. Diversity programs must be narrowly tailored to achieve the purpose of diversifying the institution.[98] Institutions cannot use quotas, and can only use race as one of several "plus" factors accorded to applicants who demonstrate the potential to contribute a diverse perspective.[99] Although institutions can admit a "critical mass" of applicants via a diversity program, they can do so only to the extent that there is a relationship between the numbers admitted and the educational diversity benefits to the institution.[100] The lock-in model suggests that these nar-

91. *See id.* at 318-20 (reparations or additional subsidies need to remedy disparities in accumulated wealth). *See also* Roithmayr, Locked In Segregation, *supra* note 11, at 54.

92. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

93. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Gratz v. Bollinger, 539 U.S. 244 (2003).

94. *See Adarand*, 515 U.S. at 200 (suggesting that the Court would be unlikely to accept affirmative action to remedy past discrimination where there is no proof that the entity adopting the program has discriminated nor proof that the individuals who are benefitting from the program were the victims of past discrimination).

95. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

96. *See* Roithmayr, Locked In Segregation, *supra* note 11.

97. *See id.*

98. Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

99. *See id.*

100. *Grutter*, 539 U.S. at 336.

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rowly-tailored, limited programs will make no dent in reducing racial disparities in admissions.

C. THE REPRODUCTION OF WHITE ADVANTAGE

This section argues that the Court's opinion in *Grutter* affirmatively privileges white interests, for three reasons. First, the diversity rationale itself tends to prioritize white interests, because the rationale focuses on the value that students of color add to the existing merit-admitted (and predominantly white) classroom. Second, the *Grutter* opinion endorses the kind of "meritocratic" decisionmaking that privileges the admission of white applicants and excludes people of color. Finally, as is made clear by the Court's legitimacy rationale, diversity-oriented programs make it easier for institutions to conceal the discriminatory impact of conventional admissions standards, to the benefit of white students.

1. *Undue Burdens, Undue Benefits*

As articulated in *Grutter*, the diversity rationale appears to prioritize white interests, even as the rationale purports to include the interests of communities of color. In a line of cases extending back as far as *Bakke*, the modern Court has discussed the need to make sure that affirmative action does not unduly burden the interest of whites.[101] In *Grutter*, however, parts of the Court's opinion appear to go beyond limiting undue burdens for whites, to affirmatively privileging white interests.[102]

For example, the Court's discussion about the importance of a diverse student body suggests that diversity focuses on benefits to white students. In the Court's view, when students of a

101. In the Court's opinion in *Bakke*, Justice Powell focused on the burden of affirmative action to "innocent whites" and their subsequent resentment. *Bakke*, 438 U.S. at 295 (1978). In Richmond v. Croson the Court rejected an affirmative action program in large part because of its impact on whites. Richmond v. Croson, 488 U.S. 469, 493 (1989). Justice Scalia's concurrence warned that treating whites "unfairly" could lead to racial hostility. "([E]ven benign racial quotas have victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. . . . When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson or Croson burns." *Croson*, 488 U.S. at 527. *See also id.* at 494 (majority opinion mentions possible racial hostility deriving from stigma).

102. The Court's opinion in Gratz v. Bollinger rejected the undergraduate points-based program in part because of the Court's concern that the white Italian-American or white artist would not be able to gain entry as a diversity candidate. *See* Gratz v. Bollinger, 539 U.S. 244, 271 (2003).

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wide variety of backgrounds are present, "'classroom discussion is livelier, more spirited and simply more enlightening and interesting.'"[103] Likewise, students are "better prepare[d] for an increasingly diverse workforce and society, and better prepare[d] . . . as professionals." [104]

To be sure, the Court suggests generally that all students present in the classroom will benefit, including students of color. But those students who will be "better" prepared, and for whom classroom discussion comparatively is "livelier" and "more interesting" are presumably those white students who have already been admitted to elite institutions on the basis of conventional admissions standards.[105] Indeed, much of the University of Michigan's expert research supported the diversity argument by looking to the benefits that white students obtained from cross-racial interaction.[106]

Likewise, the 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. In approving the law school affirmative action program, the Court cites to the University of Michigan's argument that a critical mass is essential to diminish the stereotypical "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue."[107]

Of course, given the persistence of segregation in employment, education and housing, minority students are far less likely to fall into the trap of believing that minority students express some monolithic viewpoint. Indeed, those students are far more likely already to have been exposed to a critical mass of people of color, with a range of viewpoints, when they come to law

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103. *See Grutter*, 539 U.S. at 330.

