

[Dis]Integration: Second-Order Diversity and Schools

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This Article challenges the prevailing definition of diversity. Borrowing from Heather Gerken, it argues that diversity is best understood not simply as a rationale for creating integrated spaces, but also [dis]integrated ones—places where minority students and faculty can occupy majority positions and are able to exercise majority control. Such spaces serve legitimate pedagogical goals that are different from those associated with statistical integration and therefore warrant consideration by courts tasked with reviewing the use of race in university admissions.

INTRODUCTION

In her landmark article “Second-Order Diversity,” Heather Gerken advances a new definition of diversity, one that emphasizes differentiation across institutions, rather than within them.¹ As Gerken puts it, diversity within institutions—such as classrooms—constitutes only one way of thinking about the concept, what she refers to as “first-order” diversity. While diversity across institutions constitutes a second way of thinking about the concept, or what she terms “second-order.”² Second-order diversity, continues Gerken, includes institutions where minorities are able to wield the same power typically reserved for majorities, giving them the opportunity to express themselves in ways not possible in conventional, majoritarian contexts.³ To illustrate, Gerken provides two examples: majority-minority electoral districts and majority-minority juries—both of which have garnered considerable critical attention.⁴

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¹ Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102–04 (2005).

² *Id.*

³ *Id.* at 1104.

⁴ *Id.* at 1103; see generally Jeffrey Abramson, *Second-Order Diversity Revisited*, 55 WM. & MARY L. REV. 739 (2014); Jenny E. Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825 (2015); Guy-Uriel Charles, *Dissent, Diversity, and Democracy: Heather Gerken and the Contingent Imperative of Minority Rule*, 48 TULSA L. REV. 493 (2013); Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361 (2007); David Fontana, *Relational Federalism: An Essay in Honor of Heather Gerken*, 48 TULSA L. REV. 503 (2013); Doni Gewirtzman, *Complex Experimental Federalism*, 63 BUFF. L. REV. 241 (2015); David Schleicher, *From Here All-the-Way-Down, or How to Write a Festschrift Piece*, 48 TULSA L. REV. 401 (2013); Jason Solomon & Paula Hannaford-Agor, *The Civil Jury as a Political Institution*, 55 WM. & MARY L. REV. 715 (2014); Ilya Somin, *Taking*

Given short shrift in Gerken's analysis, however, are schools.⁵ To her mind, schools occupy a different constitutional domain than either electoral districts or juries, for they tend to be focused more on "inculcating civic morality" than enhancing "political agency or expression."⁶ This Article challenges that position, countering that schools today are in fact deeply engaged in political agency and expression and stand to be considered through the lens of second-order diversity, as well as first. This is particularly true of primary and secondary schools in urban districts, where reform groups like Forward through Ferguson and Black Lives Matter have moved beyond integration and begun to advocate for policy solutions more aligned with second-order diversity than first.⁷ It is also true for higher education, both in the context of historically Black colleges and universities (HBCUs), as well as majority white schools, where minority students have called for their own organizations, their own events, and in some cases even their own academic departments.⁸

That minorities might seek to carve out their own spaces was never envisioned by the Supreme Court in *Brown v. Board of Education* and has been generally cast as a failure of intentionality by scholars committed to the ideal of integration.⁹ So too have integration scholars declared the re-segregation of urban schools to be a failure, though many of their proposed solutions—busing, multi-district remedies, and creative assignment plans—

Dissenting by Deciding All the Way Down, 48 TULSA L. REV. 523 (2013); Franita Tolson, *Second-Order Diverse in Name Only?: Sovereign Authority in Disaggregated Institutions*, 48 TULSA L. REV. 455 (2013).

⁵ See Gerken, *supra* note 1, at 1108.

⁶ See Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 106 (2007); E-mail from Heather K. Gerken, Dean, Yale Law Sch., to author (July 29, 2019, 9:54 EDT) (on file with author).

⁷ See generally THE FERGUSON COMMISSION, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUALITY (2015) [hereinafter FERGUSON]; THE MOVEMENT FOR BLACK LIVES, A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM, & JUSTICE (2016) [hereinafter MOVEMENT]. That groups like Forward Through Ferguson and Black Lives Matter choose not to focus on integration is intriguing, particularly given the decades of social science research indicating that integration benefits minority children. See, e.g., Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L. Q. 1, 21 n.107 (2017).

⁸ See Henry Louis Gates, Jr., *Black Studies at the Crossroads: A Discussion with Henry Louis Gates Jr.*, 55 J. OF BLACKS IN HIGHER EDUC. 58, 61 (2007); Kenneth W. Mack, *Second Mode Inclusion Claims in the Law Schools*, 87 FORDHAM L. REV. 1005, 1021 (2018); Susan Olzak & Nicole Kangas, *Ethnic, Women's, and African American Studies Majors in U.S. Institutions of Higher Education*, 81 SOC. OF EDUC. 163, 163 (2008); MOVEMENT, *supra* note 7.

⁹ See JBHE Foundation, *Taking Steps to Curtail Black Student Self-Segregation at Harvard College*, 15 J. OF BLACKS IN HIGHER EDUC. 14–15 (1997); JBHE Foundation, *When Racial Diversity on Campus Is Only Skin Deep: Could the "Jigsaw Classroom" Teaching Method Break Down Self-Segregation?*, 45 J. OF BLACKS IN HIGHER EDUC. 36–37 (2004).

have all been struck down by the courts.¹⁰ This leaves us at an apparent impasse. However, scholars of democratic design like Heather Gerken have long dealt with similar problems in other contexts, most notably electoral districts and juries, both places where minorities have suffered considerable discrimination in the past. Indeed, Gerken's interest in second-order diversity itself began as an effort to think creatively about the problems that racial minorities face in democratic societies, a problem that might be better solved through "a structural rather than rights-based" frame.¹¹

This Article borrows from Gerken's analytic to illustrate how majority-minority schools and minority spaces within majority schools provide minorities with room to: 1) dissent by deciding, 2) turn the tables on majorities, and 3) cycle through new pedagogical approaches that do the ideological work necessary for political action, whether by galvanizing minority identity and/or theorizing minority strategy.¹²

Central to this Article is new sociological research suggesting that diversity does not always operate in the way that we, or the courts, tend to assume. According to the prevailing view, diversity contributes to pedagogy by encouraging statistical integration; in other words, the placement of students from different backgrounds in the same classrooms, thereby facilitating cross-racial understanding and cross-racial discussion. However, new research indicates that minority students do not necessarily see integrated classrooms as the only benefit from diverse academic settings. Many also benefit from spaces where they are the majority, both socially and academically. Such "second-order diversity" locales are valuable because they provide minority students with a respite from implicit and explicit bias, as well as intellectual zones where they can exchange ideas, trade strategies, and do the theoretical work necessary to enhance minority agency and expression in the political sphere.

No better example of this exists than African American Studies, an intellectual discipline forged expressly to create a majority-minority space within majority white schools. Borne out of student activism in the 1960s, Black Studies programs were conceived both as academic disciplines and also political spaces, places for generating leaders and sharing intellectual resources with neighboring Black communities.¹³ According to historian Martha Biondi, the call for Black Studies presumed that "the entire nation's

¹⁰ See PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION 289–94 (2004); JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 196–99 (David Hackett Fischer & James M. McPherson eds., 2002).

¹¹ Gerken, *supra* note 1, at 1105.

¹² See *id.* at 1104.

¹³ Martha Biondi, *Controversial Blackness: The Historical Development & Future Trajectory of African American Studies*, 140 DAEDALUS 226, 227 (2011).

educational system [was] a contested and profoundly significant space: a means of racial domination, on the one hand, or a path to [B]lack empowerment on the other.”¹⁴ No better example could be provided of how education might extend from the inculcation of civic values to the enhancement of minority agency in politics, as this Article will demonstrate.

The Article proceeds in three parts. Part I suggests that diversity has always existed in some tension to integration, and that the Supreme Court’s elevation of diversity to the level of a compelling interest was a reaction to, rather than a fulfillment of, the assimilationist ethos in *Brown*. Part II applies Gerken’s notion of second-order diversity to primary and secondary schools, suggesting that reformers have begun to move away from integration and toward an ethos of minority empowerment uniquely tailored to the needs of under-privileged urban children.¹⁵ Part III shows how second-order diversity operates at the level of higher education, both in the context of HBCUs and also majority white institutions where minority students have successfully forged their own spaces, their own student organizations, and even their own academic departments.

I. THE *BROWN*/DIVERSITY MYTH

Central to the case for diversity is pedagogy, the idea that students stand to learn from difference.¹⁶ This was the argument that the Supreme Court made when it first elevated diversity to the level of a compelling interest in

¹⁴ *Id.* at 228.

