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## THE VIRTUES OF HETEROGENEITY, IN COURT DECISIONS AND THE CONSTITUTION

In recent decades, the project of integrating long-segregated American society has stalled, if not lurched into reverse. Though the impermissibility of de jure segregation remains well established, de facto segregation has metastasized, in many cases overwhelming gains made during the Civil Rights Era.<sup>1</sup> When the Supreme Court closed the door on the interdistrict busing at issue in *Milliken v. Bradley*,<sup>2</sup> Justice Marshall's dissent began with the mournful prophecy that "[o]ur Nation . . . will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together."<sup>3</sup> In far too many cases, Justice Marshall's warning has been proven true.<sup>4</sup>

One controversial set of solutions to racial separation and inequity in the United States falls under the heading of affirmative action. Though rarely defined in one sweeping phrase,<sup>5</sup> affirmative action is fairly understood as a programmatic effort to increase the representation of traditionally underrepresented groups within a limited set of opportunities — for example, jobs, housing units, or spots in an academic cohort.<sup>6</sup>

This approach has often been characterized as a kind of reparation — a class-level compensation to traditionally excluded groups to account for those past harms.<sup>7</sup> But there are other justifications.<sup>8</sup> Per-

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<sup>1</sup> See, e.g., Emma Brown, *On the Anniversary of Brown v. Board, New Evidence that U.S. Schools Are Resegregating*, WASH. POST (May 17, 2016), <https://www.washingtonpost.com/news/education/wp/2016/05/17/on-the-anniversary-of-brown-v-board-new-evidence-that-u-s-schools-are-resegregating/> [https://perma.cc/XW2J-LMA6]; Emily Richmond, *Schools Are More Segregated Today than During the Late 1960s*, THE ATLANTIC (June 11, 2012), <https://www.theatlantic.com/national/archive/2012/06/schools-are-more-segregated-today-than-during-the-late-1960s/258348> [https://perma.cc/49ZK-L4JL].

<sup>2</sup> 418 U.S. 717 (1974).

<sup>3</sup> *Id.* at 783 (Marshall, J., dissenting).

<sup>4</sup> See, e.g., Grant Smith & Daniel Trotta, *U.S. Hate Crimes Up 20 Percent in 2016 Fueled by Election Campaign — Report*, REUTERS (Mar. 13, 2017, 11:23 PM), <http://www.reuters.com/article/us-usa-crime-hate-idUSKBN16LoBO> [https://perma.cc/8DXE-9FSC]; Art Swift, *Americans' Worries About Race Relations at Record High*, GALLUP (Mar. 15, 2017), <http://www.gallup.com/poll/206057/americans-worry-race-relations-record-high.aspx> [https://perma.cc/U44Z-BRVL].

<sup>5</sup> Carl L. Livingston, Jr., *Affirmative Action on Trial: The Retraction of Affirmative Action and the Case for Its Retention*, 40 HOW. L.J. 145, 151 & n.35 (1996); John Valery White, *What Is Affirmative Action?*, 78 TUL. L. REV. 2117, 2124 (2004).

<sup>6</sup> Cf. Livingston, *supra* note 5, at 151 n.35 (citing various definitions).

<sup>7</sup> E.g., *id.* at 151.

<sup>8</sup> See, e.g., RANDALL KENNEDY, FOR DISCRIMINATION 78–109 (2013); Aderson Bellegarde François, *Only Connect: The Right to Community and the Individual Liberty Interest in State-Sponsored Racial Integration*, 112 PENN ST. L. REV. 985, 991–96 (2008).

haps the most notable is the “diversity rationale”: the idea “that individuals and institutions benefit in some way if they represent as many diverse viewpoints as possible, including racial diversity.”<sup>9</sup> Thus, “[i]nstead of the presence of blacks or other racial minorities constituting a necessary punishment in expiation of past sins, the diversity rationale makes their presence a positive good.”<sup>10</sup>

Affirmative action in perhaps its most contentious form uses status as a member of a traditionally underrepresented race as a decisionmaking factor. It has on this ground been interpreted by the Supreme Court as a form of racial discrimination and subjected to strict scrutiny accordingly.<sup>11</sup> Operating within that mode of analysis, the Court has struck down integrationist projects undertaken voluntarily by local school districts,<sup>12</sup> though it has been slightly more forgiving in the context of higher education.<sup>13</sup> Yet recent developments in the executive branch suggest that even previously upheld higher-education programs may now be imperiled.<sup>14</sup>

In weighing integrationist programs, from primary to higher education, the Supreme Court has often spoken of the Constitution as a document that can support only the most limited integrationist efforts — as a document that values individual rights so much that they can almost never be subordinated to systematic attempts to promote diversity in a given institution.<sup>15</sup> This view is often closely linked to the idea that “[o]ur [C]onstitution is color-blind”<sup>16</sup> — that it prohibits virtually all racial classifications,<sup>17</sup> or at least all but those “necessary to

<sup>9</sup> François, *supra* note 8, at 995; *see also* KENNEDY, *supra* note 8, at 94.

<sup>10</sup> KENNEDY, *supra* note 8, at 100. As this quote indicates, Professor Randall Kennedy uses the term “positive good” to distinguish between something that confers affirmative benefits and something that simply eliminates harm. *See id.* at 244. Kennedy also notes “the delicious irony that this rhetoric was used by defenders of slavery in the nineteenth century to rehabilitate themselves.” *Id.* at 244 n.\*.

<sup>11</sup> *E.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417–19 (2013).

<sup>12</sup> *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>13</sup> *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>14</sup> *See* Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html> [<https://perma.cc/79JE-KDHM>]; Susan Sviuga & Nick Anderson, *Justice Department Investigating Harvard's Affirmative-Action Policies*, WASH. POST (Nov. 21, 2017), [http://wapo.st/2jdN4pY?tid=ss\\_tw&utm\\_term=.f0015c16ee7d](http://wapo.st/2jdN4pY?tid=ss_tw&utm_term=.f0015c16ee7d) [<https://perma.cc/H9NS-U7E9>].

<sup>15</sup> *See, e.g.*, *Parents Involved*, 551 U.S. at 730; *Grutter*, 539 U.S. at 334–35; *see also* François, *supra* note 8, at 998–99, 1004–06 (discussing the primacy, in the Western legal tradition, of “first-generation” liberty rights over “second-generation” social and economic rights).

<sup>16</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); *see Parents Involved*, 551 U.S. at 748 (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); Rachel F. Moran, *Let Freedom Ring: Making Grutter Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475, 476 (2009).

<sup>17</sup> *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472 (2004) (“For many, the belief that

remedy past discrimination.”<sup>18</sup> Though others read the Constitution as expressing an “antibondage principle” — that is, “the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups”<sup>19</sup> — the general consensus is that the anticlassification principle has predominated “over the past half-century.”<sup>20</sup>

This Note suggests that something important about the Constitution’s values has gone unsaid in this debate: that the Constitution, in addition to at least opposing identity-based subordination, itself expresses tremendous faith in heterogeneity. So while the Constitution may in general be a “charter of negative rather than positive liberties,”<sup>21</sup> in the specific context of integration, there is a separate point to be made about its commitment to systemic diversity and the broad-based blessings that flow from it, especially in light of the relative rarity with which the Court has defended integration as a freestanding good rather than only a reparation for past harms.