104. *See id.*

105. The Brief for the American Association for Educational Research, to which the Court cites, refers primarily to the expert report of Patricia Gurin, which focuses significantly on surveys of white students in ascertaining the benefits of cross-racial exposure. *See* Brief for the American Educational Research Association et al, as Amicus Curiae in Support of Respondents Before the U.S. Supreme Court, Grutter v. Bollinger, 539 U.S. 306 (2003) (02-241).

106. *See* Expert Report of Patricia Gurin, Gratz v. Bollinger (E.D. Mich.) (No. 97-75321); "Empirical Results From the Analysis Conducted for This Litigation: The Effect of Structural Diversity on Classroom and Informal Interactional Diversity," Grutter v. Bollinger, No. 97-75928 (E.D. Mich.) (discussing comparative benefits to white students with varying degrees of exposure to students of color).

107. *Grutter*, 539 U.S. at 333.

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school. In contrast, many whites who attend law school will encounter classmates of color for the first time, having also attended segregated public schools and lived in segregated neighborhoods.[108] Again, the particular benefit of cross-racial understanding and breaking down stereotypes that diversity programs provide likely inures primarily to white students.[109]

The Court also finds that diversity in education is compelling because it is good for business.[110] Although benefits to business are not exclusively benefits to whites, it is important to note the Court's marked shift from a rationale focusing on the benefits to non-whites of eliminating the vestiges of slavery or remedying past discrimination to focusing on benefits to business and the military.[111]

It should perhaps come as no surprise that the opinion in *Grutter* focuses on white interests in this way. After all, given the Court's restrictive jurisprudence on remedial affirmative action, the University of Michigan (perhaps smartly) chose not to push any argument that would have focused more directly on benefits to communities of color.[112] In addition, the structure of the lawsuit itself contributed to a privileging of white interests—the case asked a state institution to justify an affirmative action program on the basis of the institution's existing mission. The lock-in model suggests that, as institutional structures—for example, the institutional mission and objectives—grow up around white advantage, those practices will serve to reproduce the early advantage that whites acquired by way of monopoly.

Derrick Bell writes that material gains come to communities of color only when those gains serve white interests.[113] *Grutter* demonstrates Bell's point. In *Grutter*, the compelling government interest that the Court uses to justify race-conscious admissions preferences is neither remedying past discrimination nor reducing societal discrimination, nor even benefitting the small numbers of students who are admitted via diversity programs. Rather, the Court finds a compelling interest in diversifying the classroom for the benefit of white students.

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108. *See* Expert Report, *supra* note 106.

109. *Grutter*, 539 U.S. at 328-29.

110. *See id.*

111. *See* David Wilkins, *From "Separate Is Inherently Unequal" to "Diversity is Good for Business: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

112. *See supra* notes 96-99 and accompanying text.

113. *See* Derrick Bell, Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

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2. *Meritocracy vs. Diversity*

The Court's opinion in *Grutter* favors white interests in a second way: by endorsing and protecting elite meritocracy, despite the fact that meritocratic admissions standards disproportionately exclude applicants of color. To justify this move, the Court assumes that racial diversity and academic excellence are at odds with one another, and cannot be reconciled except through diversity-based affirmative action programs. So, for example, the Court declares that a narrowly tailored diversity program does not "require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."[114] Likewise, the Court assumes that decreasing emphasis on GPA and LSAT scores would constitute a dramatic sacrifice of "academic quality of all admitted students" and "a vital component of [the law school's] educational mission."[115]

The assumption that academic excellence and diversity are at odds with one another is deeply embedded in much of both liberal and conservative thinking about affirmative action. Under this view, institutions are structurally pressured to choose between their commitment to academic excellence (associated with success on numerical measures of quality) and the importance of admitting applicants of color (whose scores are not as high on measures of excellence). In this putative dichotomy, excellence is equated with (disproportionately white) success on the LSAT and in GPAs; admitting applicants of color is equated with sacrifice of standards. Affirmative action then becomes a way to avoid the hard choice.

