

DOES *GRUTTER* OFFER COURTS AN OPPORTUNITY TO CONSIDER RACE IN JURY SELECTION AND DECISIONS RELATED TO PROMOTING FAIRNESS IN THE DELIBERATION PROCESS?

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INTRODUCTION

This essay considers whether the two recent Supreme Court affirmative action cases, the Michigan law school and undergraduate cases, *Grutter v. Bollinger*¹ and *Gratz v. Bollinger*,² provide support for opening the process of jury selection and deliberation to more fully include people of color and other under-represented groups and their experiences. I shall argue that these recent affirmative action cases can provide some support for ensuring better representation of people of color in the jury selection process, challenging the pre-textual use of peremptories and opening opportunities to talk about race during trials. The Court's reasoning in *Grutter* that diversity is a value that a law school can appropriately promote when it considers the admissions qualifications of candidates could lead the Court similarly to sustain limited race-conscious efforts to assure a process of inclusion in jury selection and in steps leading up to and including deliberation. *Grutter* opens the possibility for persons concerned about improving the justice system to be able to persuade courts to develop more effective ways to include our richly diverse citizenry in the jury system.

I. THE INFLUENCE OF COLOR BLINDNESS

As in other areas involving equal protection, the doctrine of color blindness has become firmly entrenched in the jurisprudence of jury selection and rulings concerning jury decision-making.³ In a forthcoming article,⁴ I argue along with

1. 123 S. Ct. 2325 (2003).

2. 123 S. Ct. 2411 (2003).

3. See, e.g., Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000) (discussing the effects of gender and race in jury deliberation); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353 (1999) (analyzing community representation as a solution to unequal racial composition of criminal juries); Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29 (1994) (identifying the benefits of a reconceived model of citizen participation in the context of civil juries). See also Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 (2003) (contending that "the [Supreme] Court . . . provides protection and judicial solicitude for privileged and powerful groups . . . while at the same time requir[ing] traditionally subordinated and oppressed groups to utilize the political process to seek redress for acts of oppression"); Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996) (discussing the effects of racial differences in tort reform).

4. See Phoebe A. Haddon & Frank M. McClellan, *Race Consciousness in Jury Selection and Decision Making* (forthcoming Fall 2004).

Frank McClellan that color blindness has, in fact, created a culture of hostility toward minority claims of bias in the jury selection process that perpetuates the under-representation of minorities on juries, eroding even minimum efforts to rectify disparities in the participation of racial and other minorities that are the focus of challenges under *Batson v. Kentucky*⁵ and its progeny.⁶ This reality is particularly troublesome because it also constricts the opportunities during the trial to talk about race⁷ and to confront stereotypes that can lead to bias in decision-making,⁸ despite evidence that such discussions can produce meaningful changes in the way race is addressed in trials.⁹

Color blindness leads society to understand inequality produced by individual and structural bias as the exception rather than the rule.¹⁰ Because color blindness ignores disparities that are structurally embedded in institutions and masks oppression that is not clearly intentional, it leaves unredressed inequality that continues to be socially pervasive and injurious to those experiencing it.¹¹ In the

5. 476 U.S. 79 (1986).

6. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (holding that gender-based motivation for exercising peremptory challenges violates equal protection); *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that racially motivated exercise of peremptories violates equal protection); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (applying *Batson* to civil litigation). In *Purkett v. Elem*, 514 U.S. 765, 768 (1995), the Court itself emphasized the broad discretion of trial courts to determine whether the exercise of peremptory strikes exhibits a pattern violating equal protection. The Court went on to conclude that a race-neutral explanation for strikes need not be credible to be sustained by the trial court. *Purkett*, 514 U.S. at 768. The result is that *Batson*'s three-stage inquiry leaves the litigant challenging peremptories without meaningful protection. The recent Fifth Circuit disposition of *Miller-El v. Dretke*, 361 F.3d 849 (5th Cir. 2004), dramatically demonstrates this point. After the Supreme Court reaffirmed *Batson*'s three-step inquiry into whether a racially motivated pattern exists and noted that disparate treatment between whites and blacks in the venire was indicative of a racial pretext, the circuit court, reviewing the record and bowing to the trial court's discretion, again concluded that no racially motivated pattern of striking venire persons existed. *Miller-El*, 361 F.3d at 862. See *Minetros v. City University of New York*, 925 F. Supp. 177 (1966) (reviewing cases).

