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Beyond Admissions: Racial Equality in Law Schools

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BEYOND ADMISSIONS: RACIAL EQUALITY
IN LAW SCHOOLS

Sharon E. Rush*

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In the late 1940s, Mr. G.W. McLaurin, a Black man, was admitted
to the graduate school at the University of Oklahoma.1 Although he had
already received a Master's Degree in education, he aspired to earn a
doctorate in that field as well.2 He gained admission to the University
after a federal court found that an Oklahoma law that prohibited Blacks
and Whites from attending public schools together violated the United
States Constitution.3 Mr. McLaurin successfully persuaded the federal
court that the statute violated his equal protection rights because there
was no comparable graduate program available for him in the state
university system.4

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This essay builds on ideas that I presented at a faculty workshop here in the Fall of 1996. I
particularly appreciate the suggestions, ideas, and support of my dear friends and colleagues,
Andrea P. Muirhead and Walter O. Weyrauch. My research assistants, Patricia Duffy and Carter
Andersen, are among the best and the brightest, and I never want them to stop working with me.
2. Id. at 638.
3. Id. at 639-40. The school authorities were required to exclude Mr. McLaurin by the
Oklahoma statutes "which made it a misdemeanor to maintain or operate, teach or attend a
school at which both [W]hites and [Blacks were] enrolled or taught." Id. at 638.
4. See id. at 639 (observing that the federal court held that "the State had a constitutional
duty to provide him with the education he sought as soon as it provided that education for
applicants of any other group").
In response to the federal court order, the Oklahoma legislature amended the law that prohibited Blacks and Whites from attending public schools together so that Mr. McLaurin could enroll at the University of Oklahoma. However, the amended statute explicitly provided that any Blacks admitted to a public school should nevertheless be segregated from the White students. The statute further defined segregation to mean that Black students would be taught in separate classrooms or at separate times from White students. As a condition of his admission, Mr. McLaurin had to agree that he would comply with the University President’s plans for maintaining segregation within the University.

It is difficult to imagine what Mr. McLaurin must have felt as he went to the University of Oklahoma day after day. He was not allowed in the classroom where the White students and professors engaged in intellectual discussions. Instead, he sat in the anteroom at his designated desk. When class was not in session, White students had access to the University’s entire library where they could study. Mr. McLaurin, in contrast, was only allowed to study at his designated desk on the library’s mezzanine. During mealtimes, the White students relaxed and enjoyed the social time away from the rigors of graduate study. They laughed together; they undoubtedly listened to each other’s problems; some of them probably shared life-stories and developed deep friendships. Meanwhile, Mr. McLaurin was isolated from them in the cafeteria and sat alone at his designated table. He did not talk to anyone. He did not share in the laughter and relaxation. He did not have anyone in which to confide. He had no chance to become friends with any of his classmates. Mr. McLaurin ultimately could not

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5. See id. at 639-40.
6. Id. at 639.
7. Id. at 639 n.1.
8. Id. at 640.
9. Id.
10. Id.
11. See id.
12. See id.
13. Cf. id. (noting that Mr. McLaurin had “to sit at a designated table and to eat at a different time from the other students in the school cafeteria”).
15. See id.
16. Cf. id.
17. Cf. id.
18. Cf. id.
19. Cf. id.
experience perhaps the most important factors involved in graduate education.

The segregation policy at the University of Oklahoma may have caused Mr. McLaurin to feel anxious and alone. The only source of affirmation he had at the school on a daily basis was himself. Certainly, this isolation would cause him to question whether he could succeed in the University or whether he was as bright and capable as his White classmates. He may have even considered whether getting the doctorate degree was worth the pain and humiliation he suffered every day. Perhaps his community outside of school offered him support and tried to fortify him for his daily struggles in the all White school, but this undoubtedly would be insufficient. In school, he was a lone Black man, tagged by the state of Oklahoma as inferior to his White classmates in the most visible ways. Thus, because the intra-school segregation policy treated him unequally, he sued to establish its unconstitutionality.\(^{20}\)

In one sense, only Mr. McLaurin could understand the effects of the segregation policy on his self-esteem, his confidence, his ability, and his integrity, but in an important way, almost anyone who knew of this situation could conclude that it was fundamentally unfair to isolate him from his White classmates because of his race. In this way, perhaps it is not so remarkable that the United States Supreme Court Justices were able to see the inequality of it, too. Accordingly, the Court in *McLaurin v. Oklahoma State Regents for Higher Education*\(^{21}\) required Oklahoma officials to abandon the segregation policy and not isolate Mr. McLaurin from his White classmates.\(^{22}\) Consistent with equal protection, Mr. McLaurin had a right to be integrated into the University of Oklahoma’s graduate program in education.\(^{23}\)

Although the *McLaurin* decision enjoys much less popularity and receives less attention in the study of Constitutional Law, the *McLaurin* decision is in many ways as important as *Brown v. Board of Education*.\(^{24}\) *McLaurin* is important because it raised the fundamental questions: “What is integration?” and “How is integration related to racial equality?” It is ironic that the Court struggled with these questions

\(^{20}\) See id. at 638-39.
\(^{22}\) Id. at 641-42.
\(^{23}\) See id. at 642.
\(^{24}\) 347 U.S. 483 (1954).
four years before de jure segregation in public schools was held unconstitutional in Brown.26

Interestingly, the McLaurin Court did not expressly discuss the concept of integration anywhere in the opinion.27 Instead, it focused on the concept of equality, and held that the segregation policy "handicapped" Mr. McLaurin in such a way that he could not receive an education equal to that of his White classmates.28 Specifically, the Court held that the restrictions imposed on Mr. McLaurin by the segregation policy "impair[ed] and inhibit[ed] his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."29

Although the McLaurin Court did not expressly address integration,30 the decision helps illuminate what integration means, particularly in the context of equal protection. Significantly, the McLaurin Court clarifies that equality is premised on integration and that integration means more than just having a presence in an institution. The case highlights the complexities of the concept of integration even though the concept on its face seems rather simple. Thus, McLaurin is an invitation to explore the relationship between equality and integration; I accept that invitation in this essay.