But the Court ignores several important facts in constructing the parameters of this choice. First, the Court assumes that excellence is measured by GPA and LSAT scores, which are very heavily weighted in the conventional admissions process. Available evidence points to the contrary, however, that LSAT scores and GPA constitute very poor predictors of first-year grades, let alone of overall excellence. According to the Law School Admissions Council, the median predictive power of the LSAT for first-year grades is low: the test score explains only 16% of the variance in first year grades. A combined index explains only 25% of first-year grades.[116] Beyond first-year per-

114. *Grutter*, 539 U.S. at 339.
115. *See id.* at 340.
116. LAW SCHOOL ADMISSIONS COUNCIL, LSAT & LSDAS REGISTRATION &

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formance, numerical measures are even less predictive of overall academic success, future job satisfaction, income, leadership or community contribution.[117]

Second, the Court assumes that the admission of students of color with lower scores entails a sacrifice of excellence. Again, available evidence points to precisely the contrary conclusion. William Bowen and Derek Bok have extensively documented the fact that admitting students of color with lower GPAs and scores requires no sacrifice of excellence.[118] Students of color with lower numbers who graduate from selective institutions earn adequate grades, graduate at similar rates, earn similar incomes, achieve advanced degrees and leadership positions at even higher rates, and enjoy similar job satisfaction.[119]

Third, the Court assumes that current conceptions of merit are race-neutral and not connected to the early white "first-mover" monopoly advantage that the lock-in model describes. In earlier work, I have argued that first-mover monopolist groups can use the concept of "standards" to define selection criteria in ways that continue to favor themselves.[120] Given that whites monopolized the legal profession during its Jim Crow days, we should not find it surprising that law school admissions standards continue to favor white applicants and disproportionately exclude applicants of color.[121] Moreover, just as educational disparities are locked in, so too are merit standards, owing to the self-reinforcing signaling effect of LSAT scores in law school

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INFORMATION BOOK 121 (2002) ("Correlation is stated as a coefficient for which 1.00 indicates an exact correspondence between candidates' test scores and subsequent law school performance.... The closer to 1.00 the correlation coefficient is, the greater the test's predictive validity.... The correlation between LSAT scores and first-year grades varies from one law school to another.... During 2000, validity studies were conducted for 183 law schools. Correlations between LSAT scores ranged from 0.13 to 0.62 (median is 0.41). Correlations between LSAT scores combined with undergraduate grade-point averages and first-year law school grades ranged from 0.26 to 0.67 (median is 0.50)."). To be sure, many argue that although the LSAT is a poor predictor, it is the best instrument law schools have. Philip D. Shelton, *Admissions Tests: Not Perfect, Just the Best Measures We Have*, CHRON. OF HIGHER EDUC., July 6, 2001, at B15. Even so, given the costs in terms of excluding people of color, such low predictive value makes continued use hard to justify.

117. *See* Richard O. Lempert et al., *From the Trenches and Towers: Michigan's Minority Graduate in Practice: The River Runs Through the Law School*, 25 L. & SOC. INQUIRY 395, 468-69 (2000) (empirical study of Michigan graduates showing that graduates of color who had been admitted with lower scores and GPAs were as successful as white graduates with higher scores).

118. *See* BOWEN & BOK, *supra* note 87.

119. *See id.*

120. *See* Daria Roithmayr, *Barriers to Entry*, *supra* note 11.

121. *See id.*

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rankings (and relatedly, employer hiring preferences and alumni donations).[122]

Notwithstanding the disproportionate impact of meritocratic standards, the Court goes out of its way to extend quasi-constitutional protection of the law school's interest in elite standards of excellence. At oral argument, Justice Scalia asked Michigan's counsel why the law school did not reduce emphasis on the LSAT and GPA, in order to diversify its student body.[123] Counsel Maureen Mahoney answered that the school should not have to choose, and then argued expressly that the state had a compelling interest not only in diversity but in elite academic excellence as well.[124]

In its opinion, the Court accepts the law school's argument that elite institutions should not have to choose between excellence and diversity. As Justice Scalia points out, in so doing, the Court implicitly finds that the government's interest in elite meritocracy is compelling.[125] At the very least, the Court finds that the government's interest in elite meritocracy is sufficiently compelling that the law school is not required to reduce weight on LSAT scores and GPA in order to diversify.

