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Diversity v. Colorblindness

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Diversity v. Colorblindness

Patrick S. Shin*

ABSTRACT

There seems to be broad social consensus that racial diversity is generally a good thing. Disagreements tend to focus on the constraints we should observe in bringing such diversity about. Evaluating the justification of such constraints requires understanding the kind of good that racial diversity is supposed to constitute. In this Article, I draw on concepts familiar from philosophical discussions in value theory to analyze the value of racial diversity on the one hand and that of colorblindness on the other. Using several opinions from Parents Involved in Community Schools v. Seattle School District No. 1¹ to stake out some of the central positions, I argue first that the value of racial diversity is conditional or extrinsic, not intrinsic, but that we have both instrumental and non-instrumental reasons to regard it as something worth caring about. I further argue that the constraint of colorblindness is, strictly speaking, orthogonal to the value of racial diversity, because what colorblindness opposes is selecting for diversity, not diversity itself, but that the two values come into opposition when such selection is required to bring about diversity. I consider the case for adhering to the constraint of colorblindness in such circumstances. I contend that the strongest positive argument for a deontological conception of colorblindness—viz., that it expresses a constitutional principle of equal respect—is obsolete. I further suggest that the strongest negative argument—viz., that selecting for diversity expresses disrespect for persons—ignores the possibility that such selection measures, when adopted in response to unjust social conditions, might more plausibly be regarded as an expression of a commitment to substantive principles of equality.

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1. 551 U.S. 701 (2007).

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I. INTRODUCTION

Consider the following claim:

Other things equal, it is better that a group of people exhibit racial diversity than that the group not exhibit racial diversity.

Perhaps the assertion will seem uncontroversial, as far as it goes. If a group can be constituted so that it is racially diverse without making it worse in any other respect, without any undesired side effects, and without need for any special selection procedures—i.e., all else being equal—then why not say that we have reason to prefer that the group exhibit that property? Given all of those qualifications, even the skeptic may see little reason to dispute the point. Racial diversity is generally a good thing. Who would want to deny that?

Then again, maybe all of those qualifications only make the claim more difficult to fathom. If *everything else* really is held equal, how exactly could adding the property of racial diversity make any group

of people better? If two groups of people are really identical in every other way, and we hold fixed all other circumstances of social context, then is it really so clear that the racially diverse group is necessarily better? Better in what sense? Sure, racial diversity is a good thing, other things being equal, but its value starts to seem obscure when we prescind from too many of our actual social circumstances.

So perhaps we had better reflect a bit more carefully. Let us start again with the assumption that racial diversity can have positive value. Now let us ask a few different questions. Does racial diversity *always* have value, or does its value depend on the existence of other conditions? If the latter, what are those conditions? When racial diversity does have value, what exactly is the nature of that value? What specific reasons do we have to prefer a group that is racially diverse to a group that is racially homogeneous? How do those reasons hold up against other values that we hold important? Perhaps everyone will agree that, other things equal, racial diversity is a good thing, but people obviously disagree about the relation of the value of racial diversity to other things we value. Namely, they disagree about the nature and strength of the reasons that we have to want diversity, about whether it conflicts with other values or principles to which we should also be committed, and about the priority of principles by which such conflicts should be resolved.

Take, for example, the disagreement among the Justices in *Parents Involved in Community Schools v. Seattle School District No. 1*.² In his dissenting opinion, Justice Breyer argued that in the context of public school education, the “interest in achieving racial ‘diversity’ . . . [or] in promoting or preserving greater racial ‘integration’ of public schools”³ is a function of our interest in the social consequences that such diversity would help bring about, such as the eradication of remnants of past segregation, the enhancement of education for all students, and better preparation for democratic government.⁴ For Justice Breyer, the obvious importance of those

2. *Id.* Throughout this Article, I will be using the Justices’ opinions in *Parents Involved* to stake out several possible views about the nature of the value of racial diversity versus colorblindness. I intend my arguments, however, to be about the value of racial diversity in general and not limited to the particular circumstances of that case or to the context of public education.

3. *Id.* at 838 (Breyer, J., dissenting).

4. *Id.* at 843.

goals left no room to deny the constitutionally compelling value of racial diversity.⁵

Chief Justice Roberts, however, was unmoved. He dismissed Justice Breyer's conclusions about the value of racial diversity in the public school context as little more than a *non sequitur*. In the Chief Justice's view, it did not follow from the fact that racial diversity might have important social benefits that it was constitutionally permissible for school districts to use race-conscious procedures to bring such diversity about. As he put it,

Justice Breyer's position comes down to a familiar claim: The end justifies the means. . . . Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.⁶

For Chief Justice Roberts, even if one were to concede that racial diversity in the public school setting might help promote "worthy" ends, that would not justify compromising what he sees as the core value of the Equal Protection Clause: a deontological commitment to a principle of colorblindness.⁷

The disagreement between Chief Justice Roberts and Justice Breyer implicates an apparently irreconcilable conflict of values, an intractable difference of views on what we have most reason to care about—or at least what the Equal Protection Clause calls upon us to care about—when it comes to issues of racial diversity. I characterize the debate in terms of a conflict of *values* in part to emphasize that it seems to transcend disagreements about any particular matter of fact, such as whether or not racial diversity really does contribute to certain salutary social consequences. This is not to deny that the debate encompasses various important factual disagreements. Surely, it does. But whatever the conclusions that social science might deliver on particular issues in dispute—for example, whether racial diversity has measurable pedagogical benefits⁸—the question of the *significance* that we should attach to those conclusions is not itself

5. *See id.* ("If an educational interest that combines these three elements is not 'compelling,' what is?").

6. *Id.* at 743 (plurality opinion).

7. I discuss in more detail below what I mean by a "deontological commitment."

8. *Compare Parents Involved*, 551 U.S. at 839 (Breyer, J., dissenting) ("[T]he evidence supporting an educational interest in racially integrated schools is well established . . ."), *with id.* at 761–65 (Thomas, J., concurring) (expressing skepticism).

susceptible to empirical determination. The questions of how and whether the importance of achieving racial diversity relates to the value of colorblindness (such as it may be) and of how any tension between them should be arbitrated depend upon normative judgments about what we should most care about and the principles to which we should commit ourselves. The task of identifying and sharpening these questions is the focus of this Article.

After addressing some threshold difficulties in Part II relating to the definition of “racial diversity,” I devote some time in Part III to the explication of a set of helpful categories borrowed from philosophical discussions in the theory of value. I then chart out possible arguments for the value of racial diversity in each of those conceptual categories. In Part IV, I discuss the ideal of colorblindness. My main interest there is to investigate how, if we assume that racial diversity does indeed have value, the constraint of colorblindness could possibly be thought to prevent measures designed to bring it about. In Part V, I summarize several key points of my analysis and offer some concluding observations.