25. De jure segregation (segregation mandated by law) and de facto segregation (circumstantial segregation) are inextricably linked. The social forces that result in de facto segregation directly derive from the laws of a society that practiced de jure segregation. For example, even today many public schools remain racially identifiable, as if Brown were never decided. See Sharon E. Rush, The Heart of Equal Protection: Education and Race, 23 N.Y.U. Rev. L. & Soc. Change 1, 30 (1997). Similarly, property and zoning laws are structured so that racial segregation persists beyond the constitutional demise of de jure segregation. See Jerry Frug, Symposium: Surveying Law and Borders: The Geography of Community, 48 Stan. L. Rev. 1047, 1081 (1996). Ending de jure segregation was an important and essential step in achieving racial equality for Blacks and one must recognize that racial equality is not fully achieved when involuntary de facto segregation exists. Stated alternatively, integration is a constitutional component of racial equality.

26. Brown, 347 U.S. at 494 (noting that "[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

27. McLaurin, 339 U.S. at 638-42.

28. See id. at 641 (observing that Mr. McLaurin's teaching skills and performance would be adversely affected by segregation from his classmates).

29. Id.

30. See id. at 638-42.
I. UNDERSTANDING INTEGRATION

Integration may seem like a simple concept. It is generally understood that integration means having a mixture of people who possess different characteristics within a particular group. Legal analysis generally focuses on integration in two contexts: race and sex. For example, it may seem that the United States Supreme Court became racially integrated with the appointment of Justice Thurgood Marshall, and that, similarly, the Court became integrated on the basis of sex with the appointment of Justice Sandra Day O'Connor. As the McLaurin Court implicitly held, however, integration is more complex than a focus on numbers.\(^{31}\)

Imbedded in integration is the notion of equality. In the context of McLaurin, integration meant more than having one person of color in the student body at the University of Oklahoma; otherwise, the Court would not have found the intra-school segregation policy unconstitutional. Admittedly, without the presence of Mr. McLaurin in the class, the University would have been racially segregated. Ironically, however, at the time of McLaurin, de jure racial segregation was constitutional as long as a state provided separate but equal facilities for Blacks.\(^{32}\)

McLaurin exposed the relationship between de jure segregation and equality even before Brown, raising the question whether it is possible to have both within the same institution. That is, could the University of Oklahoma segregate Black and White students who were admitted to the same programs and still have “equality” as defined by the Constitution? Given the long-standing constitutional acceptance of the separate but equal doctrine, it would not have been surprising for the Court to uphold the intra-school segregation policy in McLaurin. After all, if it was constitutional to completely isolate Black students in dilapidated schoolhouses\(^{33}\) and call their education equal to that received by White children, one could argue that allowing Black students into the White schools was to take a step much closer to equality even if they were segregated from the White students within the school.

The fact that Mr. McLaurin was the only Black student in the University, then, does not alter the Court’s analysis. Had there been ten Black students, they could have provided each other with intellectual

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31. See id. at 641-42.
32. See Sweatt v. Painter, 339 U.S. 629, 631-32 (1950) (mandating the admission of a Black man to an all-White state law school because there was no “separate but equal” law school for him to attend).
discussions. The stigma of sitting at isolated tables throughout the school would have been reduced for each of them as individuals, although they would have shared a group stigmatization. Stigma itself, though, was not a cause for worry to White society under the separate but equal philosophy in place at the time.\(^4\) A group of Black students also would have created a camaraderie and eased the pain of their individual segregation. Nevertheless, the McLaurin Court's rationale would have been the same given that it defined equality as an opportunity to integrate with the White students.\(^5\) In this way, it should not have mattered how many Black students were enrolled in the program. Each one of them would have been entitled to the opportunity to mingle with the professors, use the libraries, engage in intellectual discussions with the White students, and enjoy a sense of belonging to the class. The Black students alone could not have provided themselves with that kind of sense of belonging at the University of Oklahoma because the intellectual arena historically belonged exclusively to White students.

Thus, just as having Mr. McLaurin's physical presence at the University of Oklahoma was necessary to racially integrate the school, his physical presence alone was not sufficient to racially integrate the school or to achieve his right to racial equality. Specifically, racial equality is achieved when people of color and Whites share power in an integrated environment. Stated alternatively, equality is achieved when people of color and Whites lay equal claim to a shared environment or institution. Their shared partnership provides each race with a sense of belonging to and having the right to participate in controlling the environment or institution. An important component of a partnership, naturally, is that all partners share in structuring the rules that govern the partnership. In this way, integration means much more than assimilation; integration is not achieved merely by allowing students of color to have a physical presence in an institution and expecting them to conform to and identify with White culture.\(^6\) They also must have an equal voice in shaping institutional policy. Thus, equality is related

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\(^4\) The stigmatic harm inflicted on Blacks as a result of de jure segregation was the primary reason the Brown Court overruled the separate but equal doctrine of Plessy. See Brown, 347 U.S. at 495.

\(^5\) See McLaurin, 339 U.S. at 641-42.

\(^6\) Some African Americans claim that Brown was wrong because assimilation was the main goal of dismantling the separate but equal doctrine. See, e.g., Alex M. Johnson, Jr., Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again, 81 CAL. L. REV. 1401, 1426 (1993). Assimilation seems to have been the immediate result of integration policies. See id. However, I do not think Brown has to be read as requiring that. Rather, I think Brown can and should be read as an opinion that supports racial equality.
to integration in a way that is more complex than a simple understanding of integration based on numbers alone.