This Note proceeds in four Parts. Part I reviews how the Court has characterized the purposes behind race-conscious integration in lower- and higher-education cases. Part II elaborates on the diversity rationale. Part III discusses how the Constitution itself seems to valorize diversity (at least at a high level of generality) by placing bets on heterogeneity through its structure, the First Amendment, and the Sixth Amendment. Part IV concludes by reflecting on why this observation matters.

## I. DISCUSSIONS OF INTEGRATION IN THE EDUCATION DECISIONS

There are many reasons to support integration. “Some integrationists are inspired by an ethos of human solidarity,” while “[o]thers urge integration to secure the allegiance (or at least cooperation) of alienated outsiders.”<sup>22</sup> “[S]till others . . . fear that if white and colored people are separate, the white majority will discriminate in favor of itself,”<sup>23</sup> or that minorities (regardless of active discrimination) will simply remain trapped in a vicious cycle of inequality given the already-unequal distribution of resources and advantages caused by past discrimination.<sup>24</sup>

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anticlassification commitments are fundamental entails the view that our tradition embraces a particular conception of equality, one that is committed to individuals rather than to groups.”)

<sup>18</sup> Moran, *supra* note 16, at 479.

<sup>19</sup> Siegel, *supra* note 17, at 1472–73.

<sup>20</sup> *Id.* at 1473.

<sup>21</sup> *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff’d*, 489 U.S. 189 (1989).

<sup>22</sup> Randall Kennedy, *On Racial Integration*, DISSENT, Summer 1996, at 47, 49.

<sup>23</sup> *Id.*

<sup>24</sup> See ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 113 (2010).

Some of these rationales treat integration as a form of redress — a place where two distinct groups' interests diverge, and one must prevail. As noted above, however, that characterization is not inevitable: there are also arguments for integration that treat it as something that benefits society as a whole, and thus as an aim where interests converge.<sup>25</sup>

The difference between emphasizing convergence and divergence may be a crucial one. Professor Derrick Bell, for example, famously hypothesized that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”<sup>26</sup> Though Bell himself was skeptical that salutary use could be made of his thesis,<sup>27</sup> there is nevertheless a descriptive case to be made, in light of Bell’s work, that emphasizing convergence rather than divergence is more likely to yield broader public support for integration.<sup>28</sup> In

<sup>25</sup> This does not mean, of course, that integrationist programs benefit literally every member of society. Many people, especially white people, are virulently opposed to affirmative action, seeing it as an unjust form of “reverse discrimination” against them for wrongs that they never committed. See, e.g., KENNEDY, *supra* note 8, at 109 (discussing this opposition). Justifying such programs on the grounds that they confer broad societal benefits provides an answer to the latter part of this grievance, because this justification “depends on no predicate of misconduct or unfairness.” *Id.* at 97. But it will not satisfy all critics, including the many who in good faith believe that they are nevertheless being unjustifiably or unwisely disadvantaged. There may be no satisfying answer to this problem other than the unprofound observation that many broadly shared goods — for example, construction of a highway, hospital, or public utility — nevertheless carry with them a variety of results for different individuals, with some results better than others. The consoling idea here is that the good is not merely a slice of a fixed pie taken from one group and given to another, but rather a good that can increase the size of the pie for everyone, even if that is cold comfort for those whose individual slices of the pie don’t increase as much as others’ do. With regard to race-conscious integration, for example, if a society with more diverse institutions ends up prospering more than it otherwise would, that should incrementally pay dividends for everyone — but those dividends may be much harder to measure, and in some cases less individually salient, than whether one, for example, got into the college that one wanted to go to.

<sup>26</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); see also Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004).

<sup>27</sup> See Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622–25 (2003) (identifying the Court’s diversity rationale in *Grutter* as an example of interest convergence, *id.* at 1624, yet critiquing it as “a serious distraction in the ongoing efforts to achieve racial justice,” *id.* at 1622, and voicing the concern that racial minorities had merely been “the fortuitous beneficiaries of a ruling motivated by other interests that can and likely will change when different priorities assert themselves,” *id.* at 1625).

<sup>28</sup> See, e.g., Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN’S L. REV. 253, 276–77 (2005) (arguing that “acts against self-interest are rare, especially on matters of racial equity,” *id.* at 276, and that “progressives would do better to be realistic about human nature,” *id.*, and build their efforts around the “hopeful upside to Bell’s interest-convergence thesis,” *id.*); cf. Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, COMMENTARY (Feb. 1, 1965), <https://www.commentarymagazine.com/articles/from-protest-to-politics-the-future-of-the-civil-rights-movement> [https://perma.cc/K9PT-FJKL] (“[I]n arriving at a political decision, numbers and organizations are crucial, especially for the economically disenfranchised. . . . We need allies.”). This argument does not assume, to be sure, that such a convergence of interests *should* have to exist for a minority group that has been unjustly treated to secure better treatment; in an ideal world, beliefs about justice would

keeping with the potential importance of the distinction, this Note will thus distinguish between arguments for integration that identify or emphasize a divergence of interests (divergence-oriented arguments) and arguments for integration that identify or emphasize a convergence of interests (convergence-oriented arguments).

With that framing in mind, which view of integration has the Court propounded? When it comes to primary and secondary education, the Court has tended to emphasize divergence rather than convergence, characterizing integration as a kind of redress rather than as a broad-based, freestanding positive good. The Court has, however, notably departed from this trend in some of its higher-education cases.<sup>29</sup> The remainder of this Part briefly reviews how the Court has discussed integration in those two contexts.

### A. School Desegregation

The largest and best-known body of law in which the federal courts have grappled with integration is the school desegregation line of cases, beginning with *Brown*.<sup>30</sup> That case itself is a fitting exemplar: the Court did not find much occasion to defend integration as a broad and freestanding good, but instead focused on making clear that “[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children.”<sup>31</sup> It thus, with delicately forged unanimity,<sup>32</sup> held that segregated schools are “inherently unequal” and a per se “denial of the equal protection of the laws.”<sup>33</sup>

*Brown II*,<sup>34</sup> the following year, further implied the divergence of group interests, emphasizing the apparent need to “reconcil[e] public and

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have no relation to what people personally stood to gain. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 10–19 (rev. ed. 1999). And likewise, accepting this Note’s argument does not require rejecting reparations-based arguments: there have certainly been plenty of wrongs to repay, see, e.g., Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [https://perma.cc/84E2-ATZ8], and the two justifications can easily coexist, see *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1660 (2014) (Sotomayor, J., dissenting) (“[C]onstitutionally permissible race-sensitive admissions policies can both serve the compelling interest of obtaining the educational benefits that flow from a diverse student body, and inure to the benefit of racial minorities. There is nothing mutually exclusive about the two.”).

<sup>29</sup> Other areas of law have also departed from this fixed-pie frame in limited ways. E.g., *Traficante v. Metro. Life Ins.*, 409 U.S. 205, 209–10 (1972) (holding that a white tenant had standing to challenge discriminatory housing practices against black tenants on the grounds that “the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations”). Because those departures are relatively ad hoc and underdeveloped, this Note does not address them at length.