7. Compare with *Edmonson*, 500 U.S. at 631, where Justice Kennedy opined, "the quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes." See also Haddon & McClellan, *supra* note 4 (proposing more opportunities to talk about race in the courtroom during *voir dire* and at other stages).

8. See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, *passim* (1995) (arguing that by encouraging jurors to confront stereotyped thinking individuals can avoid biased decision making).

9. *Id.* See Haddon, *supra* note 3, at 87-106 and accompanying notes (discussing the importance of "authentic representation" in jury selection and further suggesting that jury deliberations help address individual biases).

10. See generally Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation & Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (critiquing antidiscrimination theories that contributed to color-blind ideology).

11. See Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, *passim* (2000) (examining institutional racism in several legal contexts); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000) (arguing that the concept of social stratification is necessary in order to "make sense of the blindness tope at the heart of antidiscrimination law"). As Lois Heaney of the National Jury Project has observed, "the myth of 'colorblindness,' like all other efforts to deny the fact and effect of prejudice, bias and oppression, works only to the benefit of those who are not the object of prejudice. Denying the existence of racism or

context of trial by jury, the choice of a color blindness approach can have an impact on both the racial makeup of the jury and the nature of the jury's deliberations.¹² It can affect both the perception and reality of whether a verdict represents the culmination of a fair, just trial for the criminal defendant or civil litigant.¹³ As in other contexts, the effect of a color-blind culture in the courtroom is to shift the baseline for considering legal claims of bias, diminishing the opportunities for injustice to be confronted.¹⁴

Although most jurisdictions have moved in the direction of increasing the racial and ethnic diversity of the venire, less has been done to curtail the racial and ethnic bias that can erode diversity during the juror selection process.¹⁵ The practice of using peremptory challenges to remove racial and other cognizable groups continues (despite *Batson* and its progeny), in part because many judges have been reluctant to exercise their discretion to intervene or treat skeptically the race-neutral justifications offered by attorneys in response to *Batson* challenges.¹⁶ Informed by color blindness, appellate courts have seldom exercised their supervisory power to circumscribe the use of racially or gender-motivated

homophobia does nothing to correct its effects inside or outside the courtroom, but rather undermines and jeopardizes the credibility of the justice system, and serves to compound harm to our clients." Lois Heaney, *The Case for Meaningful Voir Dire on Race and Sexual Orientation Bias*, National Jury Project, at <http://www.njp.com/CaseForMeaningfulVoir%20Dire.pdf> (last visited July 29, 2004).

12. See Armour, *supra* note 8, at 764-66 (discussing the effects of black stereotypes in legal decisionmaking); Haddon, *supra* note 3, *passim* (identifying the benefits of a reconceived model of citizen participation in the context of civil juries); Taylor-Thompson, *supra* note 3, *passim* (discussing racial impact of nonunanimity in jury voting).

13. See Kimberlé Williams Crenshaw, *Color-blind Dreams and Racial Nightmares: Reconfiguring Racism in the Post-Civil Rights Era*, in BIRTH OF A NATION'HOOD: GAZE, SCRIPT, AND SPECTACLE IN THE O.J. SIMPSON CASE 97, *passim* (Toni Morrison ed., 1997) (discussing the impact of race in the O.J. Simpson murder trial). Small-group decision making studies suggest that having one token representative of a minority group is insufficient to influence group decision making such as that which occurs in juries. Haddon, *supra* note 3, at 87-88 n.361. See also Taylor-Thompson, *supra* note 3, *passim* (discussing racial impact of nonunanimity in jury voting).