Today, most law schools admit a certain percentage of people of color, they have some faculty of color, and some top administrators also are of color. Some people would like to have a greater representation of people of color in the law school communities, but under the simplest understanding of integration that focuses on numbers, law schools generally are integrated. However small and inadequate their numbers, people of color have a physical presence in the law school community.

When I look around my own law school community, however, I often see racial segregation. Black students congregate in one area of the cafeteria, Whites students in another, and Hispanic students in yet a third. The few Asian students sit off by themselves. In addition, I see White students working in the law review offices. During the interviewing season in the fall, I see White students dressed for interviews but rarely see Black students dressed for interviews because they have fewer interviews. The hierarchy of power within most law school communities continues to be top-heavy with White students. These observations are disheartening and make me wonder whether perhaps society has given in to the simplest understanding of integration and whether we think we have satisfied the constitutional mandate of equal protection in the law school by merely opening the law school doors to students of color. Surely equal protection and racial equality extend beyond admissions.

Admittedly, the law school does not have a policy prohibiting students of different races from mingling with each other. These are not the days of *McLaurin*. In fact, the *McLaurin* Court addressed the possibility that it could lift the ban on de jure segregation within the University of Oklahoma and that de facto segregation might nevertheless remain.\(^{37}\) The White students could choose not to associate with Mr. McLaurin, or Mr. McLaurin could choose to isolate himself from his White classmates. In either event, the Court held this was not a problem that called for a legal solution.\(^{38}\) It was up to the members of the different racial groups to mingle or not mingle, as they saw fit. In this way, law students can choose to mingle or choose to stay isolated.

As I read this part of the *McLaurin* decision, I was only somewhat persuaded about the role of choice in voluntarily integrating the school.\(^{39}\) Are the students' choices—Black and White—truly theirs to

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\(^{37}\) See *McLaurin*, 339 U.S. at 641 (acknowledging that the removal of state restrictions will not necessarily diminish individual and group predilections, prejudices, and choices).

\(^{38}\) [*Id.* (noting that there was a vast difference between state-imposed restrictions prohibiting "the intellectual commingling of students, and the refusal of individuals to commingle").]

\(^{39}\) Often racism is so pervasive in our society that people of color seek solace in isolation
make in all situations? Certainly, given the strong social disapprobation that attached to violating the spirit of Jim Crow laws at the time of McLaurin, it would have been unlikely that White students would choose to associate with Black students. Similar adherence to social protocol also may have kept the Black students at a distance from the White students. In this way, the McLaurin Court may have been right that mandating racial integration would be insufficient to overcome the social compulsion for segregation. However, couching the continuing segregation as a true choice masks the social influences.

Similarly, the de facto racial segregation of students in law school communities today may be partially attributable to prior laws and attitudes, but it also may be due to current policies that unwittingly foster the students' respective isolation from each other. In exploring this possibility, I focus on racial segregation on law reviews, a persistent problem with respect to Black students at my own law school which may be a problem for other schools as well. Law review as an institution enjoys enormous significance in allocating power among students.

The most competitive employers often limit interviewing and hiring opportunities to law review members. Moreover, membership on law review can make the critical difference to achieving long-term career goals for some students. For example, most judicial clerks were law review members. Increasingly, law school professors are selected from the elite list of judicial clerks. In this way, membership on law review can have a significant and enduring positive effect on a person's career. Law review opens up career possibilities that generally are foreclosed to students who do not join the review.

Given the value of membership on law review to a student's career, it is important to explore the fairness element in selecting membership for law review. My purpose in writing this essay, however, is not to derive the fairest way or even a fair way to select law review member-

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from White society to regain their identities. In this way, social isolation is not truly voluntary. See Nancy A. Denton, The Persistence of Segregation: Links Between Residential Segregation and School Segregation, 80 MINN. L. REV. 759, 808 (1996) ("[T]he issue really is whether such a 'choice' can be called voluntary if it results from a need to escape racism and racists.").

40. See Frug, supra note 26, at 1081, 1088 (discussing the link between zoning laws that spread during the 1920s and existing residential segregation).

41. Cf. Runyon v. McCrary, 427 U.S. 160, 179 n.16 (1976) (noting that "[t]he Court has recognized . . . the link between equality of opportunity to obtain an education and equality of employment opportunity"). But see Emily Campbell & Alan J. Tomkins, Gender, Race, Grades, and Law Review Membership as Factors in Law Firm Hiring Decisions: An Empirical Study, 18 J. CONTEMP. L. 211, 233-36 (1992) (reporting that the most important variable in applicant evaluation was grades because law firms consistently favor students in upper 10% of class as compared to upper 30% but that law review membership "was not a factor in the decision to interview or hire an applicant").
ship; that will take the input of many caring and concerned people of all races. Rather, my goal is merely to explore the unfairness in existing selection methods and to suggest that alternative methods can be fairer to everyone and also promote racial equality. Certainly, as long as law reviews remain racially segregated, racial equality in law schools remains elusive because students of color are cut-off from significant career opportunities. Perhaps this exploration will lead to ideas about how law school communities can become more integrated in ways that move us beyond the simplest understanding of integration based on numbers and move us into the sophisticated *McLaurin* definition of integration based on racial equality.

II. LAW REVIEW MEMBERSHIP

Most law schools admit students onto their law reviews in one of two ways. A certain number of students are automatically eligible for law review membership because their grade point averages at the end of their first semester or first year places them at the top of their class—usually the top five or ten percent.\(^2\) An alternative way of gaining membership onto law reviews at most schools is through a writing competition sponsored by students already on the review. Each student who is interested in writing onto the review receives a packet of materials which forms the basis for a written note to be evaluated by law review members. Generally, the notes are presented anonymously for evaluation.

Some schools allow note authors to write letters explaining how they would bring diversity to the review. Diversity can be defined to include race, sex, sexual orientation, religion, socio-economic background, personal disadvantages, culture, or even ideology. The personal letters are read in conjunction with the notes and membership decisions are based on a combination of a particular author's writing and analytical ability as well as the author's ability to bring diversity to the review.