¹⁵ This Article focuses on districts where education reformers have decided that they stand a better chance of success by focusing on the needs of children within districts, including majority-minority districts, than expending valuable political capital trying to redraw district lines, whether by mobilizing voters or lobbying courts. Christopher Suarez argues for a different approach, holding that minority students stand to benefit from going to school with majority peers and that school district lines should be redrawn across the country to ensure that no district boasts more than 60% low income students and most districts boast no more than 40% low income students. This approach presumes a major change in federal law, one that a Gerkenian second-order diversity analysis does not. See Christopher A. Suarez, *Democratic School Desegregation: Lessons from Election Law*, 119 PENN ST. L. REV. 747, 784 (2015). Suarez hinges his theory on the value of first-order diversity, not second, a position that remains popular among many academics. See, e.g., Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 4–7, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915); Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 409–10 (2012); Kaufman, *supra* note 7, at 3; Nancy Conneely, Note, *After PICS: Making the Case for Socioeconomic Integration*, 14 TEX. J. C. L. & C.R. 95, 115 (2008);

¹⁶ See Harvard’s Reply Memorandum in Support of Its Motion For Summary Judgment On All Remaining Counts at 17–18, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176-ADB).

1978, and it remains the argument for diversity today.¹⁷ As Harvard University put it in December 2018, “intellectual transformation is deepened and conditions for social transformation are created” whenever students “come from different walks of life.”¹⁸

This was not, however, the Supreme Court’s rationale for integration. *Brown v. Board of Education* rejected the idea that white students might learn from their Black peers, positing instead that African American students were damaged and needed help.¹⁹ Footnote 11 of the ruling cited a study by Swedish sociologist Gunnar Myrdal, who declared that Black America was a “pathological form” of America and that the solution to America’s racial “dilemma” was full assimilation of African Americans into mainstream white society, at the cost of Black identity.²⁰ “We assume,” wrote Myrdal, “that it is to the advantage of the American Negroes as individuals and as a group to become assimilated into American culture, to acquire the traits held in esteem by the dominant white Americans.”²¹ To prove his point, Myrdal included a chapter by a University of Chicago graduate student named Arnold Rose, who declared cultural “assimilation” to be a “central element” of the “American creed,” a point underscored by the “melting pot” ideal in which “diverse ethnic groups” immigrated to the United States and “abandon[ed] their cultural ‘particularities.’”²² Excluded from this process, argued Rose, were African Americans, who had not been “allowed to assimilate,” but rather had been kept apart by prohibitions against intermarriage and laws that “segregated” the races.²³ Shut out of the American melting pot, Blacks “developed” their own “separate institutions” including their own “American Negro culture.”²⁴

Black culture did not—in Rose’s opinion—possess its own inherent value or worth, but rather represented a “distorted” or “pathological” version of the “general American culture.”²⁵ To bolster this claim, Rose referenced a series of factors, including a study of the Black family by African American sociologist E. Franklin Frazier, noting that “family disorganization” was high in Black communities, as evidenced by “Negroes hav[ing]

¹⁷ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (“The 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.”).

¹⁸ *Mission*, HARVARD COLLEGE, <https://college.harvard.edu/about/mission-vision-history> [<https://perma.cc/NC38-S5TK>] (last visited June 20, 2020).

¹⁹ See 347 U.S. 483, 494 (1954); see also GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 927 (1st ed., 1944).

²⁰ MYRDAL, *supra* note 19, at 927.

²¹ *Id.* at 929.

²² *Id.* at 927.

²³ *Id.* at 928.

²⁴ *Id.*

²⁵ *Id.*

about eight times as much illegitimacy as native whites.”²⁶ Although Frazier’s actual argument was that Black illegitimacy rates varied based on geography and therefore reflected “social environment” more than culture, Rose hammered away at Black culture, even referencing the “emotionalism” of the “Negro church” to demonstrate that Black culture was less developed.²⁷ According to Rose, charismatic religion only further compounded “the insufficiency and unwholesomeness of Negro recreational activity,” “the plethora of [inferior] Negro social organizations,” and the tendency of African Americans to support “the cultivation of the arts to the neglect of other fields.”²⁸ Oddly oblivious to the value that many found in these categories, Rose jumped to endorse assimilation, arguing that it would be to the “advantage” of Blacks in America “to become assimilated into American culture” and to “acquire the traits held in esteem by the dominant white Americans.”²⁹ Though Rose paid lip service to the basic premise of anthropology that “*all* cultures may be good,” he posited that “here, in America,” white culture was “highest” and that any minority group “not strong enough to change it” should assimilate into that culture.³⁰

Myrdal endorsed Rose’s conclusions, arguing that the chapter represented a “fresh approach” to one of the central premises of the study, namely that white culture was the “highest” form of culture in America and that African Americans needed to “acquire” as many “traits” from the “surrounding white culture” as possible.³¹

Not everyone agreed. Ralph Ellison, a Black writer from Oklahoma, criticized Myrdal’s view that “the Negro’s entire life” was simply a reaction to the “dominant white majority.”³² How “can a people,” asked Ellison, “live and develop for over three hundred years simply by *reacting*?”³³ Reluctant to view Black culture as pathological, Ellison challenged Myrdal’s claim that white culture was somehow better, noting for example that “radio advertising,” “Hollywood,” and “lynching” were all products of white culture, and that Blacks stood to gain little from embracing such phenomena. “Why, if my culture is pathological,” asked Ellison, “must I exchange it for these?”³⁴ Instead, Ellison posited that precisely because Blacks were shut out of white society, they had gained a healthy perspective on white

²⁶ *Id.* at 933.

²⁷ *See id.* at 928–29; *see also* DARYL MICHAEL SCOTT, CONTEMPT & PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996, at 44 (1997).

²⁸ Myrdal, *supra* note 19, at 928–29.

²⁹ *Id.* at 929.

³⁰ *Id.*

³¹ WALTER JACKSON, GUNNAR MYRDAL AND AMERICA’S CONSCIENCE: SOCIAL ENGINEERING AND RACIAL LIBERALISM, 1938–1987, at 170–71 (1990).

³² RALPH ELLISON, SHADOW AND ACT 315 (1995).

³³ *Id.*

³⁴ *Id.* at 316.

pathologies, developing instead their own culture that boasted “much of great value” and “richness.”³⁵ Rather than assimilate Blacks into white society, Ellison recommended a change in the “basis of society” that would improve people’s lives but not erase their cultural identity.³⁶ “In Negro culture,” he concluded, “there is much of value for America as a whole.”³⁷

Ellison’s critique, published in *The Antioch Review* in 1944, fell on deaf ears. Three years later, NAACP attorney Thurgood Marshall cited *An American Dilemma* in a brief filed on behalf of Ada Lois Sipuel, an aspiring law student denied entry to the University of Oklahoma Law School on account of her race.³⁸ He cited it again in 1952 when the NAACP brought a direct challenge to segregated schools, resting its claim on the notion that not only did Jim Crow fail to encourage Black development, but it caused tangible, psychological harm to Black children.³⁹ NAACP attorneys—Thurgood Marshall, Robert L. Carter, and Spottswood Robinson—cited the Myrdal study in a brief filed on behalf of Dorothy E. Davis and other Black students in Virginia, challenging segregated schools in that state.⁴⁰ That case would later be consolidated into three other cases from South Carolina, Delaware, and Virginia, to form the basis of *Brown v. Board of Education*, which the Court decided on May 17, 1954.⁴¹

In its opinion, the Court cited Myrdal to help demonstrate that segregation violated equal protection because it harmed Black youth, regardless of whether schools were equally funded.⁴² Even if Black schools were the same materially, reasoned Chief Justice Earl Warren, they still damaged Black children because segregation itself generated “a feeling of inferiority” that was unlikely to ever be “undone.”⁴³ This was true, maintained the Court, even if schools were “equalized, with respect to buildings, curricula, qualifications and salaries of teachers and other ‘tangible’ factors.”⁴⁴

Not everyone concurred. Prominent Black writer Zora Neale Hurston wrote a letter to the *Orlando-Sentinel* decrying the ruling. “How much satisfaction can I get,” queried Hurston in August 1955, “from a court order for somebody to associate with me who does not wish me near them?”

³⁵ *Id.*

³⁶ *Id.* at 317.

³⁷ *Id.*

³⁸ See Brief for Petitioner at 29, 46, 47, *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631 (1948) (No. 369); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 258–59 (1987).

³⁹ Brief for Appellant at 3–4, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1).

⁴⁰ *Id.* at 29.

⁴¹ 347 U.S. 483, 483 (1954).

⁴² *Id.* at 494–95 n.11.

⁴³ *Id.* at 494.

⁴⁴ *Id.* at 492.