<sup>30</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>31</sup> *Id.* at 494 (quoting the lower court in the Kansas case).

<sup>32</sup> See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE* 681–702 (2004).

<sup>33</sup> *Brown*, 347 U.S. at 495.

<sup>34</sup> *Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294 (1955).

private needs” while still respecting “the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis.”<sup>35</sup> In place of an affirmative defense of integration or a mandate that school authorities integrate posthaste, the Court instead launched a line of cases in which it and the lower courts would be responsible for “consider[ing] whether the action of school authorities constitute[d] good faith implementation of the governing constitutional principles.”<sup>36</sup> This doctrinal move implied a divergence-oriented view about integration: that it was not societally valuable enough to enforce for its own sake, but rather only to impose as a penalty for bad behavior.<sup>37</sup>

The cases that followed *Brown* and *Brown II* further exemplified this divergence-oriented framing. The Court defended, for example, its own authority in the face of Southern defiance,<sup>38</sup> while being careful to state that it was “not unmindful of the deep-rooted problems involved” in integration — the “multifarious local difficulties and variety of obstacles which might arise,” the eminent possibility of “legitimate local problems.”<sup>39</sup> Even in its most desegregation-friendly opinions, the Court seemed at pains to treat integration as a kind of logistical headache.<sup>40</sup>

The first clear convergence-oriented defense of integration came, rather, in dissent. In 1974, when the Court in *Milliken v. Bradley*<sup>41</sup> held that there could be no interdistrict remedies without interdistrict violations and effects,<sup>42</sup> the dissenting Justices mourned the decision’s pan-racial downsides in fuller measure than the Court had ever sung its prior opinions’ pan-racial upsides. Justice White observed that without

<sup>35</sup> *Id.* at 300.

<sup>36</sup> *Id.* at 299.

<sup>37</sup> This conclusion does not follow necessarily; a later case distinguished, for example, the reach of legislative authority to mandate “that in order to prepare students to live in a pluralistic society each school should . . . reflect[] the proportion for the district as a whole” from a lack of judicial authority to do the same. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). But that finer distinction seems overshadowed by the unspoken implication that if the Court really was prepared to defend integration as a good thing for everybody, it would not have given recalcitrant districts such an easy out. *Cf.* Paul Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585, 613–14 & n.76 (1983) (citing sources advancing the view that “the Court furnished a limited remedy [in *Brown II*] because it gave independent weight to remedial costs and viewed interference with the sensitivities and interests of white opponents of *Brown* as a balanceable cost,” *id.* at 613–14).

<sup>38</sup> *See, e.g.,* *Cooper v. Aaron*, 358 U.S. 1 (1958); *see also* Bell, *supra* note 26, at 529 (discussing the Court’s antidefiance rationale in *Cooper*).

<sup>39</sup> *Goss v. Bd. of Educ. of Knoxville*, 373 U.S. 683, 689 (1963) (citation omitted).

<sup>40</sup> *See, e.g.,* *Green v. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 436–39 (1968) (observing that integration “would necessarily involve solution of ‘varied local school problems,’” *id.* at 436 (quoting *Brown II*, 349 U.S. at 299), and that progress had to be “tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution,” *id.* at 437); *Swann*, 402 U.S. at 28 (stating that integrationist remedies “may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some,” even if that “awkwardness and inconvenience [could not] be avoided in the interim”).

<sup>41</sup> 418 U.S. 717 (1974).

<sup>42</sup> *Id.* at 741, 745.

Detroit's "official policy of segregation," "neither Negroes nor whites would have suffered from the effects of segregated education, with all its shortcomings."<sup>43</sup> Instead, he wrote, "[t]he education of children of different races in a desegregated environment has unhappily been lost, along with the social, economic, and political advantages which accompany a desegregated school system as compared with an unconstitutionally segregated system."<sup>44</sup>

Justice Marshall echoed these themes, writing:

We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future.<sup>45</sup>

"In the short run," Justice Marshall acknowledged, "it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities — one white, the other black — but it is a course, I predict, our people will ultimately regret."<sup>46</sup>

People did, in fact, regret it. But the Court's decisions in response to local efforts to integrate primary and secondary schools largely hewed to prior majorities' divergence-oriented framing.<sup>47</sup> Most recently, in 2007, the Court confronted a Seattle school district that had used a system of tiebreakers based on race or ethnicity to fill open slots in schools that were both highly sought-after by students and insufficiently diverse.<sup>48</sup> Distinguishing the district's plan from more "individualized, holistic" efforts that had been blessed in the context of higher education,<sup>49</sup> the Court cried foul.<sup>50</sup> Race, Chief Justice Roberts wrote for the Court, was not being "considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints,'" but rather as "determinative" on its own.<sup>51</sup> And, as he wrote for himself and three other Justices,<sup>52</sup> it was being "directed only to" the impermissible

<sup>43</sup> *Id.* at 779 (White, J., dissenting).

<sup>44</sup> *Id.* at 780.

<sup>45</sup> *Id.* at 783 (Marshall, J., dissenting).

<sup>46</sup> *Id.* at 814–15.

<sup>47</sup> See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 (1982) (observing that while "it should be . . . clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom,'" the Court's "cases suggest that that desegregation of the public schools . . . at bottom inures primarily to the benefit of the minority, and is designed for that purpose" (citation omitted)).

<sup>48</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 (2007).

<sup>49</sup> See *infra* section I.B, pp. 879–81.

<sup>50</sup> *Parents Involved*, 551 U.S. at 722–23 (discussing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)); and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>51</sup> *Id.* at 723 (quoting *Grutter*, 539 U.S. at 337).

<sup>52</sup> Justice Kennedy did not join this part of the opinion. Rather, his concurrence "formed an implicit majority, together with Justices Stevens, Souter, Ginsburg, and Breyer in finding that racial

goal of “racial balance, pure and simple.”<sup>53</sup> The fear that the plurality put forward was that if racial balancing could be treated “as a compelling end in itself, [it] would ‘effectively assur[e] that race will always be relevant in American life.’”<sup>54</sup> In other words, as the Chief Justice put it: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>55</sup>

### B. Higher Education

The Court has, by contrast, sounded convergence-oriented notes in the context of higher education. In *Regents of the University of California v. Bakke*,<sup>56</sup> identified by some as the “origin” of the “diversity rationale,”<sup>57</sup> the Court invalidated the University of California at Davis Medical School’s “special admissions program,” which held spots aside for racial and ethnic minorities, as “a line drawn on the basis of race and ethnic status.”<sup>58</sup> But the Court notably upheld treating “race or ethnic background” as a “plus” in admissions programs, so long as the program was “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.”<sup>59</sup> In his opinion, Justice Powell emphasized that “[a]cademic freedom . . . long has been viewed as a special concern of the First Amendment,”<sup>60</sup> quoting Justice Frankfurter for the idea that “[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.”<sup>61</sup> This “atmosphere of ‘speculation, experiment and creation’ — so essential to the quality of higher education — is widely believed to be promoted by a diverse student body,” Justice Powell noted.<sup>62</sup> “[I]t is not too much to say,” he continued, “that the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation

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integration under certain circumstances might indeed satisfy the compelling interest prong of strict scrutiny.” François, *supra* note 8, at 988; see *Parents Involved*, 551 U.S. at 797–98 (Kennedy, J., concurring).