II. THRESHOLD ISSUES

Several threshold problems need to be addressed. The first is that not everyone will agree about what the term “racial diversity” means.⁹ More specifically, there is likely to be disagreement about what “diversity” means, what “race” means, and the conditions under which a particular group can be regarded as racially diverse. Furthermore, each of these points of possible disagreement seems more or less independent of the others. Agreement about what “diversity” with respect to a characteristic means does not imply agreement about the meaning of “race,” and agreement about the meanings of “race” and “diversity” does not ensure agreement about whether any particular group of people can be regarded as racially diverse.

My intent in this paper is neither to resolve nor to dismiss these possible disagreements. They are simply not my focus. I will try to steer clear of them to the extent that it is possible for me to do so.

9. See Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 CAL. L. REV. 1149 (2003) (reviewing ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002) (discussing various difficulties in understanding the notion)).

By no means do I wish to brush off the serious difficulties associated with defining the notion of race,¹⁰ nor do I mean to take issue with critical debunking accounts of the concept.¹¹ I bracket these worries because I do not think that addressing them is particularly helpful to understanding the values of racial diversity or of colorblindness. So I will not use “race” in any technical or specially defined sense, but rather to refer to that amalgam of characteristics—e.g., skin color, self-identification, ethnicity, ancestry, country of origin, etc.—that people ordinarily take into account in making determinations about an individual’s race.¹²

As for the term “racial diversity,” a slightly different stipulation is in order. “Racial diversity” is a context-dependent¹³ and normatively loaded¹⁴ term. Some might believe, for example, that whether a particular group can be characterized as racially diverse depends on how closely the actual racial composition of the group approximates some ideal benchmark, such as the actual racial distribution of some broader population,¹⁵ or perhaps on whether traditionally

10. See generally LAWRENCE BLUM, “I’M NOT A RACIST, BUT . . .”: THE MORAL QUANDARY OF RACE (2002); K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, in K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 30, 30–74 (1996).

11. See, e.g., Appiah, *supra* note 10, at 71–74; Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

12. I do this with the awareness that my usage here could be regarded as objectionably naïve. See generally Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 36–40 (1991) (distinguishing three different meanings of “race” in Supreme Court decisions); Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, in ROBERT C. POST ET AL., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 112–13 (2001) (discussing Gotanda’s account).

13. See, e.g., PETER H. SCHUCK, *DIVERSITY IN AMERICA* 7–8 (2003) (defining diversity as a function of differences that “a particular society deems salient” and as dependent on “how a particular society perceives differences and which of them it considers salient to people’s status”).

14. See generally SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* 46 (2003) (discussing the view that “diversity” is a “code word” for a certain sort of redistributive policy); SCHUCK, *supra* note 13, at 8 (“Those who invoke the diversity ideal may hope to associate themselves with a political mood or constituency, to convey their adherence to the letter and spirit of pro-diversity laws, to avoid having to defend past conduct, to change the subject, and so forth.”); Carbado & Gulati, *supra* note 9, at 1153 (“To opponents of affirmative action, diversity means quotas and ‘underqualified’ people of color; to supporters, diversity means a richer learning environment and social progress.”).

15. See LEVINSON, *supra* note 14, at 24 (hypothesizing, as a “quite common” idea of diversity in the employment context, “that one’s workforce reflects in some important sense

underrepresented minority subgroups have a substantial presence within the group.¹⁶ Because my central concern in this Article is an analysis of the value of racial diversity, I must avoid any usage of the term that risks begging critical questions about the reasons we have to pursue it. To that end, I will try to adhere to a primarily descriptive rather than a prescriptive or normative usage of the term.¹⁷ I shall simply understand racial diversity as a rough measure of the heterogeneity of a group's members in respect of racial phenotype. I will say, on this understanding, that a group in which all individuals share membership in a single race has an absence of racial diversity, that a group in which more than one racial subgroup is present has at least some racial diversity, and that a group in which many racial subgroups are present and substantially represented has a higher degree of racial diversity. This is, to be sure, an extremely vague account, but for my purposes should suffice. What is important for the present discussion is to be clear that I will be using "racial diversity" as a descriptive term, rather than as an implicit reference to some normative ideal for the constituency of any given group of people.

These stipulations clear the way for a discussion of the value of racial diversity while avoiding intractable threshold disputes. I do not believe that the central disagreements about the value of racial diversity hinge upon differences of view as to the proper conception of race or as to what specific criteria or measures should be used in determining whether a particular group is racially diverse. I am not saying that disagreements about the value of racial diversity *never* come down to such conceptual differences of view.¹⁸ But people who agree about the concepts of race and diversity might still disagree about the value of racial diversity, and people who agree about the value of racial diversity might not agree about the best way to

the demographic composition of the surrounding society"); SCHUCK, *supra* note 13, at 164 (criticizing the tendency to think of diversity in terms of "proportional representation").

16. For a critique of definitions of diversity based on statistical underrepresentation, see Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* WIS. L. REV. 105, 131–46 (1993) (discussing the difficulties of constructing a meaningful notion of diversity consistent with a commitment to substantive equality).

17. See SCHUCK, *supra* note 13, at 20 (distinguishing between descriptive and normative diversity).

18. See, e.g., LEVINSON, *supra* note 14, at 15–16 (voicing concern that disagreements about the significance of diversity may in many cases stem from disagreement about what it really means).

conceive of race and diversity. The clash between Justice Breyer and Chief Justice Roberts, for example, surely does not reduce to a theoretical disagreement about the concept of race or about what constitutes true racial diversity. Resolving whatever disagreements they might have on those matters would not settle their basic dispute. Agreement on a definition of racial diversity would only sharpen the issue that separates them. Is racial diversity something worth caring about? And even if it is, is it the sort of value that could justify using race-conscious procedures to produce it? It is to those issues that I now turn.

III. THE VALUE OF DIVERSITY

A. *Categories of Value*

On one modern philosophical approach to value, we can say that a thing is valuable when it gives us reason to hold certain favorable attitudes or to take certain favorable actions with respect to it.¹⁹ But not everything that is valuable provides the same sorts of reasons for action or calls forth the same sorts of attitudes. We might agree that both a stock certificate and a finger painting given to us by a child are things of value, but the way in which we value the former is different from the way in which we value the latter. A pair of familiar distinctions allows us to differentiate among the various ways in which things have value or in which we value things. One is the distinction between intrinsic and extrinsic value, and the other is the distinction between valuing something instrumentally and valuing something as an end.²⁰ Understanding these distinctions will help us sort out just what someone might be claiming when making an assertion that racial diversity is (or is not) valuable or good.