Hurston posed the question from her coastal home in Eau Gallie, Florida, writing a letter to the *Orlando-Sentinel* that would become one of the most notorious critiques of *Brown* in the 1950s.⁴⁵ “I regard the U.S. Supreme Court as insulting rather than honoring my race,” she declared, balking at the presumption that African Americans suffered damage simply because they lacked white contact. Blacks wanted opportunity and resources, she argued, not intimacy. “If there are not adequate Negro schools in Florida,” asserted Hurston,

and there is some residual, some inherent and unchangeable quality in white schools, impossible to duplicate anywhere else, then I am the first to insist that Negro children of Florida be allowed to share this boon. But if there are adequate Negro schools and prepared instructors and instructions, then there is nothing different except the presence of white people.⁴⁶

Hurston’s critique came on the tail end of a long career celebrating Black cultural achievement, often ranking it above white achievement. During the Harlem Renaissance, for example, Hurston wrote stories about the spiritual strength of Black communities, their resilience, and also their creative self-expression. By contrast, she cast white society as violent and racist, a point she made clear in her 1948 novel *Seraph on the Suwanee*, about a family of whites who brutalize one another in northern Florida.⁴⁷ Hurston’s critique of mainstream white culture echoed Ellison’s and informed her anger at *Brown*, a decision that struck her as dismissive, even hostile, to Black history and culture.⁴⁸

Black intellectuals were not *Brown*’s only cultural critics. White southerners like Eudora Welty, Harper Lee, and Robert Penn Warren—all of

⁴⁵ Letter from Zora Neale Hurston to Editor, *Orlando Sentinel* (Aug. 11, 1955), *reprinted in ZORA NEALE HURSTON: A LIFE IN LETTERS* 738–39 (Carla Kaplan ed., 2002) [hereinafter Letter from Zora Neale Hurston]. Newspapers across the South reprinted Hurston’s letter. William W. Taylor, Jr., Special Counsel to North Carolina’s Advisory Committee on Education, wrote Hurston on Aug. 25, 1955, requesting permission to “reprint” the letter in “pamphlet form” for distribution around the state. Letter from William W. Taylor, Jr. to Zora Neale Hurston (Aug. 25, 1955) (on file with the University of Florida Library). “We believe that it might be of great help in our efforts to find a reasonable solution to the problem now facing the public schools,” wrote Taylor, “and that it is an excellent implementation of the recent policy address of the Governor of this State.” *Id.* See also Letter from Virginius Dabney to Martin Andersen, Publisher, *Orlando Sentinel* (Aug. 15, 1955) (on file with the University of Florida Library) (discussing the decision to reprint Hurston’s letter in the *Richmond Times-Dispatch*); Letter from Burke, Kuipers & Mahoney, Inc. to Martin Andersen, Publisher, *Orlando Sentinel* (Oct. 19, 1955) (on file with the University of Florida Library) (discussing Hurston’s letter in the *Dallas Morning News*).

⁴⁶ Letter from Zora Neale Hurston, *supra* note 45.

⁴⁷ See generally ZORA NEALE HURSTON, *SERAPH ON THE SUWANEE* (1948).

⁴⁸ See Letter from Zora Neale Hurston, *supra* note 45.

whom supported civil rights—nevertheless reacted negatively to the Court’s assumption that African American culture was pathological. Lee articulated this view in a story about a white lawyer who defends a Black client in Alabama in the 1930s, showing how the attorney’s servant, Calpurnia, boasted her own institutions, traditions, even culture—all to the acclaim of the lawyer, Atticus Finch, and his children, Scout and Jem.⁴⁹ Eudora Welty did the same in a short story about a white doctor who finds spiritual renewal in a Black community.⁵⁰ Robert Penn Warren concurred, first by defending Jim Crow as a refuge for Black art in 1929, and then by casting *Brown* as an effort to render all southerners, white and Black, “exactly alike.”⁵¹

Warren expressed this position to Ralph Ellison during an interview at the American Academy in Rome in 1956, even suggesting that something authoritarian lurked behind the Court’s mandate in *Brown*, an effort not simply to achieve legal equality, but to eradicate diversity.⁵² “What I’m trying to say is this,” he explained,

A few years ago I sat in a room with some right-thinking friends, the kind of people who think you look in the back of the book for every answer—attitude A for situation A, attitude B for situation B, and so on for the damned alphabet. It developed that they wanted a world where everything is exactly alike and everybody is exactly alike. They wanted a production belt of human faces and human attitudes.⁵³

Ellison concurred. “Hell, who would want such a world?”⁵⁴

That Ellison shared Warren’s concern that “right-thinking” liberals might threaten diversity was significant. He harbored no love for segregation, or white southerners, a point he had made clear in a letter that he wrote to fellow Black writer Albert Murray while in Rome.⁵⁵ “[W]e’re trying hard as hell to free ourselves,” he explained to Murray, “so that when we got the

⁴⁹ See generally HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

⁵⁰ See Eudora Welty, *The Demonstrators*, *THE NEW YORKER*, Nov. 26, 1966, at 56.

⁵¹ Ralph Ellison & Eugene Walter, *Warren on the Art of Fiction*, *PARIS REVIEW* (1957), reprinted in *TALKING WITH ROBERT PENN WARREN* 47 (Floyd C. Watkins, John T. Hiers & Mary Louise Weaks eds., 1990); see Robert Penn Warren, *The Briar Patch*, in *I’LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION* 254–55 (1930).

⁵² See Ralph Ellison, Eugene Walter & Robert Penn Warren, *Warren on the Art of Fiction*, *PARIS REVIEW* (1957), reprinted in *TALKING WITH ROBERT PENN WARREN* 47 (Floyd C. Watkins, John T. Hiers, & Mary Louise Weaks eds., 1990).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Letter from Ralph Ellison to Albert Murray (March 16, 1956), reprinted in *TRADING TWELVES: THE SELECTED LETTERS OF RALPH ELLISON AND ALBERT MURRAY* 113–18 (Albert Murray & John F. Callahan eds., 2000) [hereinafter March 16 Letter].

crackers off our back we can discover what we (Moses) really are and what we really wish to preserve out of the experience that made us.”⁵⁶ “Moses” was Ellison’s euphemism for African Americans, a group that he believed possessed valuable insight into American life, forged in the violent crucible of Jim Crow.⁵⁷

“[C]rackers,” by contrast, were whites, whose culture left much to be desired. To jettison Black traditions for “crackerdom,” as Ellison called white society, was undesirable, leading him to side with Warren on the issue of diversity or, what Warren termed, “pluralism.”⁵⁸ “I want variety and pluralism,” explained Warren to Ellison, and “appreciation,” appreciation of the differences and divisions in America, the divergent traditions and cultures that enriched the national tapestry.⁵⁹ Warren’s endorsement of pluralism spoke to an America defined by second-order diversity rather than first, a disaggregated landscape where different peoples and different cultures could coincide.⁶⁰ “Man is interesting in his differences,” declared Warren, a point that did not preclude reform, but placed restrictions on it, particularly on grand schemes like integration, which sought cultural assimilation.⁶¹ Warren acknowledged to Ellison that “some sort of justice and decency” should be achieved, maybe even with government help, but not at the cost of diversity.⁶² Government campaigns to achieve justice by eliminating diversity struck Warren as fundamentally wrong, bids to legislate “undifference.” “I feel pretty strongly about attempts to legislate *undifference*,” explained Warren to Ellison, “That is just as much tyranny as trying to legislate difference.”⁶³

Warren took a hard line on second-order diversity, suggesting that pluralism warranted protection for pluralism’s sake.⁶⁴ Ellison was more nuanced, and argued specifically for a politics of racial equality that also allowed room for the preservation of the Black perspective.⁶⁵ However, both writers prized difference and praised disaggregated institutions in a way that led them to question the assimilationist logic behind *Brown*. Both also harbored doubts about the feasibility, nay desirability, of big government solutions to social problems. This was Warren’s point in Rome, which Ellison

⁵⁶ *Id.* at 117.

⁵⁷ *See generally id.*

⁵⁸ *See* Letter from Ralph Ellison to Albert Murray (Feb. 4, 1952), reprinted in TRADING TWELVES: THE SELECTED LETTERS OF RALPH ELLISON AND ALBERT MURRAY 29 (Albert Murray & John F. Callahan eds., 2000) [hereinafter February 4 Letter]; *see also* Ellison, Walter & Warren, *supra* note 52.

⁵⁹ *See* Ellison, Walter & Warren, *supra* note 52.

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See id.*

⁶⁵ *See* February 4 Letter, *supra* note 58.

agreed with, and it was a point that both writers had confronted in their work: Warren in *All the King's Men* and Ellison in *Invisible Man*.

In the latter, Ellison's narrator clashes with communists—the ultimate assimilationists—and carves out a physical space for himself underground, a basement sanctuary hidden from the roving eyes of the state.⁶⁶ Warren penned a similarly anti-authoritarian tale in his Pulitzer prize-winning novel, *All the King's Men*, about a southern demagogue who cynically accumulates power around himself in the name of ending poverty, a goal that he never takes seriously.⁶⁷ Both Warren and Ellison seemed to recognize that aspirational politics might open the door to frightening, totalitarian tendencies.⁶⁸

Prominent intellectuals like Ellison and Warren were not the only Americans to fear totalitarianism in the post-World War II period, nor were they the only Americans to embrace second-order diversity as an antidote to centralized control. Perhaps the most prominent lawyer to embrace this view was Lewis F. Powell, Jr.—an attorney from Richmond, roughly the same age as Warren and Ellison, who rose to the United States Supreme Court in 1972.⁶⁹ Born in Suffolk, Virginia in 1907, Powell grew up in the segregated South, fought in World War II, and came to believe that the greatest threat to American life was not inequality—which he had become inured to in Virginia—but the centralization of state power.⁷⁰ Powell witnessed the horror of such totalitarian power up close during World War II and again in 1958, when he traveled with the American Bar Association to the Soviet Union. In a summary of his trip written shortly after his return, Powell noted the alarming degree to which the Russians controlled thought and punished dissenting ideas.⁷¹ Communism, he came to believe, was fundamentally un-free, a propaganda-driven system that tolerated no political or ideological independence; a system that burned books and banned speech, all in the name of equality.⁷²

Soviet aspirations of creating a classless society, in Powell's mind, were closely tied to its reliance on aggressive government measures: five year

⁶⁶ See generally RALPH ELLISON, *INVISIBLE MAN* (1952).