<sup>53</sup> *Parents Involved*, 551 U.S. at 726 (opinion of Roberts, C.J.).

<sup>54</sup> *Id.* at 730 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)).

<sup>55</sup> *Id.* at 748.

<sup>56</sup> 438 U.S. 265 (1978).

<sup>57</sup> François, *supra* note 8, at 995.

<sup>58</sup> *Bakke*, 438 U.S. at 289 (opinion of Powell, J.).

<sup>59</sup> *Id.* at 317.

<sup>60</sup> *Id.* at 312.

<sup>61</sup> *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment)).

<sup>62</sup> *Id.*



of many peoples.”<sup>63</sup> At least insofar as the First Amendment was specially concerned with academic freedom,<sup>64</sup> the school had a compelling interest in promoting racial and ethnic heterogeneity.

Twenty-five years later, in *Grutter v. Bollinger*,<sup>65</sup> the Court returned to Justice Powell’s language to uphold the University of Michigan Law School’s “race-conscious” yet “highly individualized, holistic review” program.<sup>66</sup> But “[i]n contrast to Powell’s opinion in *Bakke*,” Dean Robert Post notes, “*Grutter* does not offer an account of the intrinsic value of the educational process,” but “instead conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership.”<sup>67</sup> For example, writing for the *Grutter* Court, Justice O’Connor stated “that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”<sup>68</sup> She continued:

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle [sic] mission to provide national security.”<sup>69</sup>

These arguments “potentially reach far more widely than do [Justice] Powell’s” in *Bakke*, because they recognize such a wide array of “social goods” that diversity can “facilitate.”<sup>70</sup> Justice O’Connor identified diversity as supporting not only “learning outcomes,” but also success in

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<sup>63</sup> *Id.* at 313 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). As Dean Robert Post observes, “Powell conceptualized diversity as a value intrinsic to the education process itself”; because education “thrived on ‘the robust exchange of ideas,’” the Justice understood it as “necessary to facilitate this process of education.” Robert C. Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 59–60 (2003) (quoting *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)).

<sup>64</sup> See *Bakke*, 438 U.S. at 312; cf. Post, *supra* note 63, at 48–49 (“The Court will engage in stricter scrutiny, and hence fashion constitutional law to be more impervious to constitutional culture, when it believes that important First Amendment principles are more directly threatened.”).

<sup>65</sup> 539 U.S. 306 (2003).

<sup>66</sup> *Id.* at 337.

<sup>67</sup> Post, *supra* note 63, at 60.

<sup>68</sup> *Grutter*, 539 U.S. at 330 (quoting Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>69</sup> *Id.* at 330–31 (alterations in original) (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents at 5, *Grutter*, 539 U.S. 306 (No. 02-241)) (citing Brief of 3M et al. as Amici Curiae in Support of Respondents at 5, *Grutter*, 539 U.S. 306 (No. 02-241); Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 3–4, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>70</sup> Post, *supra* note 63, at 60.

the workforce, a more competitive economy, and a more effective military.<sup>71</sup> In doing so, she gave the Court's furthest-reaching defense of integration as a broad-based good. This Note now turns to discuss further a central element of that justification.

## II. THE DIVERSITY RATIONALE

As noted above, there are many reasons to favor integration. In *Bakke* and *Grutter*, the Court sketched out versions of one of the most prominent: the “diversity rationale.”<sup>72</sup> This rationale can be understood to emphasize convergence — it suggests that having a plurality of voices at the table will produce better outcomes.<sup>73</sup> Those potentially better outcomes are many, including lower bias and greater cultural competence,<sup>74</sup> as well as greater communal solidarity.<sup>75</sup> Drawing especially on Professor Elizabeth Anderson's work, this Part focuses on one particular, constitutionally significant broad-based good that heterogeneity serves: fostering better decisionmaking by both individuals and groups. This Part then addresses the dangers of essentializing about a particular group — and why those dangers should counsel caution in implementing, but not abandonment of, integrationist efforts.

### A. Diversity and Decisionmaking

Great thinkers have long posited that good judgment requires getting outside of one's own, parochial perspective. Immanuel Kant argued that it requires “a man of enlarged thought,” one who can “disregard[] the subjective private conditions of his own judgment . . . and reflect[] upon it from a universal standpoint (which he can only determine by placing himself at the standpoint of others).”<sup>76</sup> John Stuart Mill wrote that it was “hardly possible to overrate the value . . . of placing human beings in contact with persons dissimilar to themselves, and with modes

<sup>71</sup> *Grutter*, 539 U.S. at 330–31.

<sup>72</sup> See KENNEDY, *supra* note 8, at 94–100; François, *supra* note 8, at 995.

<sup>73</sup> See, e.g., Bell, *supra* note 27, at 1624–25; see also *supra* notes 9–10 and accompanying text.

<sup>74</sup> Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 622–43 (2011).

<sup>75</sup> See, e.g., DANIELLE S. ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE *BROWN V. BOARD OF EDUCATION*, at xix (2004) (“Distrust can be overcome only when citizens manage to find methods of generating mutual benefit despite differences of position, experience, and perspective. The discovery of such methods is the central project of democracy.”); ANDERSON, *supra* note 24, at 93–94; cf. ROBERT D. PUTNAM, MAKING DEMOCRACY WORK (1994) (arguing that democracies work best when there are high levels of trust, cooperation, and association among citizens).

<sup>76</sup> IMMANUEL KANT, CRITIQUE OF JUDGMENT § 40 (J.H. Bernard trans., Macmillan 2d ed. 1914).

of thought and action unlike those with which they are familiar.”<sup>77</sup> Hannah Arendt suggested that it was impossible to think well “in strict isolation or solitude” — we need “the presence of others ‘in whose place’ [to] think, whose perspectives [to] take into consideration.”<sup>78</sup> Our ability to judge well, she maintained, “depends on the presence of others.”<sup>79</sup>

In a democracy, we are all judges in some sense. We serve on juries and school boards, join tenant associations and civic organizations, and participate in town meetings and elections for offices from city councilmember to President. All of these are, Professor Frank Michelman argues, “arenas of potentially transformative dialogue,”<sup>80</sup> situated in “historically American” forms of self-organization.<sup>81</sup> Through this public action, Michelman argues, it is fair to say “that we are all constantly engaged in ‘constitutional choices.’”<sup>82</sup>

Heterogeneity is crucial in such settings. Integration yields more informed and accountable decisionmaking, producing benefits that extend from the workplace to the everyday practice of democracy.<sup>83</sup> As Anderson argues: “Citizens are . . . epistemically diverse. To understand and solve problems of public interest requires that information held by diverse citizens from different walks of life be brought to the attention

<sup>77</sup> Katherine W. Phillips, *What Is the Real Value of Diversity in Organizations? Questioning Our Assumptions*, in SCOTT E. PAGE, *THE DIVERSITY BONUS* 223, 223 (2017) (quoting JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 581 (William Ashley ed., 1987)).