19. T. M. SCANLON, *WHAT WE OWE TO EACH OTHER* 95 (1998). On Scanlon's theory of value, which he calls a "buck-passing" account, a thing's goodness or value is not itself a reason-giving property that the thing possesses. *Id.* at 95–98. Rather, for a thing to be valuable is simply for the thing to have other properties that provide and constitute reasons to respond to it in certain ways. *See id.* at 97. I am in general agreement with Scanlon's account, but the discussion of this paper should not depend on any particular theory of value. For recent discussions of the buck-passing account of value, see, for example, Roger Crisp, *Goodness and Reasons: Accentuating the Negative*, 117 *MIND* 257 (2008); Jonas Olson, *Buck-Passing and the Wrong Kind of Reasons*, 54 *PHIL. Q.* 295 (2004); and Pekka Väyrynen, *Resisting the Buck-Passing Account of Value*, in 1 *OXFORD STUDIES IN METAETHICS* 295, 295–324 (Russ Shafer-Landau ed., 2006).

20. *See generally* Rae Langton, *Objective and Unconditioned Value*, 116 *PHIL. REV.* 157 (2007).

The intrinsic-extrinsic distinction is usually understood as having to do with the source of a thing's value, or more precisely, the extent to which a thing's value depends on its relation to other things. Something is intrinsically valuable if it is valuable simply in itself,²¹ regardless of its relation to anything else that might be valuable.²² To say that something has intrinsic value is to say that its value or goodness does not depend on external conditions and so is in that sense unconditionally good,²³ or that we always have reason to want it to exist.²⁴ In contrast, something is extrinsically valuable if its value depends on conditions external to it, such as the condition of being causally related to a particular consequence, or the condition of being regarded as valuable by a particular person.²⁵

The distinction between instrumental value and value as an end has to do with whether the value of a thing depends upon its usefulness in bringing about, or its potential to give rise to, desirable states of affairs. We regard a thing's value as purely instrumental if we value it entirely for its potential to bring about such consequences.²⁶ We regard its value as non-instrumental if we value it for its own sake, as an end in itself, or for reasons other than considerations relating to its usefulness in bringing about any particular set of

21. See CHRISTINE M. KORSGAARD, *Two Distinctions in Goodness*, in *CREATING THE KINGDOM OF ENDS* 249, 250–51 (1996).

22. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 2–3, 19 (1993).

23. KORSGAARD, *supra* note 21, at 257–58 (interpreting Kant).

24. G.E. Moore famously suggested that a thing could be thought to have intrinsic value if we would consider it worthwhile for the thing to exist “even if there were absolutely nothing else in the Universe besides.” G.E. MOORE, *ETHICS* 68 (1912) [hereinafter MOORE, *ETHICS*]; see also G.E. MOORE, *PRINCIPIA ETHICA* 187 (1903); NOAH M. LEMOS, *INTRINSIC VALUE: CONCEPT AND WARRANT* 10–11 (1994). Of course, on this definition of intrinsic value, one might well believe that nothing has intrinsic value (although Moore himself assumed this was not possible, G. E. MOORE, *PRINCIPIA ETHICA*, *supra*, § 17 ¶ 2) or that only some very limited classes of things do, such as rational beings. Immanuel Kant famously argued that the only thing that was unconditionally good was a “good will,” i.e., the motive of acting in accordance with duty. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 7 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997) (1785); KORSGAARD, *supra* note 21, at 257. These ontological questions about value are not particularly germane to my discussion here. What is important for my purposes is that one can value a thing for its own sake (i.e., non-instrumentally) without being committed to any belief that the thing has intrinsic value in the Moorean sense. It is also possible to regard something as instrumentally valuable even while also believing that it has intrinsic value, as I suggest below.

25. See ANDERSON, *supra* note 22, at 19; KORSGAARD, *supra* note 21, at 257–58.

26. See JOSEPH RAZ, *THE PRACTICE OF VALUE* 15–16 (2003) (“Things are of mere instrumental value when their value is entirely due to the value of what they bring about, or to the value of what they are likely to bring about or may be used to bring about.”).

further consequences or results.²⁷ According to one influential account, the intrinsic-extrinsic and instrumental-end distinctions are best regarded as orthogonal.²⁸ A slightly different recent account suggests that we think of instrumental value simply as one species of extrinsic value.²⁹ The precise relation between the two sets of distinctions, however, is not critical for my own purposes here. What is important is to note the two sets of questions that can be asked about a thing's value. First, is it valuable unconditionally, in and of itself? And second, whether it is valuable in and of itself, do we value it as an end (for its own sake), for its usefulness in bringing about certain results, or for other reasons? I take the first question as relating to the intrinsic-extrinsic distinction and the second as relating to the instrumental-end distinction.

Returning to our examples, we might say that the value of the stock certificate is extrinsic and wholly instrumental. Its value is extrinsic in that it depends and is conditional on the significance it is given by the rules of various financial and legal institutions.³⁰ We can also say that the stock certificate is instrumentally valuable insofar as we value it merely as a means of securing, or as a representation of,

27. Langton, *supra* note 20, at 162–64.

28. Christine Korsgaard argues that the intrinsic-extrinsic distinction bears on the way in which a thing can *have* value, whereas the instrumental-end distinction bears on the way in which *we value* a thing. See KORSGAARD, *supra* note 21, at 250, 257; Langton, *supra* note 20, at 160 (discussing Korsgaard's view).

29. See Langton, *supra* note 20, at 163–64. Langton's account is an elaboration and modification of Korsgaard's view. Langton argues that Korsgaard's approach may be too limiting. According to Langton's alternative approach, the intrinsic-extrinsic distinction can apply both to the way in which a thing can have value and to the way in which we value things. For Langton, to value something intrinsically is to value it for its own sake, and to value something extrinsically is simply to value it for the sake of something else. She suggests that we think of valuing something instrumentally as a specific way of valuing it for the sake of something else, i.e., as a subspecies of valuing something extrinsically. Furthermore, according to Langton's proposal, while a thing can have either intrinsic or extrinsic value, she suggests that we think of a thing as extrinsically valuable if it gets its value from another source, and that instrumental value be regarded as one specific type of extrinsic value. See *id.* There are, of course, many other ways in which philosophers have tried to explicate the notion of intrinsic value and the distinctions among the ways in which things can have value or be valued. See, e.g., ANDERSON, *supra* note 22, at 2–3, 19; RAZ, *supra* note 26; Warren S. Quinn, *Theories of Intrinsic Value*, 11 AM. PHIL. Q. 123 (1974); Judith Thomson, *On Some Ways in Which a Thing Can Be Good*, 9 SOC. PHIL. & POL'Y 96 (1992).