This ruling is quite troubling, for two reasons. First, the Court's implicit holding appears to ignore the discriminatory impact of conventional standards. In any cost-benefit analysis that properly considers the interests of communities of color, the discriminatory effect of LSATs and GPAs should outweigh the limited predictive value of those measures. Second, and relatedly, the Court's holding on this issue potentially eviscerates any future constitutional challenge to elite standards that disproportionately or wholly exclude people of color. Indeed, courts could potentially rule that a law school's interest in remaining an elite institution constitutes a sufficiently compelling interest to justify complete exclusion of people of color on the basis of LSAT scores.[126]

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122. *See id.*

123. Transcript, Oral Argument, Grutter v. Bollinger, No. 02-241 32 (April 1, 2003).

124. "There is a compelling interest in having an institution that is both academically excellent and racially diverse, because our leaders need to be trained in institutions that are excellent, that are superior academically, but they also need to be trained with exposure to the viewpoints, to the perspectives, to the experiences of individuals from diverse backgrounds." *See id.* at 32-33.

125. Grutter v. Bollinger, 539 U.S. 306, 353-54 (2003).

126. As mentioned earlier, non-whites are far more disproportionately excluded on the top end of the standardized test score spectrum. *See Latest News*, *supra* note 4 and accompanying text.

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In reconciling the so-called tension between meritocracy and diversity via affirmative action, elite meritocracy appears to take far more than its share. Small-scale diversity-oriented affirmative action programs pose no real threat to the interests that meritocracy protects (which, one suspects, is precisely what makes them acceptable to elite institutions). These limited programs do not require institutions to systematically eliminate the racially disparate impact of conventional standards. Likewise, these programs have no effect on the institutionally locked-in inequality that perpetuates white monopoly benefits.

C. DISGUISING RACIAL PRIVILEGE AS RACE-NEUTRAL

The Court's opinion in *Grutter* benefits whites in a third (albeit indirect) way. In particular, *Grutter* approves the kind of small-scale diversity-oriented programs that conceal the institutional bias of conventional admissions standards. Because whites are disproportionately favored by such standards, disguising such racial bias benefits white interests.

Recent research and experience in several states confirms that the small-scale affirmative action conceals the race-specific impact of the conventional focus on LSAT and GPA. In both Texas and California, where government was prohibited from using race in admissions decisions, institutional reliance on conventional admissions standards produced highly segregated law school and undergraduate populations.[127] The dramatic resegregation that followed passage of Proposition 209 and the announcement of the Hopwood decision persuaded Texas and California legislatures to adopt the so-called "X percent" plans for undergraduate institutions.[128]

Prior to Hopwood and Proposition 209, none of these legislatures had taken any sort of action with regard to the racially disparate impact of conventional admissions standards. No evidence exists that legislators were even aware of racial disparities in LSATs and GPAs. The existence of small-scale affirmative action programs had successfully concealed the way in which those standards disproportionately excluded applicants of color.

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127. Texas automatically admits the top 10% of each school's graduating class to each "general academic teaching institution." TEX. EDUC. CODE ANN. § 51.803 (West 2001). California admits the top 4% and Florida admits the top 20%. *See* Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution,'* CHRON. HIGHER EDUC. at A31, A32 (2000).

128. Experts uniformly agree that such plans are race-conscious in nature because they rely on the segregated nature of schools in order to produce racial diversity. *See id.*

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Likewise, at the national level, small-scale diversity-oriented affirmative action conceals nationwide disparities. Research indicates that elite law school populations would quickly resegregate on the basis of conventional admissions standards to become almost exclusively white. Linda Wightman has documented the dramatic impact on students of color that a purely "color-blind" admissions process would have in legal education.[129] According to her research, such processes would produce dramatic drops in the number of students of color at law schools, and not just at the elite schools.[130] Similarly, the University of Michigan Law School's expert, Stephen Raudenbush, testified that, in the absence of any race-conscious preference, under-represented minorities would constitute only 4% of the law school's entering class, as opposed to the actual 14.5%.[131]

Diversity-based affirmative action serves to hide these facts. Diversity programs permit law schools to represent their meritocratic admissions standards as race-neutral, fair and "legitimate," despite the fact that these standards exclude almost all applicants of color. The Court's opinion in *Grutter* is quite open about this legitimating function of diversity-based programs. "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."[132] Thus, diversity is useful because it helps to convince people that meritocracy is fair and legitimate, despite the fact that meritocratic standards at the most elite range exclude virtually all applicants of color.