⁶⁷ See generally ROBERT PENN WARREN, *ALL THE KING'S MEN* (1946).

⁶⁸ See Ellison, Walter, & Warren, *supra* note 52.

⁶⁹ See ANDERS WALKER, *THE BURNING HOUSE: JIM CROW AND THE MAKING OF MODERN AMERICA* 167 (2018).

⁷⁰ See Anders Walker, *Diversity's Strange Career: The Racial Pluralism of Lewis F. Powell, Jr.*, 50 SANTA CLARA L. REV. 647, 661, 679 (2010).

⁷¹ *Id.* at 662–63.

⁷² *Id.* at 668.

plans, purges, and so on.⁷³ By contrast, America's commitment to liberty struck Powell as inextricably linked to constraints on government power that created zones of freedom, places where there could be vast disparities in wealth, in education, and even in political viewpoints, disparities that were themselves expressions of diversity, or what he also liked to term pluralism.⁷⁴ In one of his most startling opinions, for example, Powell declared that inequality in public school funding contributed to "pluralism" by preventing the centralization of education because it protected local schools from centralized control, even as it pressed schools in low-income districts to innovate.⁷⁵

Powell elaborated on this view in *Regents v. Bakke*, the opinion that declared diversity in university admissions to be a compelling interest.⁷⁶ There, Powell explained that all of America was made up of minorities, even whites, many of whom had suffered discrimination at the hands of the state. To ascertain who had suffered more, he argued, was impossible, meaning that any program aimed at helping a racial group violated equal protection.⁷⁷ However, schools could consider race for the purpose of diversity, provided they had a sincere pedagogical reason for doing so.⁷⁸ This meant that some schools might strive for a heavy Black presence in order to develop Black leaders, much like Wellesley, Smith, and Mount Holyoke sought to develop women leaders. Or, some schools might strive for classes that included students of a variety of races, whether to forge interracial understanding or to deconstruct the notion of race itself. It did not really matter to Powell what schools wanted to do, so long as different schools were allowed to do different things, and the state did not impose centralized mandates.⁷⁹

Schools could not exclude all students of a particular race, per *Brown*, but Powell did not think that *Brown* went much beyond that.⁸⁰ As early as 1970, for example, he argued that *Brown* called for the removal of overt racial classifications, nothing more.⁸¹ Powell proceeded to argue that aggressive measures to achieve racial balance—like busing—were

⁷³ See generally Lewis F. Powell, Jr., *Instruction on Communism and Its Contrast With Liberty Under Law* (January 1962) (transcript available at <https://scholarlycommons.law.wlu.edu/powellspeeches/64/>).

⁷⁴ Powell's commitment to institutional freedom can be seen in his defense of private schools. See, e.g., Lewis F. Powell, Jr., *The Challenge to the Private Preparatory School 2-4* (January 31, 1967) (transcript available at <https://scholarlycommons.law.wlu.edu/powellspeeches/1/>).

⁷⁵ See *San Antonio v. Rodriguez*, 411 U.S. 1, 49-51 (1973).

⁷⁶ See 438 U.S. 265, 314-15 (1978).

⁷⁷ See *id.* at 295-99.

⁷⁸ See *id.* at 312.

⁷⁹ See *id.*

⁸⁰ See WALKER, *supra* note 69, at 181.

⁸¹ See *id.*

unwarranted. He made this point in a brief filed on behalf of the defendants in *Swann v. Charlotte-Mecklenburg Board of Education*, a case about busing in North Carolina.⁸² So long as Charlotte retracted its policy of assigning students to schools based specifically on race, argued Powell, then it satisfied *Brown*. If, however, racial segregation persisted due to residential patterns, then it was not a violation of equal protection.⁸³ Were the Court to rule differently, he warned, whites would flee the city.⁸⁴ Powell cautioned that this was already happening in Richmond, where he lived, and that courts should hew closely to a narrow reading of *Brown*; otherwise, Black children would find themselves more segregated and isolated than before.⁸⁵

II. SECOND-ORDER DIVERSITY AND LOWER EDUCATION

Powell's prediction that racial balance might lead to white flight proved prophetic. Across America, whites left urban centers to escape busing, prompting a demographic shift that historian Tom Sugrue has equated to an "urban crisis."⁸⁶ As whites left cities, they boosted suburban development and drained urban coffers, leaving African Americans isolated and abandoned in crumbling inner-city cores.⁸⁷ Whites also left the Democratic Party, opting for a grassroots, suburban conservatism that transformed American politics, blaming the urban crisis on Lyndon Johnson's "War on Poverty" and "Great Society" programs, meanwhile lobbying for lower taxes, less entitlements, and local schools.⁸⁸

This shift affected law as well. Anti-busing sentiment helped elect California conservative Richard Nixon to the presidency in 1968, and Nixon subsequently appointed Powell to the Supreme Court in 1971.⁸⁹ Once there, Powell helped construct a firewall around suburban school districts, all in the name of local control and institutional pluralism.⁹⁰ This story, often told

⁸² Brief for Respondent at 16, *Swann v. Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (No. 281).

⁸³ See WALKER, *supra* note 69, at 181.

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 3–5, 266–71 (1996); see also PATTERSON, *supra* note 10, at 16.

⁸⁷ SUGRUE, *supra* note 86, at 266, 269.

⁸⁸ MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 5, 232, 234–37 (2006).

⁸⁹ See MATTHEW F. DELMONT, *WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION* 114, 118 (2016); JOHN C. JEFFRIES, *JUSTICE LEWIS F. POWELL, JR.* 1 (2001).

⁹⁰ See WALKER, *supra* note 69, at 175–96; see, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 50 (1973) (holding that unequal school district funding does not violate equal protection and promotes pluralism); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 224 (1973) (declaring de facto and de jure segregation to be the same, warranting a narrow reading of *Brown v. Board of Education*) (Powell, J., concurring); *Milliken v. Bradley*, 418

in terms of declension, reversed the hope that *Brown* might achieve racial balance in American schools and, in many cases, resulted in urban resegregation.⁹¹

But with Black schools came Black space. Though white resistance explains why public schools have remained segregated, school reformers have begun to focus less on schemes aimed at increasing integration and more on providing African American children with the education they need, independent of whites.⁹² This approach invites us to reconsider whether the political benefits that Gerken ascribes to second-order diversity might also be applied to schools. They include, for example: 1) whether majority Black schools give African Americans control of their own institutions, 2) whether they provide an opportunity to turn the tables on majorities, 3) whether they give minorities the freedom to dissent by deciding policy, and finally, 4) whether majority Black school systems provide room to experiment with, or “cycle” through, approaches to achieving educational goals for Black children that would not be available in majority white settings.⁹³

Examples of Gerken’s frame are emerging in school districts across the country that have grown tired of expending resources on integration and have started to focus instead on creating “Afrocentric” schools.⁹⁴ For example, New York City boasts a half-dozen Afrocentric schools that enroll roughly 2,300 children, staffed mostly by African American teachers and administrators who are able to “control” the institution and “dissent by deciding” the curriculum as well as modes of discipline, both problems for African American students in majority white schools.⁹⁵ Afrocentric schools are also able to “focus on [B]lack culture in literature, history and art classes,” without fearing majority white backlash.⁹⁶ In such situations, Black teachers and parents are able to “turn the tables” on majority white institutions, many of which single out Black students for disproportionate punishment, underestimate Black intellectual potential, and alienate Black students socially due to implicit peer group bias.⁹⁷ Precisely because few white

U.S. 717, 747 (1974); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 745 (1982) (equating diversity with the maintenance of single-sex schools) (Powell, J., dissenting).

⁹¹ See JAMES PATTERSON, *supra* note 10, at 191–205.

⁹² Eliza Shapiro, “I Love My Skin!” *Why Black Parents are Turning to Afrocentric Schools*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/nyregion/afrocentric-schools-segregation-brooklyn.html>.

⁹³ See Gerken, *supra* note 1, at 1104.

⁹⁴ Shapiro, *supra* note 92.

⁹⁵ See *id.*; Gerken, *supra* note 1, at 1104.

⁹⁶ See Shapiro, *supra* note 92.