30. Cf. KORSGAARD, *supra* note 21, at 257–58 (equating extrinsic value with conditional value).

other things that we value.³¹ Similar examples might include things like tools, paints, medicines, maps, and so on.

Not all extrinsically valuable things, however, need be regarded as having purely instrumental value. In other words, the value of some things can be conditional or dependent on their particular contexts, yet not consist in their usefulness in bringing about any further results or consequences. We might think of the value of the child's finger painting, for example, as entirely extrinsic yet non-instrumental. Our reasons for regarding the finger painting as something good or valuable have nothing to do with its usefulness as a means to any further end, so we do not regard its value as instrumental. But we would not think of the object as having any value in and of itself. Objectively speaking, it is perhaps nothing more than a haphazard smear of random colors. The finger painting's value depends on conditions external to it, such as the fact that it was given to us by a child as an expression of her affection for us. The value of the finger painting is in that sense extrinsic yet non-instrumental.

We think of the child herself, of course, as being both non-instrumentally and intrinsically valuable. The child's value does not depend on her usefulness, and we would also say that her value, like the value of any person, is not conditioned on anyone's actual attitudes or actions with respect to her. She is valuable and worthy of moral respect by virtue of being a person or her status as a (developing) rational agent. Some might argue that certain natural phenomena—think of the Grand Canyon or perhaps an unspoiled rainforest—are also both non-instrumentally and intrinsically valuable, insofar as our esteem for those things has nothing to do with what they can be used to produce, and insofar as they could be thought valuable even if no one actually cared about them.³² We can say of such things that they are valuable and good just by virtue of the sorts of things they are, and that we value them for their own sakes or as ends in themselves.

The categories of instrumental and intrinsic value are in a limited sense mutually exclusive, in that it would be contradictory to say that something was both intrinsically valuable and that its value was

31. As Rae Langton points out, however, a misguided miser might value the stock certificate as though its value was non-instrumental and intrinsic. Langton, *supra* note 20, at 165.

32. See MOORE, *ETHICS*, *supra* note 24, at 68.

merely instrumental. If we regard something as intrinsically valuable, then we necessarily also believe that its good derives at least in part from something besides the consequences it can effect. But it does not follow that intrinsically valuable things can only be valued for their own sakes.³³ It is certainly possible to regard as instrumentally valuable something that holds intrinsic value. If, for example, our child's finger paintings unexpectedly become objects of critical acclaim and popular fancy, an unscrupulous art broker might come to regard the child as a mere instrument to further his own financial ends. Similarly, an industrialist who regarded the unspoiled rainforest as a source of lumber might similarly be described as treating as instrumentally valuable something that is good in itself. We might say that the art broker and the industrialist are in some sense making mistaken and morally objectionable judgments about the value of the objects of their interest. Perhaps we might even say, more generally, that bearers of intrinsic value *ought not* be valued as mere instruments. But it seems nevertheless true that it is possible for people to regard as instrumentally valuable things that could (and perhaps *should*) be valued for their own sakes.

By the same token, it seems possible to value for its own sake something that we might think *ought* to be regarded as merely having instrumental value. A miserly billionaire, for example, might regard the continued accumulation of his personal wealth as good in and of itself,³⁴ rather than as a means for securing goods or services for himself or others. Whereas regarding intrinsically valuable things as mere instruments (as do the art broker and industrialist above) can be morally objectionable, the sort of misvaluing that the miser is guilty of seems not so much immoral as it does misguided, irrational, or fetishistic.³⁵ Our beliefs about the nature of a thing's value — i.e., whether it is intrinsic or extrinsic—thus influence our judgments about the way in which we ought to value the thing —i.e., whether as a means to further ends or for its own sake.

Clarity about the nature of a thing's value and how we ought to value it is important to evaluating claims about the extent to which

33. For a very insightful discussion on this point, see Langton, *supra* note 20, at 162–65.

34. *See id.* at 165.

35. Of course, we might also criticize the miser on moral grounds if his fetishistic attitude toward money was causing him to be uncharitable or otherwise neglectful of duties he owes to others.

that thing is worth promoting, protecting, or otherwise caring about. For example, suppose that you come across a stack of your child's finger paintings as you are cleaning out your office. I walk by and see you wistfully admiring them. I coldly argue that the paintings are not worth preserving because they are nothing but random splotches of ugly colors on cheap paper that serve no useful function and have no monetary worth. How will you respond? Surely, you will not be moved by my argument. Why not? It is because my argument is nothing more than an assertion that the finger paintings have neither instrumental value nor intrinsic significance. But, of course, your reasons for caring about the finger paintings have nothing to do with those considerations. You might agree that they are not valuable either as useful instruments or in virtue of their intrinsic merits, but you value them nonetheless.³⁶ You do not necessarily believe that the paintings have any value or worth in and of themselves. They are valuable because they arise out of your relationship with your child. You care about the finger paintings not for their own sakes, but for the sake of that relationship. Their value is extrinsic yet you do not value them in a purely instrumental way. My blindness to this possibility was my mistake in dismissing your interest in the finger paintings.

B. Racial Diversity as Conditionally and Extrinsically Valuable

Let us venture into more controversial waters. Finger paintings are one thing; the problem of specifying the value of racial diversity is another. What can we say about the value of racial diversity? Diversity is a property of a group of individuals.³⁷ Of course, particular individuals can contribute or detract from a group's racial diversity, but it is the group, not its members individually, that bears the property of diversity. We can start, then, by asking whether racial diversity is an *intrinsically* or *extrinsically* valuable property for a group of people.

I stated above that to say that a thing is intrinsically valuable means that its goodness does not depend on external conditions. Thus, to say that a particular property is intrinsically valuable is to say

36. Here is a case in which Langton might say that you simply value the finger paintings extrinsically. See Langton, *supra* note 20, at 163.

37. Groups can of course be composed of subgroups, and so one might also talk about intergroup diversity, see SCHUCK, *supra* note 13, at 20–21, but I am concerned here with diversity *within* groups composed by individual persons.

that it is unconditionally good that something be characterized by it, or that we always have reason to want that property to be present. If racial diversity has intrinsic value, therefore, we should always have reason to want a group of people to have this property, whatever the circumstances. This does not seem altogether plausible.

Under some conditions, it would seem at best a matter of indifference whether a group possessed racial diversity. Suppose a band of violent criminals walks into a bank and takes everyone inside hostage. Is it necessarily a good thing that the hostage group be racially diverse as opposed to homogeneous? If the band of criminals happens to be all white, would we be inclined to say that it would be better if that group were more racially diverse?