Interestingly, some schools that allow students to write personal notes as part of the writing competition introduced this into the evaluative process because their previous admissions process resulted in the selection of few, if any, students of color. Personal statement policies increase the likelihood that students of color will become law review members. In addition, they increase the likelihood that students from other under-represented groups will be selected for membership. For example, a White student who demonstrates that he or she has been

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\(^2\) For example, the University of Florida College of Law currently invites the top 5% of the first year class to join its law review. The remaining members must gain admission through an open, anonymous writing competition.
disadvantaged in law school because the student is blind may convince law review members that he or she is nevertheless worthy of membership. A Black lesbian may persuade a law review to accept her as a member because she helps diversify the review in a number of ways, including her race, sex, and sexual orientation. Naturally, the blind White student or the Black lesbian may diversify the review from an ideological viewpoint as well. In this way, individuals do not have to deny aspects of their identities; rather, individuals can be valued for different identity traits that make them unique.

Schools that facilitate the admission of under-represented students onto their law reviews are acknowledging at least two important points. First, they are acknowledging that having diversity on the review is important and valuable. Moreover, facilitating the admission of under-represented groups onto reviews acknowledges that the process of relying exclusively on grades and anonymous notes alone unfairly disadvantages some students—generally the students who are most likely to bring diversity to the reviews. A move away from reliance on grades and anonymous notes which factors in other indicia of quality would make the process fairer and more inclusive. For example, a Black student might be able to add insights into an analysis of an article focusing on race discrimination that a White student might not see. The Black student's input would enhance the overall quality of the article and, hence, the review. Diversity and fairness, then, become the goals of schools that deviate from standard selection criteria and implement policies that enhance the likelihood that under-represented groups will become members of a particular law review.

Ironically, while the goal of fairness motivates some schools to open up the evaluative process for determining membership on law reviews, the same goal causes other schools to adhere to the traditional evaluative process that looks solely at grades and anonymous notes. In other words, some schools are reluctant to deviate from the traditional selection criteria for law review membership because they fear that any deviations would be unfair. Schools that adhere to traditional criteria for law review selection also may want to achieve diversity and, in particular, racial diversity. Nevertheless, their law reviews remain largely racially segregated because they cannot figure out a fair process to promote diversity.

At present, then, some law school communities are challenged to implement law review selection policies that promote diversity and are also fair. This challenge necessarily involves an exploration of how reliance on traditional criteria is unfair. Unraveling the unfairness in the traditional process helps illuminate the reasons why diversity is a valuable goal and also why non-traditional selection processes are fairer
than a reliance on grades and anonymous notes. In turn, this exploration may result in discovering even more ways in which equitable law review selections can be made that also promote the valuable goal of diversity.

III. DIVERSITY AND INTEGRATION

Earlier, I defined diversity to include such identity traits as race, sex, sexual orientation, religion, socio-economic background, personal disadvantages, culture, or even ideology. This list is not meant to be exhaustive; perhaps there are other ways in which diversity can be achieved. At some point, however, the concept of diversity must be finite or it becomes meaningless. Certainly, from a legal standpoint, diversity is a limited concept and understanding its limits also clarifies why it is important and even constitutionally compelled.

The concept of diversity became an issue in legal analysis when the Supreme Court decided *Regents of the University of California v. Bakke.* In *Bakke,* a 5-4 decision, the Court struck down an affirmative action admissions policy implemented by the U.C. Davis Medical School to racially diversify its school. Specifically, the school set aside sixteen of one-hundred seats in the entering class for minority applicants based on race or economic disadvantage. Four Justices struck down the policy as violative of Title VI of the Civil Rights Act of 1964. In the concurrence, Justice Powell found that the set-aside policy denied Mr. Bakke, a White man, his right to equal protection based on race. Among other things, Justice Powell found that, while race can be a factor in making admissions decisions, it cannot be the determinative factor. Justice Powell suggested that a school could diversify its classes by looking at a number of characteristics of each applicant, including race and "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated
compassion, a history of overcoming disadvantage, ability to communi-
cate with the poor, or other qualifications deemed important."

Unfortunately, Justice Powell’s broad definition of diversity renders
it meaningless in equal protection analysis. Consider an example using
the Court’s understanding of diversity. Admissions officials to a state
law school are selecting applicants from among its “hold” category. The
hold category includes files from applicants who were neither automati-
cally admitted nor automatically denied admissions based on their Law
School Admissions Test (LSAT) scores and their grade point averages.
The hold category consists of hundreds, if not thousands of files. The
Committee is deciding whether to admit an applicant who served for
two years in the Peace Corps. No other applicant being considered for
admission to the class has Peace Corps experience.

Justice Powell found that it was permissible for admissions officials
to factor in an applicant’s “unique . . . service experience” or “compas-
sion.” Admissions officials could use the applicant’s Peace Corps
experience as a “plus” to admit the applicant over an applicant without
such experience, and this would be constitutional. Moreover, a non-
Peace Corps applicant who is denied admission does not have a
successful suit alleging a denial of equal protection. Because a classifi-
cation based on Peace Corps experience is not suspect or quasi-suspect,
it is rational for the law school to value Peace Corps experience over
non-Peace Corps experience. Similarly, if the applicant with Peace
Corps experience is denied admission to the law school, neither does
that applicant have a successful equal protection suit. Equal protection
simply does not protect the Peace Corps applicant because it is rational
for the school to choose another applicant over the Peace Corps
applicant, even though the Peace Corps applicant would have diversificed
the class.

50. Id. at 317 (Powell, J., concurring).

[The race of an applicant may tip the balance in his favor just as geographic
origin or a life spent on a farm may tip the balance in other candidates’ cases. A
farm boy from Idaho can bring something to Harvard College that a Bostonian
cannot offer. . . .