⁹⁷ See Linsey Edwards, *Homogeneity and Inequality: School Discipline Inequality and the Role of Racial Composition*, 95 SOC. FORCES 55, 55–56 (2016); Karl L. Alexander, Doris R. Entwisle & Maxine S. Thompson, *School Performance, Status Relations, and the Structure of Sentiment: Bringing the Teacher Back In*, 52 AM. SOC. REV., 665, 680 (1987);

students apply to enter Afrocentric schools, in other words, said schools are able to “cycle” through new pedagogical approaches aimed at “empower[ing] [B]lack children in ways that traditional schools in America historically have not,” in part by stressing “[B]lack power, pride and excellence.”⁹⁸

Nowhere is this more apparent than St. Louis, Missouri. In 2016, a state commission tasked with studying racial inequality in the region issued a report, *Forward through Ferguson*, that advanced “189 calls to action” aimed at improving the life outcomes for Black children in the city.⁹⁹ The document made no mention of racial integration, a remarkable omission given that St. Louis boasted the “largest and longest-running school desegregation program” in the country at the time.¹⁰⁰ That program, sparked by a lawsuit to desegregate St. Louis public schools, had involved the construction of magnet schools to draw white students into the city, mandatory busing within the city, and a voluntary busing program for Black city students interested in attending majority-white suburban schools.¹⁰¹

That *Forward through Ferguson* did not even mention school integration in its report may reflect the busing program’s impending phase-out in 2019, or it may represent a larger shift in thinking about race and reform. Similar to New York City, St. Louis is recognizing the benefits of looking beyond just the first-order goal of statistical integration to decidedly second-order goals. For example, recent data released by St. Louis Public Schools suggests that even though students who were bused to suburban districts outperformed their peers in general city schools, city students who remained and accessed the twenty-three “magnet and choice programs” in St. Louis did even better.¹⁰² Such numbers seem to coincide with a larger shift in thinking about the value of integration in the United States, a shift reflected not only in *Forward through Ferguson*, but also *Vision for Black Lives*, a policy platform endorsed by Black Lives Matter in 2016 (which did not mention integration), and recent trends in cities like Detroit, Philadelphia,

Edward W. Morris & Brea L. Perry, *Girls Behaving Badly? Race, Gender, and Subjective Evaluation in the Discipline of African American Girls*, 90 SOC. OF EDUC. 127, 144 (2017).

⁹⁸ Shapiro, *supra* note 92.

⁹⁹ FERGUSON, *supra* note 7, at 17; see Stephen Deere, *Nixon Announces Members of Ferguson Commission*, ST. LOUIS POST-DISPATCH (Nov. 19, 2014), https://www.stltoday.com/news/local/govt-and-politics/nixon-announces-members-of-ferguson-commission/article_018cc5a3-d3db-5296-a581-75ca49921153.html [<https://perma.cc/4XQF-QJL6>].

¹⁰⁰ Elisa Crouch, *St. Louis Desegregation Program Headed for Phase out*, ST. LOUIS POST-DISPATCH (June 10, 2016), https://www.stltoday.com/news/local/education/st-louis-desegregation-program-headed-for-phase-out/article_9dadfa4c-3d49-5b80-b6ec-2b1c03d2e5c7.html [<https://perma.cc/9CRZ-QK3R>]; see generally FERGUSON, *supra* note 7.

¹⁰¹ See Crouch, *supra* note 100.

¹⁰² *Id.*; see Shapiro, *supra* note 92.

Chicago, and New York, where growing numbers of Black parents are opting for “schools explicitly designed for [B]lack children.”¹⁰³

At least one third of *Forward through Ferguson*’s 189 calls to action place “youth at the center” of reform, recommending a series of initiatives aimed at providing poor children with the resources and education that they need to move directly, and successfully, into decent paying jobs—minus integration.¹⁰⁴ Currently, 80% of all children in St. Louis public schools are African American, and nearly 60% of those children qualify for subsidized lunch, meaning that they live at or below the poverty line.¹⁰⁵ The report recommends reducing childhood hunger in St. Louis by eliminating bureaucratic hurdles to the federal government’s Supplemental Nutrition Assistance Program (SNAP), which funds subsidized lunch programs.¹⁰⁶ This alone provides a tangible benefit to disadvantaged youth, not to mention a glimpse into the manner in which the report focuses not simply on changing the composition of classrooms (first-order diversity), but providing poor children with resources that their middle and upper middle class peers already have.

Along these lines, the report calls for establishing “school based health centers,” capable of providing students with “access to mental health, case management and reproductive health.”¹⁰⁷ Such centers would perform a variety of functions, targeting deeper issues of poverty and deprivation. For example, the report mentions classes on “healthy eating,” treatment for “behavioral health issues,” and “evidence-based trauma-informed training,” all services that affluent students would arguably contract for privately, through health insurance.¹⁰⁸ Student health centers also focus on logistical challenges facing poor families, including time off for doctor’s visits and trips to the pharmacy.

¹⁰³ See Martell Teasley et al., *School Choice and Afrocentric Charter Schools: A Review and Critique of Evaluation Outcomes*, 20 J. OF AFRICAN AM. STUD. 105 (2016); Azi Paybarah, *N.Y. Today: When Schools Are Designed for Black Children*, N.Y. TIMES, Jan. 9, 2019, <https://www.nytimes.com/2019/01/09/nyregion/newyorktoday/new-york-news-afrocentric-schools-black.html>; see also Yamiche Alcindor, *Black Lives Matter Coalition Makes Demands as Campaign Heats Up*, N.Y. TIMES, (Aug. 1, 2016), <https://www.nytimes.com/2016/08/02/us/politics/black-lives-matter-campaign.html>.

¹⁰⁴ FERGUSON, *supra* note 7, at 18.

¹⁰⁵ *St. Louis City School District*, PUBLIC SCHOOL REVIEW, <https://www.publicschoolreview.com/missouri/st-louis-city-school-district/2929280-school-district> [<https://perma.cc/H3V8-QFH8>] (last visited June 16, 2020); *Child Food Insecurity*, ST LOUIS-MO.GOV, <https://www.stlouis-mo.gov/government/departments/mayor/initiatives/resilience/equity/youth/wellbeing/child-food-insecurity.cfm> [<https://perma.cc/CHM9-EWEC>] (last visited June 16, 2020).

¹⁰⁶ FERGUSON, *supra* note 7, at 41, 43.

¹⁰⁷ *Id.* at 115.

¹⁰⁸ *Id.* at 42, 104.

Beyond health care and lunch programs, the education component of *Forward through Ferguson* also covers school discipline, a topic that has received considerable attention from scholars interested in the treatment of Black students by white teachers. For example, the report notes that 14% of African American elementary school students in Missouri had suffered school suspensions, while only 1.8% of white students in Missouri had been suspended.¹⁰⁹ Part of this gap stemmed from implicit bias among teachers, including Black teachers, who were more prone to viewing African American students as “troublemakers.”¹¹⁰ To address this, the commission recommended “cultural responsiveness and anti-bias training” for educators, an expenditure that may not have received support in a majority white school district.¹¹¹

Forward through Ferguson also recommended early childhood education and job training, including training for parents who have children in early childhood education. This approach takes into account the reality that parents living below the poverty line are, themselves, in need of education and lack the resources to pay for childcare while going back to school.¹¹² For primary and secondary school students, the Report recommends integrating “high quality career and technical education (CTE) into the curriculum in part through work-based learning,” a type of vocational training geared towards providing low-income students with high-income jobs.¹¹³

Looked at broadly, the proposals in *Forward through Ferguson* go far beyond what conventional notions of public education might entail, a type of coordinated social service delivery system for children, teenagers, and even their adult parents.¹¹⁴ That the Ferguson Commission deemed such measures necessary, or at least important enough to include in their Report, is worth underscoring. Collectively, the calls to action regarding education in St. Louis paint a startling portrait of the lives of children in the region. Rather than a population simply lacking daily contact with white youth, the predominantly Black children of St. Louis require a panoply of services that strain the very concept of education itself, including trauma counseling, comprehensive health care, vocational training, food, and even shelter. For example, the report recommends “financial literacy and technical assistance” for Section 8 housing beneficiaries, an end to predatory lending, and a requirement that private developers address the “affordable housing needs of the state, region, and locality where they will be located.”¹¹⁵

¹⁰⁹ *Id.* at 42.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 44.

¹¹³ *Id.* at 131.

¹¹⁴ *See generally id.*

¹¹⁵ *Id.* at 55, 153.

Compared to earlier programs aimed at transporting a select number of urban children out of the city, a plan that emphasized the benefits Black children might gain from whites, and vice versa (“first-order diversity”), *Forward through Ferguson* represents a decidedly “second-order” approach to education in the city. It is not as explicitly Afrocentric as programs in New York, but it nevertheless achieves many of the same goals that Gerken identifies: it turns the tables on white implicit bias, hands control to Black administrators, allows Black teachers the opportunity to dissent by deciding, and provides a host of “calls to action” that are themselves experimental approaches to educating under-privileged youth.¹¹⁶

More complicated is the role that second-order diversity might play in higher education, as the next section shall demonstrate.

III. SECOND-ORDER DIVERSITY AND HIGHER EDUCATION

Though liberals tended to celebrate Powell’s endorsement of first-order diversity in *Bakke*, not all proponents of racial equality agreed with his approach.¹¹⁷ For example, African American Justice Clarence Thomas took issue with Powell in 2002, deriding the idea that first-order diversity constituted a compelling interest as a “cruel farce.”¹¹⁸ Thomas, like Powell, hailed from the South and possessed a sense of Black pluralism not unlike that endorsed by Ralph Ellison and Zora Neale Hurston in the 1950s.¹¹⁹ Thomas shared Hurston’s anger at the presumption that African Americans were somehow damaged if they did not go to school with whites, a position that derived from his childhood in Pin Point, Georgia, a majority Black township near Savannah that boasted a long tradition of Black self-reliance, dating back to the Civil War.¹²⁰ Oddly, this upbringing made Thomas even more sympathetic to the types of arguments that Heather Gerken would later identify as second-order diversity.¹²¹

Thomas illustrated his viewpoint in a concurring opinion in *United States v. Fordice*, which advocated strongly for historically Black colleges and universities (HBCUs)—institutions that Gerken has described as examples of second-order diversity.¹²² Specifically, Thomas, citing the Carnegie

¹¹⁶ See Gerken, *supra* note 1, at 1104; FERGUSON, *supra* note 7, at 8.