14. Hutchinson, *supra* note 3, at 638-40, 654.

15. See Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (holding neither juries nor venires must include a cross-section of the population; only systematic exclusion is prohibited); Haddon, *supra* note 3, *passim* (analyzing case law that has addressed systematic exclusion). State and federal studies on racial and gender fairness in the courts have documented the disparities between the general ideal of having a fair cross section of the community included in the pool and actual composition of juries and venire. See, e.g., FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 52-102 (2002), available at <http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf> (last visited July 29, 2004) (recognizing disparities in representation of minorities on juries in some counties in Pennsylvania). Notably, some court administrators keep no data on minority jury selection for fear that their efforts to track racial and gender composition of juries would be considered a form of racial profiling. *Id.* at 54.

16. See, e.g., Minetos v. City Univ. of New York, 925 F. Supp. 177, 183-84 (S.D.N.Y. 1996) (acknowledging that judicial interpretations of *Batson* are "all over the map," particularly when considering what constitute facially race-neutral explanations for challenges). But see People v. Rivera, 810 N.E.2d 129, 135 (Ill. App. Ct. 2004) (holding that trial court has standing to act on behalf of a juror subject to discriminatory selection practices). The appellate court concluded, however, that "although a trial court has a right to raise *Batson* objections *sua sponte* there is no corresponding duty to do so, and a defendant who fails to timely object to a prosecutor's challenges cannot avoid waiver by arguing that the trial court had a duty to question the prosecutor's motives." *Id.* at 136.

peremptory challenges by providing rules limiting discretion. Neither have appellate courts conferred affirmative duties on trial judges to make inquiries that probe a proffered facially neutral justification for the peremptories.¹⁷

Trial judges have tended to conduct *voir dire* using this same color blind posture, fearing that the mention of race risks exciting passions in the jury or venire and bias in decision-making.¹⁸ There are also cases where remarks of counsel in their openings and closings have been attacked as “beyond the realm of appropriate advocacy.”¹⁹ The attorneys are criticized for inciting unfair bias because they acknowledge that getting justice may be affected by the racial composition of the jurors or the demographics of the jurisdiction.²⁰

II. *GRUTTER*'S BEGRUDGING VALIDATION OF RACE AS A “PLUS FACTOR” IN ADMISSIONS DECISIONS IN ORDER TO PROMOTE DIVERSITY

In split decisions concerning the validity of the University of Michigan admissions programs of its Law School and undergraduate College of Literature, Science and the Arts, the Supreme Court upheld the Law School's admissions policy but found the undergraduate policy in violation of equal protection.²¹ Following the reasoning of *Regents of the Univ. of Cal. v. Bakke*,²² the Court affirmed its earlier view that educational diversity could serve as a compelling

17. See *Purkett*, 514 U.S. at 768, and discussion *supra* note 6.

18. See, e.g., *State v. Davis*, 872 So. 2d 250, 253 (Fla. 2004) (finding counsel for black defendant rendered ineffective assistance because he injected his own views of bias into the case by expressing racial animus toward blacks during voir dire). Of course, there may be disagreement among litigants and courts whether comments are inflammatory or helpful in confronting bias. See Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 271-301 (2003) (discussing the ABA's attempts to regulate attorney bias and prejudice).

19. *Stanton v. Astra Pharm. Prods., Inc.*, 718 F.2d 553, 579 (3d Cir. 1983).

20. *Id.* at 579. See McClellan, *supra* note 3, at 765 n.7 (citing sources addressing the effects of race on jury verdicts and trial outcomes).

21. Because the Court recognized the compelling interest of educational diversity in *Grutter* but rejected the admissions program in *Gratz* on the basis that it was not narrowly tailored, any understanding of the opportunities and challenges of using race in the educational context must be derived from an examination of both cases. However, these cases do not clarify under what circumstances “soft” race variables amount to “hard” quota-like factors of decision making, thus creating the likelihood of future litigation. Justice Scalia derides the different conclusions reached in the Michigan affirmative action cases by characterizing them as “split double header[s].” *Grutter*, 123 S. Ct. at 2349 (Scalia, J., concurring in part and dissenting in part). Derrick Bell has commented on the opaque reasoning offered by the Court in these two cases about differences “requiring a legal micrometer to measure.” Derrick Bell, *Learning from Living: The University of Michigan Affirmative Action Cases*, Jurist Online Symposium, available at <http://jurist.law.pitt.edu/forum/symposium-aa/bell.php> (last visited July 29, 2004).