<sup>78</sup> HANNAH ARENDT, *The Crisis in Culture, in BETWEEN PAST AND FUTURE* 194, 217 (Penguin Classics 2006).

<sup>79</sup> *Id.*; see also Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76 (1986) (arguing that the great judge cannot be “a loner,” because a loner “has no encounters. He meets no otherness. Nothing shakes him up. No interlocutor violates the inevitable insularity of his experience and outlook.”). *Contra* RONALD DWORKIN, *LAW’S EMPIRE* (1986) (discussing Judge Hercules).

<sup>80</sup> Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1531 (1988); cf. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1862 (1987) (arguing that “[l]egal interpretation’ . . . is an activity engaged in by nonlawyers as well as by lawyers and judges”).

<sup>81</sup> See Michelman, *supra* note 80, at 1531 (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., G. Lawrence trans., Doubleday 1969) (1835)); see also Powers v. Ohio, 499 U.S. 400, 406–07 (1991) (discussing jury service and quoting from 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 334–37 (Schocken 1st ed. 1961) (1835)).

<sup>82</sup> Michelman, *supra* note 80, at 1531 n.157 (quoting LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES*, at vii (1985)).

<sup>83</sup> See ANDERSON, *supra* note 24, at 130–34; see also PAGE, *supra* note 77; David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter> [<https://perma.cc/VH5C-EJHG>]. That assumes, of course, that integration is done right: if people from diverse backgrounds “feel they are not welcome in the group, feel they are not respected enough by others, and expect a high cost for speaking up, then the benefits of identity diversity” are not so likely to accrue. Phillips, *supra* note 77, at 234; see also Priscilla M. Elsass & Laura M. Graves, *Demographic Diversity in Decision-Making Groups: The Experiences of Women and People of Color*, 22 ACAD. MGMT. REV. 946, 968 (1997) (observing “that demographically diverse groups have the potential to realize strong decision-making synergies but may compromise their effectiveness by marginalizing women and people of color”).

of decision makers . . . ”<sup>84</sup> One of the achievements of the Civil Rights Movement’s courageous demonstrations, Anderson points out, is that they actively overcame these epistemic barriers for many otherwise somnolent whites — “disrupting the normal routines of citizens so that they sit up and listen.”<sup>85</sup> “When,” by contrast, “advantaged groups are able to segregate themselves from the disadvantaged, they . . . become ignorant,” “complacent,” and “insular.”<sup>86</sup> Encountering others with different perspectives can be transformative — even, under the right circumstances, for the least sympathetic.<sup>87</sup>

Anderson provides examples of how integration facilitates the “intergroup communication” necessary for people “to gather and use widely dispersed information about problems and policies of public interest.”<sup>88</sup> She points out that studies show that “racially integrated juries take more time to deliberate about their case, and that the quality of their deliberation is superior to that of all-white juries”: “They consider more facts, make fewer inaccurate statements, leave fewer inaccurate statements uncorrected, and more frequently raise questions about ‘missing’ evidence (evidence that would be needed to make the prosecution’s case convincing). They are smarter and more conscientious.”<sup>89</sup> In other words, “[s]uperior information exchange in a diverse group causes superior performance.”<sup>90</sup> And the same is true “[o]utside of the jury context,” where, for example, “whites who simply *anticipate* having to discuss a racially charged issue with racially diverse others score more highly on a comprehension test of readings relevant to their discussion than whites who know they will be discussing the issue with whites alone.”<sup>91</sup> Likewise, “[e]vidence on how integrated police forces behave” suggests that they are “less likely to engage in police brutality, more likely to know and foster amicable relations with the community, and better able to embody sound race relations than racially homogeneous police.”<sup>92</sup>

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<sup>84</sup> ANDERSON, *supra* note 24, at 98.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 98–99.

<sup>87</sup> Anderson, for example, tells a story from May 5, 1963, when — amid the peaceful Birmingham protests that sparked an infamously violent response from Bull Connor — a group of marchers, led by Reverend Charles Billups, began to pray in the face of Connor’s order for his men to turn fire hoses on the marchers. After the prayer was complete, “Connor shouted to his men to stop the marchers. Awestruck, the men dropped their hoses instead, fell back, and let the marchers move past them to City Hall.” *Id.* at 100.

<sup>88</sup> *Id.* at 111.

<sup>89</sup> *Id.* at 130.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 131; *see also id.* at 132 (“Biracial police teams use less force against civilians than either all-white or all-black teams.”).

*B. The Dangers of Essentialism and the Possibility of an Endpoint*

A serious danger, however, lurks in the diversity rationale. Reasoning that members of a certain group may be more likely to bring particular perspectives or experiences to the table, Anderson acknowledges, risks essentializing about that group,<sup>93</sup> “potentially prim[ing] stereotypes of blacks as alien and block[ing] recognition of common perspectives and identities.”<sup>94</sup> Nevertheless, Anderson argues, the right understanding of these arguments is not as claims that “treat race as a proxy for cultural difference, but as a proxy for personal knowledge of what it is like to live as and be treated as a member of one’s race” — knowledge that “is inherently dependent on possession of specific racial identities,” given that “being treated as a member of one’s race is a necessary and nearly always sufficient condition of having personal, firsthand knowledge of what this is like.”<sup>95</sup>

This danger of ossifying rather than pulverizing racial stereotypes and prejudices may explain the Court’s hesitance to bless even the best-intentioned racial classifications,<sup>96</sup> and its corresponding insistence that remedial “deviation[s] from the norm of equal treatment of all racial and ethnic groups” must be only “temporary . . . measure[s],”<sup>97</sup> with a baked-in “logical end point.”<sup>98</sup> A solicitude for the individuality of all people is a powerful reason for opposing race-conscious decisionmaking.<sup>99</sup>

This Note, like Anderson’s argument, does not seek to understate the importance of individual identity, nor does it seek to rely on racial,

<sup>93</sup> For a comprehensive discussion of this danger, see generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>94</sup> ANDERSON, *supra* note 24, at 142; see also *Shaw v. Reno*, 509 U.S. 630, 647–48 (1993) (discussing the risks of “reinforc[ing] the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls,” *id.* at 647).

<sup>95</sup> ANDERSON, *supra* note 24, at 152; see also *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”).

<sup>96</sup> *Cf. Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.”).

<sup>97</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989).

<sup>98</sup> *Grutter*, 539 U.S. at 342. But see Kimberly Jenkins Robinson, *The Supreme Court, 2015 Term — Comment: Fisher’s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 196 (2016) (“The Court’s silence in *Fisher II* about any durational limits . . . may allow institutions to employ affirmative action beyond the 2028 deadline as long as they are engaging in periodic review.”).

<sup>99</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733 (2007) (opinion of Roberts, C.J.); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting).

gender, or other kind of identity essentialism.<sup>100</sup> People are far more complex than what any label or cluster of labels could begin to describe. And indeed we might well yearn for a day when knowing what it is like to be a member of a particular race or ethnicity has no discernible value to a decisionmaking process because the experience of being a member of any particular race or ethnicity has become indistinguishable, for purposes of fashioning public policy, from the experience of being a member of any other race or ethnicity. It would make sense for the advent of such a state of affairs to herald the “logical end point” to which the Court has periodically alluded.