¹¹⁷ See WALKER, *supra* note 69, at 221–22, 228.

¹¹⁸ See *Grutter v. Bollinger*, 539 U.S. 306, 372 (Thomas, J., concurring).

¹¹⁹ See WALKER, *supra* note 69, at 223.

¹²⁰ See *id.*; see J. WILLIAM HARRIS, DEEP SOUTHS: DELTA, PIEDMONT, AND SEA ISLAND SOCIETY IN THE AGE OF SEGREGATION 26 (2001).

¹²¹ See *United States v. Fordice*, 505 U.S. 717, 748 (1992) (Thomas, J., concurring); Gerken, *supra* note 1, at 1108 (“The nation’s system of higher education—with its complement of traditionally [B]lack colleges . . . is diverse in the second-order sense.”); see also WALKER, *supra* note 69, at 224.

¹²² See 505 U.S. at 748; Gerken, *supra* note 1, at 1108.

Commission on Higher Education, maintained that HBCUs “exercised leadership in developing educational opportunities for young [B]lacks” and collectively symbolized “the highest attainments of [B]lack culture,” both arguments that fit nicely into the table-turning, dissent-deciding rubric of second-order diversity.¹²³ Thomas even held that states should be encouraged to “operate a diverse assortment of institutions—including historically [B]lack institutions,” precisely the type of disaggregated political landscape that Gerken would espouse in her piece over a decade later. “It would be ironic, to say the least,” argued Thomas, “if the institutions that sustained [B]lacks during segregation were themselves destroyed in an effort to combat its vestiges.”¹²⁴

Thomas conveyed a similar sentiment in a 1995 case brought by the State of Missouri against a lower court order demanding the construction of magnet schools to attract suburban white students into Black inner-city schools in Kansas City: *Missouri v. Jenkins* resulted in a majority holding that the district court had exceeded its constitutional bounds, a point with which Thomas agreed. “It never ceases to amaze me,” declared Thomas in a concurring opinion, “that the courts are so willing to assume that anything that is predominantly [B]lack must be inferior,” a clear jab at *Brown v. Board of Education*.¹²⁵ The district’s emphasis on luring white students back into the school district struck Thomas as racist, a move rooted in the false presumption that Blacks suffered “unspecified psychological harm” simply because they did not rub shoulders with whites. This position undergirded the Supreme Court’s argument in *Brown*, but with which Black intellectuals like Zora Neale Hurston and Ralph Ellison had long taken issue. To them, and to Thomas, such notions rested on the false “assumption of [B]lack inferiority.”¹²⁶ Thomas maintained that it was simply not the case that “[B]lacks cannot succeed without the benefit of the company of whites,” even though this is what the district court had in fact held.¹²⁷ Indignant, Thomas applied the same reasoning to primary and secondary schools that he had to HBCUs, suggesting that “[d]espite their origins in the ‘shameful history of state-enforced segregation,’ these institutions can be ‘both a source of pride to [B]lacks who have attended them and a source of hope to [B]lack families who want the benefits of . . . learning for their children.’”¹²⁸

Precisely because of his faith in Black schools, Thomas went even further than Powell in endorsing racial pluralism, even to the point of deriding

¹²³ See WALKER, *supra* note 69, at 224.

¹²⁴ *Fordice*, 505 U.S. at 748–49.

¹²⁵ See *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

¹²⁶ *Id.*

¹²⁷ *Id.* at 119.

¹²⁸ See *id.* at 122 (quoting *Fordice*, 505 U.S. at 748).

Powell's arguments about diversity in classrooms. Thomas made this clear in *Grutter v. Bollinger*, a challenge to the admissions policy at the University of Michigan Law School, where he cast Powell's invocation of diversity as a threat to Black education.¹²⁹ Little pedagogical benefit would inure Black students, argued Thomas, who were accepted into majority white schools for "diversity" purposes rather than grades, for they would fall behind academically yet be on public display so white students and white institutions could feel better about themselves.¹³⁰ Thomas argued that it was better to send Black students to HBCUs, where they would be free from white micro-aggressions, free from having to teach white students about the Black experience, and statistically more likely to enjoy "higher academic achievement."¹³¹

To frame his opinion in Gerkenian terms, Thomas rejected first-order diversity and praised second, suggesting it provided a better means of advancing Black educational interests. Thomas made these points even more clear in *Grutter*, which allowed administrators to take race into account when admitting students with lower than average test scores.¹³² Guided by Powell's opinion in *Bakke*, the policy allowed for the consideration of race as one of several "soft variables" that might be noted in deciding to admit a student with lower scores for the express purpose of achieving "that diversity which has the potential to enrich everyone's education."¹³³ A white applicant named Barbara Grutter challenged the policy, leading the Court to reassess the role of racial preferences in university admissions.¹³⁴ Writing for the majority, Justice Sandra Day O'Connor upheld Powell's designation of diversity as a compelling state interest but misinterpreted his reasoning by taking diversity to be important primarily as a means of achieving racial equality. This was a stopgap measure necessary only so long as there were racial disparities in society more generally.¹³⁵ "The requirement that all race-conscious admissions programs have a termination point," reasoned

¹²⁹ See 539 U.S. 306, 364 (2003) (Thomas, J., dissenting).

¹³⁰ See *id.* at 354 n.3, 372.

¹³¹ See *id.* at 365, 372.

¹³² See *id.* at 315–16 (majority opinion).

¹³³ *Id.*

¹³⁴ *Id.* at 316–17.

¹³⁵ See *id.* at 329, 341–42. In 1992, for example, the nation's highest tribunal ruled in favor of a challenge to historically Black colleges in Mississippi, arguing in *United States v. Fordice* that simply removing express racial bans did not satisfy *Brown*, a point that cut against Powell's earlier opinions in *Keyes* and *Swann*. See *United States v. Fordice*, 505 U.S. 717, 729 (1992). Though the Court would ultimately uphold the sanctity of school district lines, it would subsequently read a different interpretation of diversity than the one Powell had endorsed in *Bakke*. See e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Grutter v. Bollinger*, 539 U.S. 306, 314, 316 (2003); see also Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (arguing that the Supreme Court has tended to view diversity programs as "penance for the specific sins of racism a government, union, or employer has committed in the past").

O'Connor, "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."¹³⁶ This was a misreading of Powell, who did not link diversity to equality and, for precisely that reason, did not believe that diversity should be considered a "temporary matter."¹³⁷ As Powell saw it, diversity was a permanent matter because it went to pedagogy, a goal protected by the First Amendment's guarantee of academic freedom.¹³⁸

Though O'Connor did not seem to think that race and pedagogy could be linked permanently, she did defer to the University of Michigan's claim that diversity was "essential to its educational mission" because it promoted "cross-racial understanding," broke down "racial stereotypes" and "enable[d] [students] to better understand persons of different races."¹³⁹ This was first-order diversity traditionally conceived, tied not just to notions of equity but also to questions of academic freedom, and protected by the First Amendment.

Thomas found this insulting. As he saw it, Michigan's plan patronized African Americans and threatened Black institutions. Citing Frederick Douglass, he rejected the majority opinion and argued that "[B]lack students can achieve in every avenue of American life without the meddling of university administrators."¹⁴⁰ Whether they went to Michigan, argued Thomas, Black students faced the same chances at future success and may even have done better at Black institutions. For example, Thomas cited "growing evidence" that racial "heterogeneity actually impairs learning among [B]lack students" and that many African American students "experience superior cognitive development at Historically Black Colleges."¹⁴¹ This raised a point similar to the one that Thomas had made in *Fordice*, namely that HBCUs warranted public support and suffered when Black students were siphoned away to majority white flagship schools.¹⁴² Thomas challenged the idea that Black students did better when surrounded by white peers, citing historically Black institutions like Morehouse College in Atlanta, which boasted only 0.1% white students, yet remained "one of the most distinguished HBCs in the Nation," and Mississippi Valley State, which had only 1.1% white students in its 2001 entering freshman class; Thomas argued that neither school

¹³⁶ See *Grutter*, 539 U.S. at 342 (internal quotation marks omitted) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)).

¹³⁷ See *id.*

¹³⁸ See *Regents*, 438 U.S. 265, 312.

¹³⁹ See *Grutter*, 539 U.S. at 328, 330.

¹⁴⁰ See *id.* at 350 (Thomas, J., dissenting).

¹⁴¹ See *id.* at 364–65.

¹⁴² See 505 U.S. 717, 748 (1992).

suffered from lacking a “critical mass” of white students. In fact, they probably benefitted from it.¹⁴³

Missing from Thomas’s analysis was the possibility that diversity might work for Black students in majority white schools, provided they obtain access to their own space. For example, sociologists Sherri Grasmuck and Jennifer Kim argue that diversity in majority white universities can, and does, take on at least two different forms: interactive and fragmented.¹⁴⁴ In the former, the interactive mode, students of different races mix in the same spaces and make connections across racial lines—much like the first-order diversity that *Grutter* describes.¹⁴⁵ In the latter, the fragmented form, however, students seek out their own spaces and forge bonds with their own racial group—more like Gerken’s definition of second-order diversity.¹⁴⁶

How might “fragmented” diversity benefit pedagogy, if at all? According to Grasmuck and Kim, some minority students gravitate “toward more insular ethnoracial mixing” in college, meaning that they actually cut ties to students from other races.¹⁴⁷ This was true for both minority students who had attended majority-minority high schools as well as minority students who had attended majority white high schools. For them, the opportunity to mix with members of their own racial group was a new experience, one that enabled them to learn more about, and feel more comfortable with their racial, ethnic, and/or cultural identity.¹⁴⁸ As one Indian student put it, “for eighteen years of my life I’ve been around other people except for Indians.”¹⁴⁹ College provided this student with an opportunity to explore contact with her own cultural and ethnic group, a pedagogical benefit that enabled her to “learn more about myself” and “my culture.”¹⁵⁰ Put another way, the opportunity not to mix with whites actually had a positive educational outcome, albeit one not mentioned in *Grutter*.