22. 438 U.S. 265 (1978). In *Bakke*, the Court reviewed a set-aside program that reserved sixteen out of one hundred seats in the medical school class at the University of California for under-represented minority groups. Although the Court was splintered in its analysis and conclusions in *Bakke*, a majority of the Court concluded that under some circumstances the use of race in decision making could be sustained and, as Justice Powell characterized it, “the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” *Id.* at 320.

governmental interest, justifying the use of race as a “plus factor”²³ in admissions decision-making, provided that the use of race satisfied the Equal Protection Clause’s narrow tailoring requirements. Whereas the Court made it clear in *Grutter* that it would not sustain a claim of proportionate representation justifying a race-conscious selection process,²⁴ it did give credence to the Law School’s argument that selection criteria that provided a more open process than was presently possible using only quantitative test scores were appropriate and consistent with the educational goal of diversity. In this way, *Grutter* provided at least some encouragement for educational institutions seeking to promote this diversity goal. It clarified that *Bakke* was good law and that a narrow tailoring requirement need not result in virtually no race-focused admissions criteria being able to survive judicial review.²⁵

An important feature of *Grutter* is the link that it makes between perspectives or viewpoints and disparate social experiences of whites and people of color in school and in other societal contexts. Even Justice O’Connor, a principal architect of the Court’s color blindness ideology,²⁶ was moved to observe: “race unfortunately still matters.”²⁷ She reasoned that the Law School’s effort to assure a critical mass of students of color was justified by the fact that the experiences of being a racial minority in this society are “unique.”²⁸ As a consequence, law schools and other educational institutions can conclude that including students of color can significantly contribute to classroom learning and thinking.²⁹ The

23. *Grutter*, 123 S. Ct. at 2342.

24. *Id.* at 2339 (stating that racial balancing that denies individuals the opportunity to be considered on their own merit or is “used for its own sake” is “patently unconstitutional,” and efforts to increase the number of racial minorities and other under-represented groups can be justified since the desired objective of attaining educational benefits that diversity produces is made possible by having a “critical mass” of minority students).

25. Joel L. Selig, *The Michigan Affirmative Action Cases: Justice O’Connor, Bakke Redux, and the Mice That Roared But Did Not Prevail*, 76 TEMP. L. REV. 579, 593 (2003).

26. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (stating that “[a]bsent searching judicial inquiry into the justification for . . . race-based measures [like the Richmond Plan], there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics”); *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 236 (1995) (“requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means”).

27. *Grutter*, 123 S. Ct. at 2341.

28. *Id.*

29. *Id.* at 2344. Admittedly, Justice O’Connor in *Grutter* paid little attention to the social inequalities that generate the need for affirmative outreach. She thereby continued the line of thinking in which responsibility to eradicate racial discrimination is lodged with ‘society,’ not government or public institutions. Moreover, the Court in *Grutter* (particularly when read with *Gratz*) narrowly limited the opportunity to use race-focused considerations, clearly evidencing its concern about the extent to which these measures would burden white admission applicants. Indeed, trial courts adopting a color-blind posture may not be inclined to take a broad view in determining whether race-conscious alternatives are sufficiently narrowly tailored in the next wave of cases that challenge affirmative action in secondary education. These courts are left to determine whether an institution is promoting educational diversity in a consistent, good faith manner or merely using diversity as a pretext for introducing race consciousness in admissions. Any program is still subject to scrutiny by them as to whether it is sufficiently narrowly tailored under *Grutter*.

decision that educational diversity can justify *some* use of race is—at least for the near future—settled.³⁰ *Grutter*, more importantly, provides a factual context in which narrow tailoring of a race-conscious alternative has survived strict scrutiny and thus leaves room for some optimism about the possibility of using similar reasoning in other equal protection contexts.