‘In Harvard college admissions the Committee has not set target-quotas for the
number of blacks, or of musicians, football players, physicists or Californians to
be admitted in a given year.’

Id. at 316 (Powell, J., concurring) (quoting App. Brief for Columbia Univ., Harvard Univ.,
Stanford Univ., and the Univ. of Penn., as Amici Curiae 2-3) (comparing the U.C. Davis
admissions policy that set aside 16 of 100 seats for minority applicants to Harvard admissions
policy).

51. Id. at 317; see also supra note 50 and accompanying text.
Diversity is meaningful in equal protection analysis, then, only when it involves suspect or quasi-suspect classifications. At present, it is clear that classifications based on race and sex meet this threshold. The Supreme Court held in *Korematsu v. United States* that laws that classify on the basis of race must pass the "most rigid scrutiny," that is, the government must prove that the law is "narrowly tailored" to achieve a "compelling state interest" to satisfy the equal protection guarantee in the Constitution.

Similarly, the Supreme Court held in *Craig v. Boren* that classifications based on sex must pass intermediate scrutiny; that is, the government must prove that the law is "substantially related" to an "important government objective" to satisfy the equal protection guarantee in the Constitution. Perhaps other groups also should be considered suspect or quasi-suspect holding the government to a higher standard of review to justify laws that classify on the basis of those other characteristics. Although these arguments warrant in-depth discussion, they are reserved for another essay. It is sufficient here to use race and sex to highlight the limitations of diversity as a meaningful concept in equal protection analysis.

Ironically, constitutional questions about policies designed to increase diversity generally only arise when the plans define diversity to include race or sex. The most important diversifying characteristics are subject to the higher levels of scrutiny to pass constitutional muster. Arguably, this is consistent with democratic principles that the government should be held to a high standard when it draws distinctions among people based on identity traits like race and sex. For example, if the Peace Corps applicant were also the only Hispanic applicant in the law school's pool of qualified candidates, we, as a society, should be more interested in the basis for the school's decision to deny the applicant admission. A denial of admission raises questions (makes us suspicious) about possible racial bias and prejudice against Hispanics underlying the decision. In our system of government, we devalue racial prejudice and

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52. 323 U.S. 214 (1944).
53. Id. at 216.
55. 429 U.S. 190 (1976).
56. Id. at 220 (Rehnquist, J., dissenting) (observing that the Court had inserted a new standard between strict and rational basis scrutiny).
57. Id. at 197.
58. For example, perhaps integrating on the basis of sexual orientation, religion, class, or handicap should be the focus of affirmative action policies. It is difficult to dispute that including people in these categories in state programs also promotes equality. For an exploration of this concept in the context of sexual orientation, see generally Sharon E. Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65, 65-106 (1997).
value racial equality. On the other hand, if the Hispanic applicant is admitted, certainly no question of racial bias arises. We think just the opposite; that the school values racial equality and affirms Hispanic applicants.

In fact, by admitting the only Hispanic applicant to the law school, the law school has taken a step toward racial integration. In this way, the Hispanic student does not merely diversify the school, he or she helps integrate the school. This shift from diversity to integration is enormously significant because the Constitution compels racial integration and racial equality. 59 Thus, it should be easier, not harder, to justify admitting the Hispanic applicant as a matter of constitutional law precisely because of the Hispanic student's race.

Bakke minimized the importance of integration in state schools because of its focus on diversity and not integration. 60 Each student brings diversity to a class because each one of us is a uniquely interesting and valuable individual. Mr. Bakke undoubtedly would have added something special and different to the U.C. Davis Medical School as well. Unfortunately, however, his whiteness would have neither diversified nor integrated the class.

The success of Mr. Bakke's reverse discrimination suit made it more difficult for state schools to achieve racial equality through integration because the goal of integration seems to have gotten lost in the quest for diversity. This is why I have called diversity the red herring of equal protection analysis; it masks the real purpose behind affirmative action policies, the integration of state institutions on the basis of race and sex to achieve equality for people of color and women.

Added difficulties stem from the Court's recent holding in Adarand Constructors, Inc. v. Pena 61 that all classifications based on race must pass strict scrutiny. 62 This would not be such a daunting task, perhaps, if the government's purpose behind affirmative action policies was characterized as trying to achieve race and sex equality through integration. The Constitution compels the government to provide such equality, and laws can be implemented that are necessary to achieve that goal. Affirmative action policies are an excellent example.

In contrast, if the purpose behind affirmative action policies is to achieve diversity, then clearly the importance of identity traits like race and sex are going to be trivialized. Diversity can be achieved by

59. See supra text at p.375.
62. Id. at 227.
maintaining all-White or all-male institutions where the class consists of a former Peace Corps volunteer, a chocolate ice cream lover, a swimmer, a Capricorn, a redhead, and persons with any other diversifying traits the admissions officials prefer over Black or female. Nor is this farfetched. The Court almost fell for this understanding of diversity recently in United States v. Virginia where the Virginia Military Institute (VMI), the only all-male state college in Virginia, argued that its all-male admissions policy was justified, and thus constitutional, because it promoted diversity. In response to this argument, the majority opinion indicated that if, in fact, VMI had actually been established for this purpose, it might have been constitutional.

The Court’s analysis, however, misinterprets the purpose behind diversity in education. Had the Court focused on the proper question—“Can an all-male state institution refuse to integrate on the basis of sex without violating the equal protection requirement?”—the analysis would have addressed the issue of the role of integration in achieving sex equality. From this perspective, it is unlikely that an actual purpose of achieving diversity would be able to save an all-male admissions policy like that in VMI. Integration on the basis of race or sex, then, should trump diversity in equal protection analysis.