Grasmuck and Kim’s study suggests that Gerken’s notion of second-order diversity might be particularly applicable in majority white schools, for it is in such schools that minority students stand to suffer most from exposure to majority aggression and are therefore interested in seeking out cultural connections and learning experiences within their own cultural group. For them, college becomes an opportunity to engage in both first and

¹⁴³ *Grutter*, 539 U.S. at 365.

¹⁴⁴ Sherri Grasmuck & Jennifer Kim, *Embracing and Resisting Ethnoracial Boundaries: Second-Generation Immigrant and African-American Students in a Multicultural University*, 25 Soc. F. 221, 224 (2010).

¹⁴⁵ *See id.* at 225.

¹⁴⁶ *See id.* at 224.

¹⁴⁷ *Id.* at 230–31.

¹⁴⁸ *Id.* at 231–33.

¹⁴⁹ *Id.* at 231.

¹⁵⁰ *Id.*

second-order diversity, something that African American students at HBCUs lack. African American students at majority white schools can interact with white students in some contexts and with members of their own race in others. This allows for what Grasmuck and Kim call “a rediscovery or reclaiming of a part of themselves that had been unexpressed formerly.”¹⁵¹ Put in Gerkenian terms, minority students in majority white schools may prize majority-minority spaces more than their white peers, for such spaces provide them with opportunities to “turn the tables” on majority assimilation, dissent by deciding new ways to explore plural identities, and “cycle” through new ways of thinking about and engaging with their own cultural traditions.¹⁵²

Grasmuck and Kim found this to be particularly important for African American students from middle class backgrounds. According to Grasmuck and Kim, “some [Black students] described shifting from a *less [B]lack* pre-college social world to a *more [B]lack* space once at the university, in part to ‘discover[] new things’ about themselves but also to find ‘comfort and support.’”¹⁵³ Support did not factor into the Supreme Court’s analysis in *Grutter*, yet scholars have found that Black students in majority white institutions tend to suffer varying levels of harm in white dominated spaces, whether from micro-aggressions, implicit bias, or outright bigotry, all reasons to carve out Black spaces in majority white institutions.¹⁵⁴

Although Justice Thomas might conclude that Black students should simply avoid white universities and opt for HBCUs, not all Black collegians agree. At Harvard, for example, African American students voice pride in the myriad advantages that come with enrolling at one of the nation’s most prestigious universities, even as they seek to carve out majority Black spaces within the university. To take just a few examples, African American students at Harvard held their first “Black graduation” ceremony in 2017, an event put on by the Harvard Black Students Association and the Harvard Black Graduate Student Alliance to “honor the achievements of [B]lack graduating students.”¹⁵⁵ Maligned by interactive pluralists, the ceremony echoed many of the claims made by the minority students that Grasmuck and Kim surveyed in their study of a large predominantly white public university. For example, Black students voiced their frustration with life at

¹⁵¹ *Id.* at 232.

¹⁵² See Gerken, *supra* note 1, at 1104.

¹⁵³ See Grasmuck & Kim, *supra* note 144, at 232.

¹⁵⁴ Janice McCabe, *Racial and Gender Microaggressions on a Predominantly-White Campus: Experiences of Black, Latina/o and White Undergraduates*, 16 RACE, GENDER & CLASS J. 133, 135–36 (2009).

¹⁵⁵ Eryn Mathewson, *Don’t Hate on Black Graduation Ceremony at Harvard University Undergrads Participated This Year, But Other Schools Have Been Doing it for Years*, THE UNDEFEATED (May 23, 2018), <https://theundefeated.com/whhw/dont-hate-on-black-graduation-ceremony-at-harvard-university/> [<https://perma.cc/G6LS-PK3X>].

Harvard in 2017, noting in the *Harvard Crimson* that the experience exacted a “toll” on African American students in the form of micro-aggressions, implicit bias, and outright rejection.¹⁵⁶ “If you’re a [B]lack Harvard student, you will likely at some point feel like Harvard isn’t meant for you,” wrote one student, “that you would have been happier somewhere else.”¹⁵⁷

To counter such feelings, African American students at Harvard have formed institutions and spaces dedicated to Black student life. “The dozen or so active [B]lack student organizations were all created,” wrote a cadre of Black students, “so [B]lack students could find homes in them.”¹⁵⁸ These include “Kuumba, BlackCAST, and KeyChange,” all of which aimed at promoting “[B]lack voices and creativity” in the arts, as well as pre-professional organizations like the Harvard Society of Black Scientists and Engineers and the Black Pre-Law Association. Such organizations all provided support, the students maintained, in their struggle against micro-aggressions, implicit bias, and overt prejudice.¹⁵⁹ That such students might want their own graduation ceremony struck Fanta Cherif, head of the 2018 Black Graduation Committee at Harvard, as obvious, something that “[e]very PWI [predominantly white institution] should have.”¹⁶⁰

How do we assess such events and the Black-centric institutions that sponsor them? One obvious conclusion is that there may be a place for second-order diversity within majority white institutions after all—and that such diversity is actually evolving organically on campus. As Grasmuck and Kim note, “[a] strong theme of ‘born-again ethnicity,’” ran through the testimonies of minority students who had accessed second-order diversity in majority institutions as well as “a transformed racial identity—more optimistic, more gay, more political” than the identity that they brought to college.¹⁶¹ Such pedagogical benefits are worth flagging. Though not all the African American students surveyed by Grasmuck and Kim prized “fragmented pluralism,” the two sociologists found that Black students were more likely to reject “interactive pluralism” than their minority peers, a point that seems to go to the heart of the diversity debate in America today.¹⁶² If, for example, schools like Harvard maintain that diversity is a viable pedagogical interest because it breaks down stereotypes and builds cross-racial understanding through interactive pluralism, how can it then

¹⁵⁶ Ata D. Amponsah, Matthew Moore, & Janae Strickland, *Welcome to the Harvard Black Community*, THE HARVARD CRIMSON (Sept. 11, 2017), <https://www.thecrimson.com/article/2017/9/11/welcome-black-harvard/> [<https://perma.cc/2UCR-ZT59>].

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Mathewson, *supra* note 155.

¹⁶¹ Grasmuck & Kim, *supra* note 144, at 233.

¹⁶² *Id.* at 230.

explain the popularity of fragmented pluralism among the very minority students that it is invoking the use of race to admit?

Harvard's pleadings in *SFFA v. Harvard* provide little by way of explanation. According to documents filed by the university in the case, diversity serves the pedagogical goals listed in *Grutter* because it places students of races together in the same classes, dining halls, and dorms, thereby achieving the very forms of interactive pluralism long associated with first-order diversity.¹⁶³ To the extent that the university recognizes the potential harm that might accrue to minority students in majority settings, it calls for the enrollment of a "critical mass" of minority students, a goal that the Supreme Court approved in *Grutter*. However, *Grutter's* approval of critical mass has little to do with second-order diversity. As proponents of the theory explain it, critical mass enhances cross-racial discussions, improves cross-racial understanding, and helps break down racial stereotypes; but it does not necessarily mean the creation of majority-minority spaces, nor does it imagine that minority students will cut ties with their majority peers for reasons of self-discovery and cultural enrichment.¹⁶⁴ "With a critical mass of students of the same race," writes Dawinder Sidhu, "those students will feel comfortable articulating their individual perspectives and opinions"—in classes full of whites.¹⁶⁵ "As a result, [minority students] will break down preconceived notions that members of racial communities share monolithic or predictable positions."¹⁶⁶

Missing from Harvard's pleadings, and from the discussion of diversity in higher education, is an appreciation for the role that second-order diversity might play in colleges and universities. And yet, evidence points strongly to all four of the goals that Gerken identifies. For example, second-order diversity provides minorities with "control over some subset of decisions, allowing them to exert the type of power usually reserved for the majority."¹⁶⁷ This, Grasmuck and Kim suggest, is important for minority students tired of implicit bias, micro-aggressions, and outright hostility. Once in minority spaces, they can control what happens in those spaces, obviating harm and exploring subjects that may be of little, if any interest to majorities. Rather than seek to influence those majorities, minority students can simply turn the tables on them, raise new concerns, establish new priorities,

¹⁶³ See Harvard's Reply Memorandum, *supra* note 16.

¹⁶⁴ See Kim Forde-Mazrui, *Does Racial Diversity Promote Cultural Diversity?: The Missing Question in Fisher v. University of Texas*, 17 LEWIS & CLARK L. REV. 987, 1011 (2013).