CONCLUSION

This Essay offers three central insights from the left in evaluating *Grutter*'s small-scale affirmative action program. First, if Justice O'Connor truly expects the country to abandon race-conscious preferences within the next twenty-five years, then government must be allowed to address what the Court has termed "societal discrimination." The law must expand the definition of discrimination to include racial disparities that can be

129. *See* Linda Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race As a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1 (1997).

130. *See id.*

131. *See Grutter*, 539 U.S. at 320.

132. *See id.* at 332.

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traced to historical anti-competitive exclusion, at the very least. Elsewhere I have argued that the U.S. should adopt a definition of discrimination that more closely resembles that used in South Africa and Canada, a definition that would encompass actions that serve to reinforce locked-in discrimination.[133]

Second, and relatedly, the Court should endorse large-scale affirmative action, at least as a temporary jumpstart to reversing the locked-in effects of a three hundred year monopoly. Indeed, in the spirit of antitrust law, institutional structures that perpetuate monopoly ought to be dismantled altogether. For example, law schools ought to be required to reduce or eliminate the weight of the LSAT and GPA, in law school admissions based on their racially disproportionate impact. Just as the Court approved the dissolution of AT&T and Standard Oil, so too should institutions be required to radically restructure in order to dismantle racial monopoly.[134]

Third, all institutions, selective and otherwise, should develop a set of admissions standards that are both "fair and functional."[135] To be fair, admissions standards should not systematically and disproportionately exclude people of color or the poor (or any other discrete and definable group) on the basis of self-reinforcing advantage that can be traced to historical anti-competitive conduct. Law schools and other institutions of higher learning should commit themselves to developing standards that promote participation by all segments of society.

To be functional, admissions criteria should more accurately predict a student's ability to benefit from a program of education. As it is, conventional merit standards defer far too heavily to measures of merit that do not even accurately predict for first-year performance, let alone overall performance in school or success in the profession. Law schools should re-tool their assessments of merit to more closely correspond with those skills and abilities that are required for the everyday practice of law, to include client listening and interviewing, case management and other clinical skills.

Having sounded the harsh note of critique, it is extremely important to re-iterate the importance of diversity-based affirmative action to the symbolic commitment to racial empowerment. It is important, of course, for those of us on the left to

133. *See* Roithmayr, Locked In Segregation, *supra* note 11.
134. *See id.*
135. *See* Guinier & Sturm, *supra* note 80.

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remain committed to preserving affirmative action no matter the scale, even as conservatives gear up for another round of attacks on diversity-based programs. Race-conscious affirmative action serves as a symbolic bulwark, a race-conscious counter to the meritocratic admissions standards that serve to reproduce racial inequality. But those of us on the left should also recognize the significant limitations of diversity-based program and the importance of dismantling locked-in monopoly of resources. It is important that we not abandon the more expansive view of racial justice in the quest to preserve the limited remedy of affirmative action.

Ironically, the issue of diversity-based affirmative action exposes an issue on which scholars on the left and conservatives claim to agree: both sides argue that affirmative action does little to address the dramatic disparities in access to educational resources. As Kimberlé Crenshaw points out, however, conservatives do not appear willing to devote significant resources and energy to eliminate racial disparities at the primary and secondary levels.[136] At the same time, radical scholars need to continue to devote as much energy to that fight as to the fight to preserve affirmative action—and now, in the wake of Justice O'Connor's twenty-five year sunset clause, perhaps even more quickly.

136. Kimberlé Crenshaw, *Beyond Affirmative Action: The Twenty-Five Year Detente*, *at* http://www.aapf.org/pages/detente.html (last visited Sept. 13, 2004) (pointing out that no serious steps were taken by proponents of Proposition 209 after the passage of the referendum to secure real educational equality).

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