But while the importance of individuality justifies caution in how we conceptualize the diversity rationale, there are compelling grounds not to reject race-consciousness altogether at this point. In a 2014 dissent, for example, Justice Sotomayor addressed her colleagues’ faith in “leav[ing] race out of the picture.”<sup>101</sup> Highlighting the many policy-relevant ways that race *does* still “matter,” Justice Sotomayor instead argued for facing up to that “stark reality” and its impact on the lived experiences of people whose differences may be “only skin deep” but whose perspectives and “sense[s] of self” are nevertheless shaped by their experiences.<sup>102</sup> Such persistent skews in lived experiences suggest that we ought not to abandon the diversity rationale, even as we ought to exercise caution in its use.

### III. THE CONSTITUTION’S BETS ON HETEROGENEITY

The diversity rationale is especially important for this Note’s purposes because it is bolstered, in a different way, by the Constitution. The Constitution itself expresses the value of heterogeneous groups and institutions through the multiple bets that it places on heterogeneity — “bets” because they reflect a wager that a heterogeneous decisionmaking process will produce a better outcome than a homogeneous one. This Part focuses on three of these constitutional bets, each of which operates at a different level of scale: the Constitution’s structure, the First Amendment, and the Sixth Amendment.

At least three caveats, however, are important. First, this argument makes sense only at a high level of generality. The original text of the Constitution countenanced slavery,<sup>103</sup> and it took many years — and the ratification of the Fourteenth Amendment — for it to be understood as

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<sup>100</sup> That is, “[t]he notion that there is a monolithic ‘women’s experience’ that can be described independent of other facets of experience,” or a comparably “monolithic ‘Black Experience,’ or ‘Chicano Experience.’” Harris, *supra* note 93, at 588.

<sup>101</sup> Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1675 (2014) (Sotomayor, J., dissenting).

<sup>102</sup> *Id.* at 1676.

<sup>103</sup> See U.S. CONST. art. I, § 2, cl. 3 (three-fifths compromise).

barring, for example, jury discrimination<sup>104</sup> and school segregation.<sup>105</sup> To understand the Constitution as endorsing the kind of heterogeneity that would support race-conscious integrationist programs (alongside more historically protected forms of heterogeneity, like viewpoint diversity<sup>106</sup>), one would have to translate its values at the time of its and its amendments' ratifications into their present-day corollaries.<sup>107</sup>

Second, the Framers clearly did not plan for every decisionmaking organ within this large, federalized republic to be perfectly diverse or heterogeneous. Rather, in many cases, they seem to have envisioned what Dean Heather Gerken has called “second-order diversity” — “variation *among* decisionmaking bodies, not *within* them.”<sup>108</sup> This approach still reflects faith in heterogeneity, but it does so at one level of remove.<sup>109</sup> So it would remain hard to understand the Constitution as expressing the value of diversity in a way that is tantamount to across-the-board racial balancing — a result that, of course, the Supreme Court has emphatically rejected many times.<sup>110</sup> But that should not detract from the idea that the Constitution itself still expresses heterogeneity as a core value.

Third, these aspects of the Constitution reflect faith in heterogeneity for purposes of democratic decisionmaking (at various levels of scale), while this Note (alongside much of the Court's integration-related jurisprudence) has focused on schools, which are not decisionmaking bodies. Schools are, however, “‘a most vital civic institution for the preservation of a democratic system of government,’ and . . . the primary vehicle for transmitting ‘the values on which our society rests.’”<sup>111</sup> And if a multiplicity of perspectives is valuable in decisionmaking, having future decisionmakers exposed to a multiplicity of perspectives through education must serve to advance this interest, both by equipping students with more perspectives and by training them to incorporate new perspectives.

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<sup>104</sup> See *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880); see also Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1280 (2000) (“At the end of the nineteenth century, systematic exclusion of African Americans [from jury participation] was still commonplace, particularly in the South.”).

<sup>105</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>106</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>107</sup> See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

<sup>108</sup> Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102, 1108 (2005) (emphasis added).

<sup>109</sup> See *id.* at 1104 (summarizing the benefits of a diverse array of systems and structures).

<sup>110</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730–31 (2007) (citing cases).

<sup>111</sup> *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (first quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); then quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)); see also *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003); ANDERSON, *supra* note 24, at 93–94.

### A. Constitutional Structure

At least at a nationwide scale, the Constitution's structure assumes the value of institutional heterogeneity.<sup>112</sup> To preserve liberty and prevent autocracy, it "divide[s]" the administration of government into state and federal governments, and then the federal government into three different branches, each with different jobs.<sup>113</sup> And then it subdivides each of those branches further still — into different houses of Congress elected in different ways and at different intervals from districts across the country;<sup>114</sup> into principal and inferior officers;<sup>115</sup> and into a Supreme Court and (assuming Congress provides for them) lower federal courts.<sup>116</sup> The nation, in other words, was set up as a "compound republic."<sup>117</sup>

This ramifying institutional power structure reflects the Framers' focus on balancing "opposite and rival interests."<sup>118</sup> Though different perspectives begot "the mischiefs of faction," Madison acknowledged, they were also ineradicable features of human society.<sup>119</sup> "As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed," Madison wrote.<sup>120</sup> It was government's "first object" to "protect[]" these diverse "faculties," though this achievement would nevertheless entail "a division of the society into different interests and parties"<sup>121</sup> that could, if left

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<sup>112</sup> See Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 352 (2016) (emphasis omitted). Professors Aziz Huq and Jon Michaels refer not just to "the standard 'three-branch problem,'" but also to the "teeming ecosystem of institutional, organizational, and individual actors within as well as outside of government" whom they identify as constituting a "thick political surround." See *id.* (quoting William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 834 (2001)). Because this section focuses on the values underlying the Constitution's *design* rather than the modern "venues and actors" (including "parties," "activists," "congressional committee staffers," and "lobbyists") characterizing its current operation, *id.* at 381, this section rehearses only its more traditional structural features.

<sup>113</sup> THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003).

<sup>114</sup> U.S. CONST. art. I, §§ 2–3; see also MICHAEL J. KLARMAN, *THE FRAMERS' COUP* 169–70, 623 (2016).

<sup>115</sup> U.S. CONST. art. II, § 2.

<sup>116</sup> U.S. CONST. art. III, § 1.

<sup>117</sup> THE FEDERALIST NO. 51, *supra* note 113, at 320. At least in theory. These purposes can, it bears noting, be thwarted when "democratic-level" forces render these subdivided institutions aligned with one another. See Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 142 (2016). And of course constitutional structure does not favor multiplicity in every possible way. For example, the Framers considered and rejected proposals in favor of a "plural executive" (or "executive council"), see KLARMAN, *supra* note 114, at 215–18, though they did nod in this direction by creating "an executive cabinet, which the president could *choose* to consult for advice," see *id.* at 218 (emphasis added).