III. SIMILAR VALUES OF GROUP INTERACTION ARE FOUND IN EDUCATIONAL DIVERSITY AND JURY OUTREACH

A promising basis from which to extend *Grutter*'s influence beyond the education setting lies in connecting the participatory rationale and dialogic roots of educational diversity to controversies about jury selection and deliberation. It is striking when one reads some of the language of *Grutter* how well that connection can be made. First, like the benefits of rich exchange that can flow from creating a diverse student body, it can be argued that having a diverse jury serves the deliberative process. Notably the unique and essential feature of the jury is its deliberative decision-making role.³¹ Studies have already documented that deliberation is enhanced in small groups where multiple perspectives are present, such as those of under-represented racial and ethnic groups, and where those views can be freely raised.³² As the 'critical mass' argument of Michigan's Law School in *Grutter* suggests, the value of having traditionally under-represented perspectives available on the jury rests on there being more than a token representative.³³ Including more than one racial or gender group member, for example, is important for the benefits of diverse perspectives to be felt in the jury's collective deliberation, just as it is in the classroom.

IV. APPLYING THE REASONING OF *GRUTTER* TO THE JURY

The color blind proponents in considering approaches to jury selection and proceedings leading up to deliberation maintain that ignoring race leaves everyone on a level playing field and that equality in litigation is promoted by 'getting beyond race.'³⁴ In *Grutter*, however, the Court majority permitted the law school to put aside that "race-neutral" posture, in the context of law school admissions, where there is a commitment to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the

30. *Id.* at 2347 (stating that "[w]e expect that [twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today").

31. Haddon, *supra* note 3, at 87-106.

32. *See* Armour, *supra* note 8, at 771-72 (analyzing the effect of rationality-enhancing racial references during trial). Indeed the small group studies that have been developed to consider the value of inclusion in juries confirm the importance of having more than one racial or gender representative for their presence to have any effect and support the critical mass argument of the University of Michigan in *Grutter*.

33. Haddon, *supra* note 3, at 87-88 n.361.

34. *See* Adarand, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) (stating that "[i]n the eyes of government, we are just one race here. It is American.").

sum of its parts.”³⁵ The same consideration that the Court used in *Grutter* is applicable in the jury setting. The Court’s language in *Grutter* is therefore instructive in thinking about the jury. The *Grutter* Court accepted the Law School’s argument that having a critical mass of minorities serves the interest of diversity and is educationally beneficial since “race . . . still matters.”³⁶ Notably, among other reasons supporting the value of diversity, the Law School posited that the presence of a critical mass of underrepresented minority students causes “racial stereotypes [to] lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”³⁷

Although the *Grutter* opinion built its rationale on the *Bakke* decision of Justice Powell, and thus was grounded “in the academic freedom that ‘long has been viewed as a special concern of the First Amendment,’”³⁸ the Court also noted that Justice Powell’s emphasis was on the importance to the nation’s future of having leaders exposed to the “ideas and mores of students as diverse as this Nation.”³⁹ A similar interest to that recognized in *Grutter*—making the trial process open to jurors who will contribute to the “robust exchange of ideas”⁴⁰ in deliberation—can lead courts to seek out a diverse venire. This diversity should not be limited to race or gender, but should include them among the “array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁴¹ And, importantly, courts should be able to take steps to avoid the compromise of outreach caused by the selection tactics of counsel.

The fact that the Court reached its decision that diversity is a compelling interest by emphasizing its willingness to defer in light of the university’s “special niche” in our constitutional tradition, and out of concern for educational autonomy does not lead inexorably to the conclusion that only universities will be accorded, where appropriate, the latitude to be race-conscious.⁴² Like university classrooms, the jury room should be a place where stereotypes are minimized and discussion is lively and enlightening for participants because it makes for the cultivation of better, more responsive citizens. This citizenship-building is enhanced by diverse members of the community self-consciously engaging in deliberation as part of their participation in democratic governance.⁴³

Grutter creates the possibility for litigants to encourage courts to carry over the interest in a fair cross section at the venire stage to the composition of the jury because participants with a variety of backgrounds have the potential to move

35. 123 S. Ct. at 2332 (citing Law School Application at 118).

36. *Id.* at 2341.

37. *Id.* at 2334 (citation omitted).

38. *Id.* at 2336 (citation omitted).

39. *Id.* at 2328 (citation omitted).

40. *Id.* at 2336.

41. *Grutter*, 123 S. Ct. at 2329-29 (citation omitted).