¹⁶⁵ Dawinder S. Sidhu, *A Critical Look at the 'Critical Mass' Argument*, THE CHRON. OF HIGHER EDUC. (Feb. 18, 2013), <https://www.chronicle.com/article/A-Critical-Look-at-the/137369> [<https://perma.cc/V88A-NKM8>].

¹⁶⁶ *Id.*

¹⁶⁷ See Gerken, *supra* note 1, at 1104.

and even challenge majority preconceptions, without having to fear majority backlash.¹⁶⁸

This is particularly true when majority spaces are elevated to the level of academic departments. Far beyond student organizations or student sponsored events, academic departments like Black Studies institutionalize second-order diversity.¹⁶⁹ As historian Martha Biondi has observed, Black Studies “was part of an intentional effort to redefine the terms of integration: away from assimilation into a Eurocentric institution and toward the restructuring of that institution and its mission.”¹⁷⁰ Though some lobbied for Black Studies programs, rather than full departments, proponents of the department idea cited the increased “control” that came with departmental status, a core aspect of second-order diversity.¹⁷¹

Central to departmental control was curricula, a topic that generated widespread controversy. Critics charged that Black Studies “lacked curricular coherence” and “failed to meet the definition of a discipline,” in part because it lacked a unified methodology.¹⁷² However, supporters countered that the focus on a single topic, the African American experience, allowed for a certain amount of experimentation and cross-pollination. This was a rare chance to see how multiple disciplines—whether history, anthropology, sociology, and/or literature—could be brought together to better understand the construction and de-construction of race.¹⁷³ According to Biondi, “most scholars in African American studies reject the effort to impose a single methodology, seeing it as unrealistic and stifling.”¹⁷⁴

The interdisciplinary nature of Black Studies provides a good example of what Gerken terms “cycling,” a process of pedagogic experimentation facilitated by the creation of academic majority-minority space. At Ohio State, for example, Black Studies courses are organized chronologically “with a literary bent,” while at Duke University, Black Studies takes a cultural studies approach.¹⁷⁵ At the University of Pennsylvania, African American Studies “filters everything through a W.E.B. Du Bois lens,” while New York University “combines pan-Africanism with urban studies.”¹⁷⁶ Such hybrid approaches lend themselves to a rigorous interpretation, and

¹⁶⁸ *Id.*

¹⁶⁹ See Fabio Rojas, *Social Movement Tactics, Organizational Change and the Spread of African-American Studies*, 84 SOC. FORCES 2147, 2151 (2006).

¹⁷⁰ Biondi, *supra* note 13, at 227.

¹⁷¹ *Id.* at 229.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 231.

¹⁷⁵ *Id.* at 230 (internal quotation marks omitted) (quoting an author of an essay criticizing “the diverse character of African American studies courses at different universities.”).

¹⁷⁶ *Id.*

reinterpretation, of racial identity, allowing the very concept of race itself to be interrogated, challenged, and explored in a manner unlikely to be rivaled in departments where race is not a focal point.¹⁷⁷

Black Studies may contribute to another goal as well, what Gerken terms “democratic visibility.”¹⁷⁸ Without minority spaces, she argues, it is possible that minority voices will consistently be drowned out by majority consensus, and critical insights into democratic systems missed. For example, the African American interpretation of American history has frequently been ahead of white majority interpretations, particularly on questions like slavery, Reconstruction, and Jim Crow. For decades after the Civil War, the most accurate account of Reconstruction belonged to W.E.B. Du Bois, who was employed at Atlanta Clark University, a segregated school. White institutions like Columbia and Harvard, by contrast, taught their students that African Americans were inferior and that Reconstruction was a mistake, a version of history that went un-debunked until the 1960s.¹⁷⁹

This raises the question of whether Black Studies programs can, or should, influence admissions policy. According to Harvard University, for example, Black student enrollment would drop from 14% to 10% were it to move towards race-blind admissions.¹⁸⁰ Could African American Studies argue that such numbers might be insufficient to sustain legitimate pedagogical goals, and therefore race needs to be considered in admissions? Gerken suggests yes. For example, Black Studies faculty could argue that there is pedagogical value in majority Black classrooms, either because they allow Black students to speak more freely (dissent by deciding), focus on different critical topics (turn the tables on majorities), and/or experiment with different thematic ideas (cycling). Harvard could argue that such students may find that majority-minority classrooms advance pedagogical goals different from, but just as important as, statistically integrated classes.

Pursuant to *Regents v. Bakke*, this would qualify as a compelling constitutional interest.¹⁸¹ In that case, Justice Powell held that race could be

¹⁷⁷ See Gerken, *supra* note 1, at 1110 n.15 (citing “[a] number of important, often overlapping literatures [that] have explored the fluidity of identity categories, including strands of antiessentialism critiques, intersectionality, [and] Critical Race Theory”). See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 20 HARV. C.R.-C.L. L. REV. 1, 20–39 (1994); Dan R. Ortiz, *Categorical Community*, 51 STAN. L. REV. 769, 804–05 (1999).

¹⁷⁸ See Gerken, *supra* note 1, at 1122.

¹⁷⁹ See IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 271–72, 286–87 (2016).

¹⁸⁰ Anemona Hartocollis, *What Would Happen if Harvard Stopped Considering Race in Admissions?*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/us/harvard-admissions-race.html>.

¹⁸¹ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978).

used in university admissions so long as it served a sincere pedagogical goal related to diversity.¹⁸² Though scholars and judges assumed that Powell meant first-order diversity, Powell recognized the value of second-order diversity as well.¹⁸³ For example, he celebrated same-sex colleges as an example of diversity (places where women could dissent by deciding), as well as private schools, parochial schools, and other institutions where intellectual, political, or religious minorities might act as majorities.¹⁸⁴ These were all examples of second-order diversity writ large, but they suggest that Powell understood diversity to mean more than simply statistical integration.

CONCLUSION

The role that diversity has played *vis-à-vis* schools has never been fully understood. As this Article argues, *Brown v. Board of Education* did not recognize diversity as a relevant constitutional concept and in many ways discounted it. Relying on Gunnar Myrdal's conclusion that Black America was pathological, *Brown* declared assimilation, not difference, to be the solution to America's racial "dilemma," a move rejected by many—white and Black—in the American South. Justice Lewis F. Powell, Jr. expressed this view by elevating diversity to the level of a constitutional interest in *Regents v. Bakke*, a decision that liberals and conservatives alike misunderstood, falsely equating the concept to statistical integration.

Heather Gerken provides us with a way out of this quandary and with an avenue to think about schools in a post-*Brown* era marked by retrenchment and reaction. For school districts that have re-segregated due to white flight, for example, Gerken's theory of second-order diversity provides us with a new way of thinking about primary and secondary education, focusing on the needs of minority students in majority-minority settings. Already, education reformers in groups like Forward through Ferguson and Black Lives Matter have begun down this road, rejecting integration as a relevant policy goal.

Statistical integration also seems less critical to higher education. Liberal reformers like Black Lives Matter and conservative voices like Justice Clarence Thomas have both voiced a recommitment to majority-minority education in the form of historically Black colleges and universities. Meanwhile, minority students at majority white institutions have worked diligently to carve out their own spaces, including their own student organizations, their own events, and—after dogged protest—their own academic departments. Perhaps no department is a better example of this than Black Studies.

¹⁸² See *id.*

¹⁸³ See WALKER, *supra* note 69, at 193, 195.

¹⁸⁴ See *id.* at 191–92.

Black Studies imagines a community of scholars and students who are predominantly African American, not white, to accomplish the goals that Heather Gerken identifies with second-order diversity. Yet, Black Studies is often ignored by schools seeking to defend diversity. For example, Harvard University avoided any mention of Black Studies in its recent case against *Students for Fair Admissions*, or SFFA.¹⁸⁵ Harvard also failed to mention the various student organizations founded by Black students to create majority-minority space, not to mention majority-minority events like Black Graduation. Instead, Harvard focused on first-order diversity, noting that students arrived at the school “with their identities partially formed, shaped by racial, ethnic, social . . . and other cultural factors,” but graduated with an “additional identity, that of membership in ‘the community of educated men and women,’” that was “inclusive of but not bounded by race or ethnicity.”¹⁸⁶ That some students at Harvard might actually deepen their racial and cultural identities, as Grasmuck and Kim found, did not factor into the school’s brief.

By failing to apply second-order diversity to schools, Harvard and other universities across the country fail to capture the reality of diversity as it is experienced on campus and, therefore, miss an opportunity to explain how both first and second-order diversity might operate together to benefit students. Certainly, statistical integration can bear pedagogical benefits, but so too can fragmented pluralism, not least by allowing minorities to control their own spaces, turn the tables on majorities, dissent by deciding, and cycle through different pedagogical approaches—precisely because they are not in majority classrooms. To order schools to abandon such orders of diversity could hinder their educational mission, substantially infringing on academic freedom.

¹⁸⁵ See generally Memorandum in Support of Defendant’s Motion for Summary Judgment on all Remaining Counts, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 397 F. Supp. 3d 174 (D. Mass. 2019) (No. 1:14-cv-14176-ADB).

¹⁸⁶ See RAKESH KHURANA ET AL., REPORT OF THE COMMITTEE TO STUDY THE IMPORTANCE OF STUDENT BODY DIVERSITY 5 (2016).