Although diversity is valuable, it must be placed in context. Integrating a state program or institution on the basis of race or sex always promotes diversity. Diversifying a state program or institution, however, does not always mean that the program will be integrated on the basis of race or sex. The equal protection guarantee in the Constitution focuses on protecting race and sex equality and thus, diversity policies also must focus on integration before considering other diversifying characteristics. A focus on integration and equality also highlights why existing selection processes for law review admissions are unfair.

64. Id. at 2276.
65. Id. at 2277-79.
66. The question of whether voluntary segregation by women and Blacks in public institutions is constitutional raises different questions. See Rush, supra note 60, at 13-15. Voluntary all-women’s public institutions and voluntary all-Black public institutions are constitutional because they promote the equal citizenship rights of historically disempowered groups (women and Blacks) without diminishing the equal citizenship rights of historically privileged groups (men and Whites). Id. at 13; see also Johnson, supra note 36, at 1468-70 (discussing the need for Black students to have the choice to attend predominantly Black colleges so as to prevent assimilation into White culture).
Some people believe the traditional law review selection criteria—grades and anonymous notes—are objective and the best way to determine law review membership. Perhaps a high grade point average is indicative of strong analytical skills. Similarly, a demonstrated ability to write a comprehensive law review note is evidence of strong analytical and writing skills. Interestingly, however, a student with a high grade point average may not be a very good writer, particularly in the law review context. Moreover, a student can have a keen analytical mind and not be a very good exam taker, either. In this way, reliance on only high grade point averages for selection to law reviews may exclude many students with strong analytical skills and include students with poor writing skills. At best, traditional selection criteria relying on grades seem imperfect. They value analytical skills as measured by grades more than they value analytical skills as measured by another method, such as oral advocacy skills. Traditional selection criteria also value analytical skills as measured by grades more than they value writing skills, otherwise all students who wished to join the review would be required to write onto it.

But even a prerequisite of demonstrated writing skills consistent with traditional law review writing style and traditional legal analysis undoubtedly would eliminate many students whose writing is more creative and individualistic, both with respect to writing style and with respect to deviating from traditional legal analysis. For example, a Black writing competition candidate may write a note that critiques a particular problem from a critical race theory perspective. Students judging the quality of the candidate’s note undoubtedly consider themselves objective readers, and they probably are very good judges of strong, traditional legal writing style and analysis. After all, they have been successful themselves in learning this way of communicating. Nevertheless, if they are unfamiliar with critical race theory, their lack of knowledge may hurt the Black candidate because the candidate’s note is more easily susceptible to being misunderstood, not understood, criticized as wrong, or rejected as an illegitimate way of critiquing law. In turn, the Black candidate may be less likely to gain admission to the law review because he or she will lose out to students whose writing style and legal analysis conform to the traditional paradigm. Experience and history tell us that it is more likely than not that the preferred writing style will be that of the White student.

My point here is not to suggest that grades or writing should be irrelevant to law review selection, but only to suggest that reliance on them is imperfect. Significantly, traditional law review selection criteria devalue different ways of measuring analytical skills and writing ability.
Traditional selection criteria exalt traditional legal analysis and writing style over all other ways of critiquing law. Most importantly, traditional selection criteria have been unsuccessful in promoting racial equality because adherence to traditional criteria has left many law reviews racially segregated. It is reasonable to wonder why the traditional process that favors the status quo should be preferred over an alternative process when the alternative process could result in racial integration of the reviews consistent with equality principles.

Given the importance attached to law review by employers, it is unfair to adhere to traditional selection criteria that are imperfect and unfair to students who do not conform to traditional analytical and writing styles. Many students may be able to identify with this observation. Students of color especially know the pain of being excluded from powerful institutions that are populated mostly by Whites. Thinking of Mr. McLaurin, imagine how students of color probably feel by their virtual exclusion from law review. Even though there is no express policy that prohibits them from becoming members of law review, their inability to participate in meaningful and equal ways with their White classmates to govern an important aspect of the law school community undoubtedly demoralizes them. They also are stigmatized because of their virtual group exclusion from this prestigious institution. Often they establish their own journals, but the historical significance of a school’s primary law review presents an almost impossible barrier to secondary journals enjoying equal esteem. Further, sometimes the existence of specialty journals “excuse” traditional law reviews from publishing articles that focus on issues relevant to the specialty journal. As a result, some articles focusing on issues that are important to broad audiences may not get as much attention as they would if the traditional law reviews published them. In this way, even the issues themselves may be perceived as less important than the issues that are published in the more traditional review.

These observations should cause us, as educators, to reevaluate law review selection criteria. The primary goal of a reevaluation should be to devise an equitable selection process that results in law reviews that are integrated on the basis of race and sex, at a minimum. In implementing new criteria, naturally there will be some debate about whether it is fair to change the criteria. The result of such questions of fairness

67. I thank my friend, Andrea Muirhead, for pointing this out. On many occasions, I have received offers from a school’s secondary journal (dealing with race or sex discrimination) even though I did not submit my article to the journals. Members of the traditional law review would automatically refer my articles to the specialty journals, implying that race and sex discrimination are not relevant to “mainstream” legal analysis.
tend to translate into resistance to change. Because the concerns about fairness are multiple, I will focus on three. First, some people might resist change because they believe that a change will lower qualifications. Closely related, others might object to changing selection criteria because students from historically under-represented groups who are successful in getting onto the review under new standards will be stigmatized. Specifically, stigma will result because of the popular perception that the students were not qualified to be on the review under the arguably more stringent traditional standards. Finally, there are those who will object because they will feel displaced by a student who makes it onto law review when they did not, especially when the “displaced” students would have made it on under traditional criteria.