These questions are of course absurd. We have no reason to care about the hostage or criminal group's racial composition, much less to prefer that either group reflect any sort of diversity. The hostages are a group of people suffering various wrongs at the hands of their captors. If the racially homogeneous composition of the hostage group were the result of some non-random circumstance (e.g., the criminals' racist motives), we might have reason to regret the existence of that circumstance or resent those responsible for it. At most, however, this would show that there are some conditions under which we might have reason to be concerned about the group's racial composition. It does not show that it would be intrinsically better that the group be racially diverse. Assuming that the composition of that group of people is a matter of pure happenstance, I do not see how one could say that it would be better for that group, better for anyone else, or better from some agent-neutral perspective that the group be racially diverse. The same seems true of the criminal group. The perpetrators are engaging in legally and morally impermissible conduct, and the group's racial composition seems (*prima facie*) immaterial to any judgment about the goodness, badness, or moral character of that group. There is no reason to think that the presence of racial diversity among this group of criminals would be *in itself* a good or bad thing.

This simple thought experiment shows, I believe, that the good of racial diversity is *not* intrinsic or unconditional.³⁸ We cannot say

38. George Sher asserts that in debates about diversity, "the appeal to intrinsic value is essentially a nonargument." George Sher, *Diversity*, 28 PHIL. & PUB. AFF. 85, 97 (1999). His assertion comes in the context of a broader contention that all arguments in favor of diversity-

that it is valuable, in and of itself, whenever and wherever it appears, nor that we always have reason to promote it or bring it about. The value of racial diversity is therefore extrinsic, in that it depends upon the particular conditions and circumstances in which it is present.

One might object here that my hostage scenario distorts our thinking about the value of diversity and cannot support any general claims about the nature of that value, because the two groups of people I identified in that case—the hostages and the criminals—are not groups that are worth caring about in the first place. One might argue, in other words, that no one cares about the racial diversity of hostages and criminal enterprises because those groups are themselves devoid of value. Perhaps racial diversity *is* always a good thing in groups or communities that have institutional value or at least legitimacy.³⁹

It is not obvious to me that this is in fact the case.⁴⁰ But even assuming this qualified statement to be true, the very need for the qualification only proves my point. The value of the property of racial diversity is conditional: it depends on the context in which it arises. It is perhaps a good thing given certain conditions but perhaps not others; or perhaps it is good for some groups and irrelevant to others. Perhaps the good of racial diversity depends on certain basic features of the group that possesses or lacks it; or perhaps it depends on various conditions characterizing society at large. In any event, the value of racial diversity appears to be conditional and hence extrinsic, rather than intrinsic in the sense of being good in and of itself.

To say that racial diversity is not intrinsically and unconditionally valuable does not diminish its significance. It only establishes that its value is contingent on the conditions under which it obtains. The examples I have suggested show, for example, that whether there is any reason to care about a group's racial diversity may depend at least in part on the nature of the group itself, including its purposes and the circumstances of its formation. While this conclusion should

based affirmative action rely on backward-looking attempts to rectify past injustices, *see id.* at 103, a conclusion that I do not endorse.

39. *Cf.* SCHUCK, *supra* note 13, at 57 (discussing institutional structures, such as markets, that value diversity).

40. Suppose a group of people join together to make an anonymous donation to support relief efforts following a natural disaster that devastates some urban community. All else being equal, would we say that it would be preferable that this group of anonymous donors be racially diverse? It does not seem to me that it should matter.

be at some level perfectly obvious, it flushes out an important implication. Because racial diversity is not an intrinsic good, the mere fact that some action will increase a group's racial diversity does not *necessarily* count as a consideration in favor of taking that action. There is nothing about racial diversity *in itself* that explains why and under what conditions it is worth caring about. This is what it means to say that the value of racial diversity is extrinsic. Any explanation of that value must provide an account of the circumstances that make it the case that racial diversity can be regarded as having value.

C. Conditions on the Value of Racial Diversity

Let me begin an effort towards such an explanation by making some general observations about the types of settings in which the racial diversity of a population seems to be relevant. Generalizing from some of the examples discussed above, the racial diversity of a group seems irrelevant—neither good nor bad—in cases where the group does not constitute a socially legitimate community or association. On the other side of that coin, it seems that we do tend to regard racial diversity as a good thing in various contexts that touch on the basic institutional organization of our society.⁴¹ These contexts include employment, education, and governance. To be clear, I assert that it seems desirable that the groups of people operating in these settings be characterized by racial diversity rather than by racial homogeneity. This seems true whether or not we would be justified in attempting to bring about racial diversity in these contexts through any particular means. Whatever one's views on the latter score, I take it to be uncontroversial that the presence of racial diversity in the groups that populate these settings is generally a good thing, something to be glad for when it is present and something to be worried about when it is not. Much the same can be said with respect to the areas of life that give structure to our social interactions, such as residential and interest-based communities. It seems good that those interactions take place in the presence of racial diversity, and it seems bad, although not without

41. See, e.g., Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 CONST. COMMENT. 15 (2004).

exception, when our social interactions are limited to racially homogeneous groups.⁴²

Thus, putting aside for the moment the controversial question of whether and how we should actively try to bring about racial diversity in any of these various contexts, it seems we can say at least that it would be in general a good thing for racial diversity to characterize the various domains and sub-domains of public and private employment, educational institutions, local and national politics, interest-based organizations of all sorts, and residential communities. We might also plausibly conjecture that the value of racial diversity in these contexts derives from their centrality to the proper functioning of our economic, political, and social institutions, and the just distribution of economic goods and opportunities. We care about racial diversity, in other words, not for its own sake, but for the sake of the value we place on the well-functioning of our social institutions and our democratic way of life in general.

These observations broadly suggest some of the contexts in which we tend to care about racial diversity. True as they might be, they do not address the reasons we might have to do so. Granted that our concern for racial diversity derives from our concern for, say, the value we place on certain forms of social interaction, the hard question is *why* our valuing the latter should be thought to provide grounds for caring about the former. Given that we care about racial diversity for the sake of broader social concerns, how exactly does the one concern follow from the other?