<sup>118</sup> THE FEDERALIST NO. 51, *supra* note 113, at 319.

<sup>119</sup> THE FEDERALIST NO. 10, *supra* note 113, at 76 (James Madison).

<sup>120</sup> *Id.* at 73.

<sup>121</sup> *Id.*



unmanaged, “kindle their unfriendly passions and excite their most violent conflicts.”<sup>122</sup>

The solution to the risks attending diversity, however, was not to run from it, but rather to embrace it — to give as many different perspectives as possible a seat at the table. Just as no one could be trusted “to be a judge in his own cause,” so too no “numerous party” should be allowed to dominate.<sup>123</sup> Instead, power would have to be divided, and dispute would have to occur at multiple levels — first, to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens,” and then through decisionmaking among those representatives themselves.<sup>124</sup> And by bringing in more voices — by “[e]xtend[ing] the sphere” to “take in a greater variety of parties and interests” — it would become “less probable that a majority of the whole” would be able to oppress the rest.<sup>125</sup> The nation would “be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, w[ould] be in little danger from interested combinations of the majority.”<sup>126</sup> In other words, “multiplicity” would protect liberty, with liberty’s hold increasing as “the number of interests” and “the extent of country and number of people comprehended under the same government” increased.<sup>127</sup>

This idea is not squishy, all-together-now deliberative democracy — rather, it is the kind of tough, adversarial fight among ideas that, in aggregate, might produce the kind of enlarged decisionmaking that Kant, Mill, and Arendt identified as so important.<sup>128</sup> The individual voices need not all be agreeable — there is no evidence, after all, that Madison valued the diversity of popular views for its own sake<sup>129</sup> — and certainly these voices would not always come to consensus (indeed, that was the point). But having each of these voices in the room — having plurality — was nevertheless essential to preserving liberty and, in turn, self-government.<sup>130</sup>

Like the horizontal separation of powers, the vertical separation of powers — that is, federalism — also reflects faith in diversity. Each state, as Justice Brandeis famously put it, is empowered to “serve as a laboratory; and try novel social and economic experiments.”<sup>131</sup> This

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<sup>122</sup> *Id.* at 74.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 76–77.

<sup>125</sup> *Id.* at 78.

<sup>126</sup> THE FEDERALIST NO. 51, *supra* note 113, at 321.

<sup>127</sup> *Id.*

<sup>128</sup> See *supra* notes 76–79 and accompanying text.

<sup>129</sup> See, e.g., KLARMAN, *supra* note 114, at 131.

<sup>130</sup> See THE FEDERALIST NO. 10, *supra* note 113, at 79; THE FEDERALIST NO. 51, *supra* note 113, at 321–22.

<sup>131</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

plurality of localized governments is thus designed not only to “be more sensitive to the diverse needs of a heterogenous society” and “increase[] opportunity for citizen involvement in democratic processes,” but also to “allow[] for more innovation and experimentation in government” and “make[] government more responsive by putting the States in competition for a mobile citizenry.”<sup>132</sup> Fifty small, different governments, in the Framers’ plan, are better than one big one.<sup>133</sup>

These structural commitments to distributing and balancing power reflect a faith in multiplicity — a belief that when it comes to democratic decisionmaking, no individual view or set of views can be as wise, in the long run, as a kaleidoscope of views. If we take the Constitution’s structure seriously, it is hard to imagine an interest more compelling.

### B. *The First Amendment*

The First Amendment has also been commonly understood as expressing the importance of heterogeneity, at least since the birth of modern First Amendment doctrine. Dissenting in *Abrams v. United States*,<sup>134</sup> a case that saw the Court uphold a conviction against a defendant who had circulated handbills opposing U.S. involvement in the First World War, Justice Holmes criticized punishing “the surreptitious publishing of a silly leaflet by an unknown man.”<sup>135</sup> In doing so, he elucidated what has come to be known as the “marketplace of ideas” justification for the First Amendment: “that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>136</sup> “That at any rate,” he continued, “is the theory of our Constitution.”<sup>137</sup>

Judge Learned Hand, discussing the newspaper industry, identified a similar faith in plurality:

[T]hat industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.<sup>138</sup>

<sup>132</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

<sup>133</sup> This faith in decentralized decisionmaking can, of course, be overstated. The Framers did not, for example, trust the states to experiment with “coin[ing] Money” or “mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts.” U.S. CONST. art. I, § 10.

<sup>134</sup> 250 U.S. 616 (1919).

<sup>135</sup> *Id.* at 628 (Holmes, J., dissenting).

<sup>136</sup> *Id.* at 630.

<sup>137</sup> *Id.*

<sup>138</sup> *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945).

“To many,” Judge Hand conceded, “this is, and always will be, folly; but we have staked upon it our all.”<sup>139</sup>

The Court has since elaborated that “[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>140</sup> There is, in other words, a “national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” even if that means we must tolerate, for example, “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>141</sup>

This commitment reflects particularly strong faith in heterogeneity; it suggests a constitutional culture that values encountering a diversity of perspectives so highly that it is willing to stomach the odious ones in order to get the rest.<sup>142</sup> The Court gave eloquent voice to this comparative evaluation in *Tinker v. Des Moines Independent School District*,<sup>143</sup> in which it held a school district had violated the First Amendment rights of students by suspending them for wearing black armbands to school to protest the Vietnam War. As Justice Fortas wrote:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.<sup>144</sup>

Plurality, in other words, presents inescapable difficulty, alongside the sharpening force of Judge Hand's multitude of tongues. But beyond the value of that sharpening force, the First Amendment wagers that such difficulty is not just worth the bargain, but is also a source of the capacity for self-government itself.<sup>145</sup>

### C. *The Sixth Amendment*

At a more local scale, the jury system also expresses the Constitution's endorsement of heterogeneity. Though it has evolved substantially over the years, “one thing about the American jury system that has remained

<sup>139</sup> *Id.*

<sup>140</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>141</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>142</sup> *See, e.g., Whitney v. California*, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring).

<sup>143</sup> 393 U.S. 503 (1969).

<sup>144</sup> *Id.* at 508–09 (citation omitted).

<sup>145</sup> *Cf. Michelman, supra* note 79, at 57 & n.300 (citing sources).

relatively constant since its inception is the ideal of a representative jury with dual goals — a jury of peers that is composed of a ‘reasonable cross-section’ of the community.”<sup>146</sup> Simply by preferring multiple jurors to one judge, the Amendment endorses plurality — expressing faith in many voices over one, even when the many are lay and the one is expert.<sup>147</sup>

The Court has emphasized that the Framers instituted this requirement for functionalist reasons — because they trusted a plurality of (private) citizens over the solitary (government-associated) decisionmaking of a “corrupt or overzealous prosecutor” or a “compliant, biased, or eccentric judge.”<sup>148</sup> By erecting this “great bulwark of . . . civil and political liberties,”<sup>149</sup> the Framers were willing to “impair the most expedient and efficient sentencing” of those accused of even the gravest crimes in favor of a belief in the wiser judgment of a greater number of heads.<sup>150</sup> The best way to safeguard liberty was to entrust decisionmaking power to many voices rather than few.