These concerns need to be addressed if a change to new criteria is going to be accepted and successful. The qualifications issue is easily addressed; not even the traditional selection criteria are good predictors of law review ability. Recall that someone with a very high grade point average can be a terrible writer. Someone who is a terrible writer may have a wonderfully creative mind that makes the person a very skilled researcher or critic of other’s writing. At a minimum, new selection criteria can be devised that are no worse than the existing ones and may be even better at selecting students who are capable of providing an excellent law review. Importantly, whatever new criteria are devised, they can be created with the goal of achieving racial equality by ensuring the law review is integrated.

Stigma is a double-edged sword. On the one hand, the virtual exclusion of a particular group from a prestigious institution sends a message that members of that group are unqualified to be a part of the institution. For example, until the late Thurgood Marshall was appointed to the Supreme Court, it appeared that no Blacks were qualified to be Supreme Court Justices. This was also true with the appointment of Justice Sandra Day O’Connor with respect to the qualification of women to be on the High Court. Even if Justices Marshall and O’Connor felt stigmatized by being the first Black and first woman, respectively, on the Supreme Court, no one would argue that they would have declined the nominations because the stigma was just too much for them to bear. On or off the Bench, the stigma problem may have stayed with them. In fact, the best way for them to dispel popular impressions that Blacks and women were not qualified to be Supreme Court Justices was to accept their nominations. Their written opinions in their roles as Justices remove any doubts that standards were lowered so they could become Supreme Court Justices. In this way, it is far better to be stigmatized and a part of the power structure than to be stigmatized and cut off from
it. The stigma stops becoming a problem only with integration and racial equality.

Another problem presented in changing law review selection criteria is the "displacement theory" objection, the "but for the change in criteria, I would have made it" problem. One way around this problem, particularly if traditional criteria are merely modified, is to create more positions on law review to accommodate the need for racial integration. Everyone who meets the traditional criteria gets on the review, or, stated alternatively, no one who meets the traditional criteria can argue that he or she was displaced because of the modified criteria. Still, at the end of the selection process there is some guarantee the review will be racially integrated. Moreover, no one who fails to meet either the traditional or modified criteria can argue displacement. Alternatively, if the traditional criteria are abandoned following adequate notice of adoption of new criteria, no one can argue that he or she has been displaced because everyone is subject to the new standards.

Finally, the fundamental concern about fairness raises this point: given the imperfections in relying on existing criteria coupled with the virtual exclusion of racial minorities as a result of relying on existing criteria, the critical question is not whether it is fair to change but whether it is fair not to change. Thus, the challenge is to introduce fair changes that maintain excellence and also promote racial equality.

V. AFFIRMATIVE ACTION AND INTEGRATION

Introducing fair changes that promote racial equality raises several issues. First, does racially integrating law reviews serve a compelling state interest? Alternatively, given the mandate in Brown to integrate public education, is there an overwhelmingly compelling reason not to integrate all aspects of legal education? Finally, even if equal protection does not mandate racial integration in law reviews, should the public school system hold itself to a higher standard and racially integrate law review membership? I will address each of these issues in turn.

In addressing the first issue, recall that the Supreme Court in Adarand held that race-conscious affirmative action programs must be subject to strict scrutiny. Applying Adarand to a policy favoring racial minorities in admission to law reviews would thus require a compelling government interest to survive an equal protection challenge. Because race discrimination is particularly acute in the field of law, an affirmative action policy to admit more minorities on law reviews would certainly be compelling. Moreover, attorneys play an important role in

68. See Adarand, 515 U.S. at 227; see also supra notes 61-62 and accompanying text.
society by protecting individual freedom from government abuse. Thus, it would seem compelling to include more racial minorities in all aspects of legal education to ensure that their freedom will ultimately be protected.

Although the admission of more minorities to law reviews would further a compelling state interest of integration and racial equality, this analysis is somewhat limited when examining the desegregation mandate in Brown more closely. To illustrate this limitation, consider the Supreme Court's decision in Watson v. City of Memphis. In Watson, Black residents of Memphis commenced an action against the city "seeking declaratory and injunctive relief directing immediate desegregation of municipal parks and other . . . recreational facilities." The issue was whether the city could "further delay . . . meeting fully its constitutional obligation under the Fourteenth Amendment to desegregate its public parks and . . . recreational facilities." Addressing this issue, the Court noted that a substantial period of time had passed since racial segregation by a state institution had been declared unconstitutional. Moreover, the Court recognized that any deprivation of constitutional rights called for immediate rectification. The Court therefore held that the basic guarantees of the Constitution are warrants for the "here and now" and, unless there is an overwhelmingly compelling reason, they must be promptly fulfilled.

The decision in Watson illustrates the importance of integrating public facilities "here and now." Affirmative action for law review membership is not merely serving a compelling state interest. Rather, in the context of integration, it is a constitutional mandate; unless there is a compelling reason to continue the virtual exclusion of minorities from law reviews, law reviews must racially integrate their membership. While it may be argued that, consistent with Adarand, an affirmative action program for law review membership must serve a compelling state interest, I suggest that, under Watson, there must be a compelling reason not to integrate. Consequently, when viewing an affirmative action policy for law reviews as integration and racial equality rather than diversity, it becomes apparent, in light of Watson, that there must be a compelling state interest to continue segregation in law review membership.

70. Id. at 528.
71. Id.
72. Id. at 529-30.
73. Id. at 532-33.
74. Id. at 533.
I suggested earlier in this essay that the challenge for law school communities is to introduce fair criteria in law review selection that maintain excellence and also promote racial equality. The Supreme Court recently acknowledged in United States v. Fordice a similar challenge faced by Mississippi's public universities where the Court noted that standardized entrance exams could be used in unfair ways. In Fordice, students at predominantly Black universities in Mississippi alleged that the state had failed to dismantle its dual university system for Black and White students in violation of their equal protection rights under the Fourteenth Amendment. Historically, Mississippi used scores on the American College Testing Program (ACT) to determine eligibility for admission to its state universities and colleges. Automatic admission to three of the four predominantly White institutions required an ACT score of 15 or higher. Automatic admission to the other predominately White institution required an ACT score of 18. The district court found the "discriminatory taint" of these requirements obvious because when the ACT requirements initially were adopted in 1963, "the average ACT score was 18 for Whites and was 7 for Blacks." State officials took advantage of racial disparities in ACT scores to set cut-off scores for automatic admission to the predominately White universities so as to exclude most Blacks. As a practical matter, then, most Black applicants were deemed "unqualified" for admissions to the predominantly White colleges and had no choice but to attend a predominantly Black college.