D. The Instrumental Value of Racial Diversity

1. Group and social benefits

Here, it becomes helpful to ask whether the value of racial diversity—given our conclusion that it is extrinsic rather than intrinsic—is instrumental or non-instrumental. Let us consider both possibilities. One familiar argument in favor of promoting racial diversity in various contexts is that it has good consequences for all members of the group in which such diversity is present, such as improved learning outcomes or beneficial socialization effects in the

42. I say this advisedly. Surely, there are particular cultural contexts in which homogeneity is *not* bad. We might imagine, for example, a group of rabbis engaged in prayer, or more intimate groups defined by familial relations. I discuss this point in a bit more depth below. *See infra* Part III.E.

educational context,⁴³ productivity benefits⁴⁴ in the workplace,⁴⁵ or better⁴⁶ outcomes in various decision-making contexts.⁴⁷ Thus, racial diversity is not valuable for its own sake, but is instrumentally valuable as a means of bringing about further consequences that directly benefit groups that have it.⁴⁸

A related but distinct argument is that racial diversity in certain contexts is instrumentally valuable not only because of its immediate effects for the groups or particular institutions that have it, but because of its longer-term potential to produce benefits for society as

43. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 843 (2007) (Breyer, J., dissenting).

44. For a recent, extended argument concerning such benefits (though not focused on racial diversity specifically), see SCOTT PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 319–20 (2007).

45. There is a wealth of established and ongoing empirical research studying the effects of diversity in corporate organizations, teams, and workgroups. See Karen A. Jehn et al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, 44 ADMIN. SCI. Q. 741 (1999); Elizabeth Mannix & Margaret Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. IN THE PUB. INT. 31 (2005), as reprinted in SCI. AM., Aug. 2006, at 32 (abridged); David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.–Oct. 1996, at 79; David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1571–89 (2004); Katherine Y. Williams & Charles A. O’Reilly III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RES. ORGANIZATIONAL BEHAV. 77 (1998); Eric S. Nguyen & Douglas Brayley, *Good Business: A Market-Based Argument for Law Firm Diversity* 7–9 (Working Paper, May 21, 2008) (citing numerous studies), available at <http://ssrn.com/abstract=1124224>.

46. Relevant senses of “better” might include fairer, more accurate, and more empathetic.

47. An example might be the claim that a racially diverse court is better because it would be likely to produce fairer, more enlightened, or more empathetic decisions than a non-diverse court. Similar claims about the decision-making abilities of diverse as compared to non-diverse groups might be made for other contexts as well. See, e.g., Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 608–10 (2006); John M. Conley et al., *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say About Why Diversity Matters* 9–24 (Univ. of N.C. Legal Stud., Working Paper, Paper No. 1415803, 2009), available at <http://ssrn.com/abstract=1415803>.

48. This idea is nicely captured by one formulation of a basic research hypothesis for social scientists studying the benefits of diversity: “Identity diverse groups perform better than homogeneous groups.” PAGE, *supra* note 44, at 319. The posited value of diversity here is that it enhances group performance, which is in turn valuable insofar as that enhanced performance will help the group bring about its goals. (Diversity of “identity” is not necessarily the same as racial diversity, but the point is still the same.)

a whole.⁴⁹ One especially familiar instantiation of this argument is that it is good for elite educational institutions to promote racial diversity among their student bodies⁵⁰ because these institutions provide a path to future leadership positions both in private industry and in government.⁵¹ By enrolling significant numbers of minority students, these institutions can “seed” the upper echelons of private industry and government with traditionally underrepresented racial groups, with a view to ameliorating race-based economic inequalities and providing role models to encourage future generations of disadvantaged minorities to pursue similar success.⁵² Another similar argument is that exposure to and participation in racially diverse groups tends to enhance attitudes of tolerance⁵³ and reduce racial bias among all members of those groups,⁵⁴ which in the long run would tend to reduce discrimination, promote healthy social relations among all citizens, and lead to a more just society.⁵⁵

The argument that racial diversity may have instrumental value does not entail any claim that racial diversity is intrinsically good,⁵⁶

49. See David Orentlicher, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777, 782–87, 795–803 (2005) (arguing for the beneficial consequences of diversity in education and employment).

50. See generally WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610 (2003) (arguing that the promotion of racial diversity can be justified as a means of improving the conditions of society).

51. “[T]he path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity.” *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (O’Connor, J.).

52. This is essentially the argument advanced by Justice O’Connor in her *Grutter* opinion. See *id.* at 332–33.

53. LEVINSON, *supra* note 14, at 95 (discussing the “civic-tolerance” argument for diversity (citing BOWEN & BOK, *supra* note 50, at 228)).

54. See, e.g., Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1066–67, 1109–10 (2006) (proposing the use of certain special circumstances of racial diversity as a way to reduce racial bias); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 24 (2000) (noting a broad range of research finding that “intergroup contact ‘will reduce prejudice’” given certain other limiting conditions) (quoting H.D. FORBES, *ETHNIC CONFLICT: COMMERCE, CULTURE, AND THE CONTACT HYPOTHESIS* 115 (1997)).

55. Racial diversity might help effect justice in more localized institutional contexts as well. Consider, for example, recent research suggesting that racial diversity in the composition of juries might increase the quality of their deliberations and the soundness of their verdicts. See Sommers, *supra* note 47, at 608–10.

56. Nor does it imply that racial homogeneity is intrinsically bad.

that it is itself valuable as an end,⁵⁷ or even that it is immediately beneficial for the particular group in which it is present. Instead, it assumes the existence of certain conditions, such as economic inequalities that disproportionately disadvantage certain racial minority groups, and that we (as a society) have reason to take action to correct those inequalities or other circumstances of injustice.⁵⁸ The “seeding” and role-model arguments in favor of cultivating racial diversity amount to no more—and no less—than an assertion that creating such diversity in certain locales provides a means to that end. On this sort of view, the value of racial diversity lies in its usefulness as a tool in realizing certain states of affairs in the future.⁵⁹ Moreover, on this view, what we ultimately care about is bringing about those future states of affairs, rather than about racial diversity in itself.⁶⁰

An obvious and important implication of staking the value of racial diversity on its potential for producing beneficial consequences or making a causal contribution to some future state of affairs is that the value of diversity becomes dependent upon a set of hypotheses that are subject to empirical verification or challenge.⁶¹ On the instrumentalist view of racial diversity, whether or not racial diversity truly is worth caring about depends on whether achieving it in a particular context does in fact produce or contribute to its claimed beneficial consequences. If the value of racial diversity consists exclusively in its instrumental efficacy, then successful challenges to that efficacy⁶² will also, as a matter of logic, disprove its value.⁶³

57. Recall that it is possible for the value of a thing to be extrinsic yet non-instrumental. The finger painting given to you by a child (discussed above) is a possible example.

58. See, e.g., Greenberg, *supra* note 50; Orentlicher, *supra* note 49.

59. See Greenberg, *supra* note 50, at 1618 (“What I find more interesting than the diversity argument [as justification for affirmative action] is its further justification of affirmative action for what it does for society as a whole [T]he whole “nation’s future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples.” (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978))).

60. See *id.*; Orentlicher, *supra* note 49.

61. And of course, the testing of these hypotheses is a current focus of ongoing social science research. See, for example, the various studies cited at *supra* notes 44–48 and *infra* note 62.