Moreover, the fair cross-section requirement underscores the value of diversity even among these voices. This requirement “does not mean,” the Court has explained, that “every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible.”<sup>151</sup> “But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups,” and that people from “every stratum of society” must be treated as competent and eligible for service.<sup>152</sup> Thus, while “[d]efendants are not entitled to a jury of any particular composition, . . . the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude

<sup>146</sup> Sara Gordon, *All Together Now: Using Principles of Group Dynamics to Train Better Jurors*, 48 IND. L. REV. 415, 421 (2015) (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946)).

<sup>147</sup> Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1563 (2011) (“Bedrock premises of the U.S. legal system fully embrace the understanding that a diverse set of perspectives makes a difference in decision-making. For instance, . . . U.S. courts . . . require juries that decide civil and criminal cases to be comprised of a number of jurors . . . pulled from a cross-section of the community.”).

<sup>148</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Although citizen-jurors’ lack of government affiliation surely played a role in the Framers’ thinking, see, e.g., *id.* at 155–56 & n.23, insulation from government could be accomplished by empaneling a solitary citizen-juror. Moreover, the judicial system itself shows a preference for plurality among government-affiliated judges, given that “the high courts in the federal and state systems, as well as intermediate appellate courts, have a group of justices, rather than a single one, deciding cases.” Johnson, *supra* note 147, at 1563.

<sup>149</sup> 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540 (4th ed. 1873); see also *id.* at 541.

<sup>150</sup> *United States v. Booker*, 543 U.S. 220, 244 (2005); see also *id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*343–44).

<sup>151</sup> *Thiel*, 328 U.S. at 220.

<sup>152</sup> *Id.*

distinctive groups in the community and thereby fail to be reasonably representative thereof.”<sup>153</sup>

Importantly, all that a defendant must show to establish a prima facie fair cross-section claim is that a “‘distinctive’ group in the community” is not fairly or reasonably represented as a result of “systematic exclusion.”<sup>154</sup> At that point, it falls to the state to establish that the challenged policy “manifestly and primarily advance[s]” a “significant state interest.”<sup>155</sup> What is not required, notably, is a showing of “discriminatory purpose” — the “systematic disproportion itself demonstrates an infringement of the defendant’s interest in a jury chosen from a fair community cross section.”<sup>156</sup> This rule illustrates that, even in the Court’s understanding, a reasonably heterogeneous jury pool is a free-standing constitutional guarantee — a broad-based good to be protected for its own sake, rather than a penalty to be meted out in response to a state actor’s particularly bad behavior.<sup>157</sup>

#### IV. CONCLUSION: WHY IT MATTERS

That the Constitution endorses heterogeneity may not make a huge difference in terms of cold, hard constitutional doctrine. Though recognizing this endorsement should put a thumb on the scale for understanding diversity (including racial diversity) as a compelling government interest, it is the narrow-tailoring prong of strict scrutiny that has proven the higher hurdle for integrationist programs.<sup>158</sup> But we should still care for two reasons: First, because that endorsement can help support convergence-oriented arguments, which may be able to persuade larger coalitions than the divergence-oriented arguments that have been prevalent to date. Second, because even small shifts in doctrinal framing can yield larger changes over a long-enough timeline.

First, as discussed in Part I, one problem with the Court’s divergence-oriented discussion of integration is that it runs afoul of at least the “hopeful upside to Bell’s interest-convergence thesis.”<sup>159</sup> If we fear, in keeping with Bell’s argument, that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites,”<sup>160</sup> then at least as a matter of pragmatism we may

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<sup>153</sup> *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (citation omitted). The Court has not, it bears emphasizing, understood the requirement to apply to the ultimate, seated jury. See *Holland v. Illinois*, 493 U.S. 474, 478 (1990).

<sup>154</sup> *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

<sup>155</sup> *Id.* at 367.

<sup>156</sup> *Id.* at 368 n.26. *Contra, e.g.*, *Washington v. Davis*, 426 U.S. 229, 238–39 (1976).

<sup>157</sup> See *Duren*, 439 U.S. at 368 n.26.

<sup>158</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007); *id.* at 797–98 (Kennedy, J., concurring); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

<sup>159</sup> *Cashin, supra* note 28, at 276.

<sup>160</sup> *Bell, supra* note 26, at 523.

wish to face the unhappy possibility that the Court's divergence-oriented arguments for integration are unlikely to persuade a large- and diverse-enough coalition to sustain meaningful, integrationist change.<sup>161</sup> The Constitution's bets on heterogeneity, however, provide one more piece of evidence to make a convergence-oriented case. That evidence can help the Court, which in its daily work already lives the values of plurality, do more to remind others "what . . . plurality is 'for.'"<sup>162</sup>

Second, we can also understand doctrinal statements, however small, as still exerting a framing influence and having "important anchoring effects on later decisionmaking."<sup>163</sup> On this account, the Court's leaving a given justification unsaid may have helped hand down to us a doctrine in which race-conscious integrationist efforts appear more suspect than they would otherwise. We can see that mechanism at play in the school desegregation cases themselves: focusing on invidious purpose and defiance in the early days of the doctrine helped shape a line of cases in which integration came to be talked about like a punishment, and courts were either distracted from, or let off the hook from, defending integration for its own sake.<sup>164</sup> These framing and anchoring effects may function as merely the lightest of constitutional breezes, insufficient to have changed any individual outcome. But that does not mean that they have not helped shape the law that we currently live with, nor that they cannot yet shape the law to come.

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<sup>161</sup> To believe that the Court missed an opportunity does not require believing that most citizens spend their days poring over the U.S. Reports, nor that "[t]he Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar," Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952). Instead, one only need believe that enough people were paying attention to make a difference — an assumption seemingly implicit in the most common explanation for why the Court often temporized on integration: because it feared inviting open defiance from already-outraged southerners. Cf. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 315–16 (2004) (discussing Justices who advocated a gradualist approach in *Brown II* on the grounds "that they could reduce the resistance of southern whites by appearing sympathetic and accommodating" or otherwise "induce moderates to support *Brown*" through such an approach, *id.* at 315); cf. also *id.* at 320 (arguing that "[t]he Justices' conciliatory gesture inspired defiance, not accommodation").

<sup>162</sup> Michelman, *supra* note 79, at 77 (discussing the pluralistic values of the appellate bench, and arguing that it exists "for dialogue, in support of judicial practical reason, as an aspect of judicial self-government, in the interest of our freedom").

<sup>163</sup> See Jack Wade Nowlin, *The Warren Court's House Built on Sand: From Security in Persons, Houses, Papers, and Effects to Mere Reasonableness in Fourth Amendment Doctrine*, 81 MISS. L.J. 1017, 1026 (2012); see also *id.* at 1021–32 (discussing how "[c]onstitutional doctrines implement constitutional meaning and in doing so they frame issues, structure analysis, and shape conclusions," *id.* at 1021).

<sup>164</sup> Cf. Bell, *supra* note 26, at 528–32 (discussing how "the danger to federalism posed by the secessionist-oriented resistance of Southern state and local officials provided courts with an independent basis for supporting school desegregation efforts," *id.* at 529–30, which those courts in turn seized on).