In 1985, Mississippi's university system remained largely segregated. Admissions officials continued to place determinative weight on ACT scores for admission to the predominantly White universities, knowing that seventy-two percent of Whites but less than thirty percent of Blacks achieved this score. The Court held that continued reliance solely on ACT scores to set automatic admissions requirements was traceable to adoption of the original admissions policy. Because the

75. See supra text at p.382.
77. Id. at 723. They also alleged violations of their Fifth, Ninth, and Thirteenth Amendment rights as well as Title VI of the Civil Rights Act of 1964. Id.
78. Id. at 734.
79. Id.
80. Id.
81. Id.
82. See id. at 734-35.
83. See id.
84. See id. at 735 (noting that, at the time of the opinion (1992), Mississippi's universities remained "predominantly identifiable by race").
85. See id.
automatic admissions policy still had segregative effects, the Fordice Court ordered admissions officials to look at other indicia of a student's ability to succeed.\(^{86}\)

Despite findings that most standardized test are biased, many people responsible for evaluating applicants for employment opportunities or educational programs continue to rely on them, sometimes accounting for the built-in biases and sometimes discounting them.\(^{87}\) In much the same way, employers in the field of law look to law review membership to meet hiring needs. Like the disparity in ACT scores among Black and White students, the disparity in law review membership has led to pervasive segregative effects in career opportunities for Black and White law students.

Although the Supreme Court has held that a disparate impact alone is not sufficient to support an equal protection challenge,\(^{88}\) the Fordice Court acknowledged that discriminatory intent can be inferred from previous ill-motivated policies that have not changed.\(^{89}\) A possible link might exist between public law schools that historically functioned under de jure segregation and those schools that continue to have de facto segregation within the institution, particularly in significant areas like law reviews. More important, perhaps, is the possibility that educational institutions should hold themselves to a higher standard than is required by finding discriminatory intent. If the goal in education is to achieve racial equality as mandated in \textit{Brown}, then integration and racial equality in all aspects of education become necessary. Given the high degree of reliance on law review membership by employers to meet

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\(^{86}\) \textit{Id.} at 737-38. The Court noted that placing more weight on students' grades would result in the admission of more Black students to the predominantly white colleges. \textit{Id.} at 737. The Court noted that "the disparity between black and white students' high school grade averages was much narrower than the gap between their average ACT scores, thereby suggesting that an admissions formula which included grades would increase the number of black students eligible for automatic admission to all of Mississippi's public universities." \textit{Id.} In addition, the Court relied on information provided by the American College Testing Program, the organization that administers the ACT, which discourages reliance on ACT scores as the sole criterion for college admissions. \textit{Id.}

\(^{87}\) Rush, \textit{supra} note 25, at 15-16.

\(^{88}\) See \textit{Washington v. Davis}, 426 U.S. 229, 246 (1976) (adopting an "intent" requirement to show a constitutional infringement in disparate impact cases). In \textit{Davis}, Black plaintiffs challenged the constitutionality of the police department's reliance on a standardized exam to qualify for positions in the department. \textit{Id.} at 237. Black applicants were four times more likely to fail the test than were White applicants. \textit{Id.} The Court held that the disparate impact alone on Black applicants was not sufficient to establish a constitutional violation; they also needed to show that the department intended to discriminate against them by relying on the exam. \textit{Id.} at 237, 248.

\(^{89}\) \textit{Fordice}, 505 U.S. at 743.
hiring needs, Blacks cannot compete equally in the field of law with their White counterparts until they are included in law review membership. Moreover, White lawyers dominate most of the prestigious law firms, intensifying the discrimination racial minorities face. In light of this, the focus on whether law reviews can constitutionally exclude racial minorities from membership seems misplaced. Rather, the question should be whether educational institutions condone the virtual exclusion of racial minorities in one of the most important aspects of a legal education.

The answer is simple. Education forms the foundation for each individual to achieve success. It also shapes the way individuals perceive themselves and others. If educational institutions continually permit Blacks to be excluded from the prestige of law reviews, they essentially set a standard that segregation is permissible in some areas of public education. Such a virtual exclusion of Blacks from law review membership effectively undermines the Brown Court’s principle of racial equality in public education. The public school system should therefore set an example and support integration and racial equality in all aspects of public education.

VI. CONCLUSION

This essay is an invitation to readers to join in an effort to devise equitable plans for integrating our law schools. The schools that allow personal statements to accompany students’ law review notes have taken a step in the right direction. Perhaps consideration should be given to automatically admitting a certain number of racial minorities based on grades or the writing competition. There are many possibilities. Moreover, whatever steps are taken to integrate law reviews, consideration should also be given to integrating all the other areas of law schools: moot court, student representation, secondary journals, the top ten percent of the class, and so forth. Mr. McLaurin could not be accepted as a full member of his graduate school program so long as he was unable to mix with his White colleagues and professors in meaningful ways. Similarly, as members of the law school community, we each need to facilitate the commingling of our White students and our students of color. This is the only way in which racial equality can be achieved. Our White students and our students of color need an equal partnership; they each need to be able to lay claim to this law school as their law school. If we are successful in promoting integration at all levels throughout the schools, then perhaps the students will be

90. See supra text at pp.373-78.
truly free to socially mingle with each other. When we look around, then, we will see integration and the hope for true racial equality.