42. *See supra* note 7 (quoting *Edmonson*) (stating that courtrooms will be given latitude to be race-conscious because of race-based fears).

43. Haddon, *supra* note 3, at 56-61. *See* Edwin Kennebeck, *From the Jury Box*, in *THE JURY SYSTEM IN AMERICA* 249 (Rita J. Simon ed., 1975) (observing that a jury box consisting of a cross-section of city life is an important way for jurors to feel associated with the system).

beyond their own isolated views in deliberation.⁴⁴ Notably, some courts have taken such steps at the *voir dire* and pre-deliberation stages.⁴⁵ Prior to *Grutter*, my inclination had been to eliminate peremptory challenges but argue for more effective use of *voir dire*; by eliminating peremptory challenges I urged courts to widen the use of challenges for cause to root out the potentially biased jurors.⁴⁶ But rather than abolish peremptories, perhaps litigants can use *Grutter* in support of affirmative efforts to police the use of challenges and seek ways to make judges more willing to probe and to structure colloquies that avoid permitting facially neutral but pretextual justifications for removing individuals from the pool.⁴⁷ The participatory language of *Grutter*⁴⁸ provides the impetus for courts not only to provide opportunities for more diverse juries but to give meaning to that outreach by encouraging each juror to examine his or her own biases as the jury participates in the trial and as the jurors engage in deliberation.

More than one of the *amici* in *Grutter* noted that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”⁴⁹ The *Grutter* Court reasoned from this position to its independent assessment that diversity serves “the overriding importance of preparing students for work and citizenship,”⁵⁰ and that the “diffusion of knowledge and opportunity”⁵¹ through public institutions like law schools is made possible by “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities.”⁵² The Court further opined that “[e]ffective

44. See generally Armour, *supra* note 8, *passim* (discussing studies of racial stereotypes and how rationality-enhancing remarks during trials may affect jury deliberations).

45. See, e.g., U.S. v. Greer, 968 F.2d 433, (5th Cir. 1992) (en banc) (refusing to hold that members of the victim’s racial or religious class should be excluded as jurors in a hate crime case where the intended victim was specifically defined and finding that trial court’s use of an individual questionnaire, group *voir dire* and individual *voir dire* was sufficient to probe bias); Hernandez v. Maryland, 742 A.2d 952, 963-64 (Md. 1999) (holding where *voir dire* question has been properly requested and directed to juror’s biases against the accused’s race, ethnicity, or cultural heritage, the trial court ordinarily will be required to submit such a question, regardless of the existence of special circumstances).

46. See Haddon, *supra* note 3, at 95 (outlining Supreme Court jurisprudence pertaining to one’s right to a representative jury). In *Batson*, Justice Marshall concurred, agreeing that a constitutional violation had occurred but arguing that the discriminatory use of peremptory challenges was so pervasive that it was time to abolish their use. 476 U.S. at 103 (Marshall, J., concurring). He offered statistics reflecting a flagrant abuse of the strikes to eliminate under represented groups. *Id.*

47. Kenneth Nunn has proposed that peremptory challenges exercised against non-whites be prohibited if race is an issue in the litigation. Kenneth Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 113-17 (1993). Of course, courts and litigants often disagree whether litigation involves race. See Haddon & McClellan, *supra* note 4 (reviewing the cases where courts take inconsistent views on whether race is at issue and taking the position that courts should be liberal in recognizing a racial connection).

48. 123 S. Ct. at 2339-40.

49. See, e.g., Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents at 3, *Grutter*, 123 S. Ct. 2325 (No. 02-241) (arguing that research studies support educational diversity as a compelling interest).

50. *Grutter*, 123 S. Ct. at 2340 (emphasis added).

51. *Id.*

52. *Id.* (quoting the Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Grutter v. Bollinger*, 123 S. Ct. 2325 (No. 02-241) (Jan. 17, 2003)).

participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”⁵³ These observations also have great force in thinking about the jury. Like student diversity, it can be argued that there are values beyond the immediate disposition of the case in having diverse juries engaged in collective decision making. Indeed, jury participation can be the only opportunity for diverse communities to come together in democratic participation and is a core obligation of citizenship.⁵⁴ This experience of self-governance should be informed by inclusionary values, values that are reflected in the *Grutter* case.