62. Examples of such challenges include studies questioning whether racial diversity in the classroom really does produce better educational outcomes, whether diversity in the workplace really does contribute to greater productivity, and whether racial diversity in residential settings really does improve inter-racial relations. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 760–66 (2007) (Thomas, J., concurring)

Along these same lines, another implication of pinning the value of racial diversity to its beneficial effects is that if one could show an equally effective method of producing those same consequences *without* cultivating racial diversity, we should have no particular reason to prefer the promotion of racial diversity over those other equally effective means. Rather, the choice between those two means of producing the desired consequences should be a matter of indifference.⁶⁴ We could still say that racial diversity had value, but that value would simply be identical to the value of the other means of arriving at the same results. This conclusion again falls out directly from the assumption that the value of racial diversity consists wholly in its instrumental value.

2. *The evidential value of diversity as a “signal”*

Although the view of the value of racial diversity as a means of effecting desirable social consequences is perhaps the most prevalent instrumentalist view,⁶⁵ it is not the only possible one. A somewhat more nuanced view involves regarding the value of racial diversity as consisting in the *information* it provides about the group that has it. We may value racial diversity, in other words, for what it “signals” about such groups.⁶⁶ On this view, we may think of racial diversity as

(citing studies and expressing skepticism about pedagogical benefits of diversity); Lisa Hope Pelled et al., *Exploring the Black Box: An Analysis of Work Group Diversity, Conflict, and Performance*, 44 ADMIN. SCI. Q. 1, 20–24 (1999) (reporting some counterproductive effects of racial diversity in the workplace); Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*, 30 SCANDINAVIAN POL. STUD. 137, 137–38 (2007) (arguing that increases in ethnic diversity appears to be correlated with increased social isolation in the short run).

63. As Peter Schuck puts the point, someone who sees the value of diversity in its potentially beneficial consequences should be “agnostic about diversity.” SCHUCK, *supra* note 133, at 66.

64. If that conclusion seems implausible, that might indicate the pull of non-instrumental considerations in favor of racial diversity, to which I turn below.

65. Cf. Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 677 (2004) (noting that current legal justifications of affirmative action have shifted away from remedial rationales and toward instrumental justifications based on the benefits of the diversity thereby produced).

66. The term “signal” has a rich, somewhat technical signification and usage in certain areas of social science research. See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* 24–26 (2000). An adequate treatment of signaling theory is far beyond my scope here. For an excellent and concise summary of the basics, see Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 446–50 (2008); see also Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998).

good just because of the value we place on other attributes that are connected to such diversity.

For example, we might think of racial diversity as good for a group of people in the same way that a physiological indicator of health, such as achieving good results on an exercise stress test, might be regarded as good for a person.⁶⁷ Passing a physical stress test is not valuable for its own sake, but neither would it be quite right to say that it is valuable for what it can be used to bring about. It is a good thing for a person to be able to pass a stress test because it evidences good health. It is a proxy for something good, but not something that we value for its usefulness in bringing about desirable effects.⁶⁸ Similar observations could be made about a newborn baby's cry or a dog's wet nose. Neither the infant's wailing nor the moisture on the pet's nose is good for its own sake, nor for any particular effects they produce. Rather, we think that it is good for a dog's nose to be wet and for the newborn to cry because those things are indicators of wellness and proper functioning. Along these lines, one might say that it is good for a group to exhibit racial diversity, because the fact of diversity indicates that the group is in some respects socially healthy, e.g., that it does not engage in exclusionary discrimination and perhaps that it is committed to a certain progressive ideal of equality. The existence of racial diversity provides us with valuable information about the group that has it. We might call this an evidential account of the value of diversity.

If racial diversity can be valuable for the information it provides, what exactly *is* that information? The answer will depend greatly on the broader circumstances of the group. For example, the existence of racial diversity in a random group of people on a subway train might signal nothing of particular interest, normatively speaking.⁶⁹ This seems consistent with what I think most people would say in this context—namely, that we have little if any reason to care whether the group exhibits diversity or not. On the other hand, the existence of racial diversity in the partnership ranks of a large law

67. See *Recovery Information Fine-Tunes Stress Test Results*, HARV. HEART LETTER, June 2003, at 1–2.

68. *Id.*

69. This is not to deny that the presence (or absence) of diversity on the train might provide a basis for various factual inferences, such as demographical information about locations along its route.

firm might allow us to draw more significant inferences,⁷⁰ and one might say on the basis of such inferences that it would be a good thing for racial diversity to exist in that kind of group. On the evidential theory of racial diversity as signal, this is because the existence of diversity in that context probably does not happen by accident and therefore says something of interest about the firm's values, commitments, and priorities—perhaps, for example, that members of the firm share an ethos of equality or justice. If we are in favor of such values and commitments, then we will be inclined to believe that the presence of racial diversity is, quite literally, a good sign. And one can believe that racial diversity is a good sign in this sense without also believing that it is valuable for its own sake or that its value depends on its ability to produce beneficial effects.

So does the evidential theory of racial diversity's value amount to an instrumental view of racial diversity or a non-instrumental view? I think that the view is somewhat difficult to categorize. One might argue that the evidential view actually implies that racial diversity itself has *no* value, and that what really bears value, if anything, is whatever state of affairs—e.g., adherence to practices of nondiscrimination or underlying conditions of justice—that the condition of diversity is supposed to evidence. So, in the law firm example, we might be able to make certain kinds of inferences about the firm based on its level of diversity, but the only thing we would really have reason to care about is whatever set of circumstances gives rise to that diversity, not about the fact of diversity itself.

At the same time, it also seems true that racial diversity regarded as a signal could be regarded as valuable in virtue of its usefulness. The signal of racial diversity could be instrumentally valuable in the same sense that any kind of information can be useful in the service of further ends. The dog's wet nose is useful to the veterinarian in making an assessment of the dog's health. In the same way, the existence of racial diversity in a particular group or community might be useful to a governing body in determining whether particular policies or programs are working fairly, equitably, or otherwise as they should be. And to outsiders who might be considering joining the membership of a group, the presence or absence of racial diversity might be useful in understanding certain values and

70. See Laura Nyantung Beny, *Diversity Among Elite American Law Firms: A Signal of Quality and Prestige* 24–29 (Working Paper, 2006), available at <http://ssrn.com/abstract=777504>.

commitments of the group that might not otherwise be ascertainable.