V. AN OPEN PROCESS FOSTERS LEGITIMACY

The *Grutter* Court added a second reason for providing an accessible process for admissions that is relevant to the issue of jury selection and deliberation: legitimacy in the eyes of the citizenry. It reasoned that for leaders to be considered legitimate “[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide . . . training.”⁵⁵ Like law schools, courts “cannot be effective in isolation from the individuals and institutions with which the law interacts.”⁵⁶ Opening the jury selection and deliberation processes is further supported by these *Grutter* observations.

In *Grutter*, the Court reaffirmed the necessity to smoke out illegal classification schemes by utilizing strict scrutiny and demanding narrow tailoring so that “there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”⁵⁷ This language would also seem to support judicial efforts to place jurors on the same footing in their deliberative capacity by encouraging them to bring their experiences and viewpoints into the jury room and to have stereotyped thinking challenged by the court or litigants as well as by the presence of a diverse deliberating body. The court’s rulings should be expansive, and not limiting, in bringing “the broad range of qualities and experiences that may be considered valuable contributions to . . . diversity.”⁵⁸ Race-neutral policies have not been able to offer the benefits of racial, gender and ethnic diversity in jury participation, just as they have often failed to do so in the classroom. One can argue that with some increased flexibility to engage in race-conscious work, courts will be able to promote some of the deliberative qualities valued in jury decision-making.

In earlier work, I supported a representational theory of jury rights, drawing civic-focused connections between jury rights and political rights associated with the franchise.⁵⁹ Although there have been others who have noted this linkage,

53. *Id.* at 2340-41.

54. Haddon, *supra* note 3, at 56-57.

55. 123 S. Ct. at 2341.

56. *Id.* (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

57. *Id.* (quoting *Crososon*, 488 U.S. at 493 (plurality opinion)).

58. *Id.* at 2344.

59. See Haddon, *supra* note 3, at 87-106 (proposing a restructuring of the jury function in order to achieve “more meaningful citizen participation in adjudication”).

including making the connection of the jury and the vote made at the time of the framing of the Fourteenth and Fifteenth Amendments,⁶⁰ other commentators have been highly critical of making analogies to political rights, fearing that the jury's deliberative quality would be compromised.⁶¹ It raises the notion that minority jurors have one perspective and are peculiarly susceptible to stereotyped, group-based thinking. I believe this fear is built upon an impoverished view of the nature of deliberation and the power of dialogue.⁶² But, it also undervalues the importance of sharing experiences that is central to the concept of educational diversity as conceived in *Bakke* and now reaffirmed in *Grutter*.

In an effort to steer clear of addressing effects of inequality and to avoid unduly burdening more privileged, non-minorities even as it cautiously validates the University's race-conscious outreach procedures, the Court in *Grutter* has carved out a narrow departure from its color blind path. The *Grutter* Court acknowledged the value of diversity in a society where disparities persist. Justice O'Connor, however, has sustained the limited use of race-consciousness in the educational context by connecting this diversity rationale to important institutional interests in promoting the appearance of open access to knowledge and society's interests in securing the legitimacy of its leaders. She has, moreover, linked these internal and external interests of diversity to loftier goals of building good citizens and promoting a democratic way of life. These same values are of concern when one thinks about participation of citizens in the jury. Thus, the considerations raised in *Grutter* have remarkable resonance as we consider ways of promoting open jury selection and meaningful deliberation for jurors living in a society where race and other marks of oppression still matter.

60. See, e.g., Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998) (arguing that the Court's colorblindness jurisprudence is misplaced because it ignores the group-based, instrumental focus of the constitutional provisions, drafting history and early cases concerning political rights).

61. Perhaps the most vehement critique of a representational theory is by Jeffrey Abramson. ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 125-27 (1994). Abramson professes to value deliberation but his color-blind focus prevents him from considering the full value of a deliberative model for the jury.

62. See generally Haddon, *supra* note 3, at 103-06 (discussing the importance of deliberation in exposing and controlling biases of individual jurors).