It might be thought that the evidential view of racial diversity is logically inconsistent with any view that would favor the creation of racial diversity as a *means* of effecting justice: if the dog's wet nose and the newborn's cry are really just signals of good health, we would be foolish to splash water on a dog's nose or make the baby cry in order to bring about a condition of health. But we must be careful here. Even if one were to regard racial diversity as epiphenomenal in some sense with respect to basic conditions of justice, it would not necessarily be foolish to aim at diversity for the sake of bringing about the conditions that it is supposed to signal. Bringing about racial diversity is obviously very different from squirting water on a dog's nose: in many contexts, it cannot be accomplished without significant institutional resolve and deep commitment. This is precisely what makes racial diversity valuable as a signal. If it were easy and costless to produce, its evidential value would be very low.⁷¹ It seems plausible, therefore, that the process of creating diversity might itself effect deep social consequences. Indeed, it might even be the case that the kind of commitments that are required to create racial diversity in certain contexts also tend to effectuate other more basic conditions of justice. If that were true, then not only would one expect racial diversity to have an evidential relation to those basic conditions, but it might nevertheless make sense to aim at racial diversity for the sake of bringing about those conditions, particularly if targeting the former turned out to be easier or more practicable than the latter. In that sort of scenario, it might make sense to aim at racial diversity as a sort of surrogate for the conditions of justice that it tends to signal.

A final way in which racial diversity as a signal might be regarded as instrumentally valuable is as a means of communicating certain information about a group to outside observers.⁷² Suppose, for example, that racial diversity is a reliable signal of a commitment to an ethos of equality and justice. If so, then a group might regard the attainment of diversity as an effective way of communicating to outsiders that it shares that ethos. Racial diversity might, from this

71. See Broome & Krawiec, *supra* note 66, at 449.

72. Cf. Wilkins, *supra* note 45, at 1591-95 (identifying some incentives law firms might have to advertise their diversity).

perspective, be like an advertisement of the group's commitment to certain norms,⁷³ or even of its prestige,⁷⁴ and its value might then lie in its usefulness as a means of inducing others to form certain beliefs about the group.⁷⁵

E. Non-Instrumental Ways of Valuing Racial Diversity

So far, I have been considering several ways in which racial diversity could be thought instrumentally valuable, or useful in the service of further ends. Are there any non-instrumentalist (yet extrinsic) accounts? Are there arguments for regarding the racial diversity of a group as having positive value that does not depend on its usefulness or its desirable effects?

I suggest two arguments for the goodness of racial diversity that do not derive from the value of its effects. First, one might argue that racial diversity is good for particular groups and communities that have it, even apart from any further consequences that diversity might facilitate, in the same way that, say, developing a variety of talents might be thought good for an individual person. Consider what we (if we were in a certain Aristotelian frame of mind) might say in the case of the individual. We might say that it is a worthwhile goal for a person to develop her talents, whether or not this is instrumentally useful to him or anyone else, simply because trying to achieve one's full potential is part of what constitutes human flourishing and hence is part of what defines the notion of good for human beings.⁷⁶ It is worth pursuing for its own sake if one cares at

73. *Id.*

74. See G. Mitu Gulati & David B. Wilkins, *Why Are There So Few Black Lawyers in Corporate Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 599–601 (1996) (explaining how the existence of racial diversity might be regarded as a sign of excellence or prestige in the law firm context).

75. There is, of course, the possibility of false signals, i.e., the possibility that a group might manufacture a certain level of racial diversity to make it appear that it is committed to a certain vision of equality, when in fact it is not. But, as noted above, creating racial diversity in the contexts we care about it most tends to be costly and requires a great deal of institutional resolve. This tends to reduce the likelihood of a "false" signal. See Broome & Krawiec, *supra* note 66, at 449.

76. Cf. Christine Korsgaard, *The Dependence of Value on Humanity*, in RAZ, *supra* note 26, at 79 (arguing that the values of some things are internal to the very idea of those things). Notice that this claim that racial diversity is good for its own sake is different from the claim I rejected earlier that racial diversity has intrinsic value. We might value racial diversity for its own sake, but that value may be thought to derive entirely from the value of the community that has it. See KORSGAARD, *supra* note 21, at 264; Langton, *supra* note 20, at 163–64.

all about one's own good.⁷⁷ One might make a similar argument that racial diversity is naturally good for people joined in community. Racial diversity is something that a community has reason to pursue for its own sake, because it partly constitutes a certain ideal of human interaction and society; and so one cannot care about the good of a community without also caring about that community's racial diversity. The argument is not that racial diversity is intrinsically good, but that it is part of an instantiation of human community to which we are committed, and so to value the latter is necessarily to value the former.

I think this argument runs up against some difficulties. For one, it helps itself to a conception of an ideal community that needs to be argued for, as I suspect not everyone will find it to be self-evidently correct. Is it really the case that racial diversity, or diversity of any other kind for that matter, is necessarily a constitutive aspect of community? I think there is reason for skepticism here. It would suggest, for example, that communities within racially homogeneous societies are somehow deficient *qua* community, even if the society's homogeneity is purely a happenstance of, say, geographical isolation. It would also suggest that, within the context of a racially diverse society, interest-based groups that might voluntarily be formed for the sake of celebrating shared racial identities could not live up to an ideal of human community. Those conclusions seem to me to depend on an implausibly narrow notion of what constitutes a good community. We can agree that racial diversity enhances many kinds of communities without necessarily having to accept that it is constitutive of the very ideal of community.

A second non-instrumental approach to understanding the value of diversity is perhaps a slight variation of the first. Whether or not racial diversity is constitutive of the good of human community, we might say, more modestly, that given the fact of a racially diverse society, valuing racial diversity within the society's various institutional domains is constitutive of a commitment to social equality and justice.⁷⁸ More specifically, if the broader population of

77. This is not quite the same as claiming that developing one's own talents has intrinsic value (if that is taken to mean that it is unconditionally good), because the value of human flourishing itself depends on there being value in the good of human beings.

78. See Lizzie Barmes & Sue Ashtiany, *The Diversity Approach to Achieving Equality: Potential and Pitfalls*, 32 *INDUS. L.J.* 274, 292 (2003) (noting a basic distinction between

a society is characterized by a certain racial diversity, and if we are committed to a conception of equality or justice under which all segments of society are entitled to the same opportunities with regard to occupation, civic participation, political life, and residential community, then we must also regard racial diversity within those relevant institutional contexts as good, insofar as such diversity is a necessary concomitant of that sort of equality.⁷⁹ In other words, if the realization of certain conditions of justice and fair equality of opportunity would entail the distribution of various goods, positions, and offices among all segments of our diverse society, then one could not regard the realization of those conditions as good without also seeing racial diversity in the relevant institutional contexts as good (to the extent that the absence of such diversity would be inconsistent with the satisfaction of those aforementioned conditions).⁸⁰ On this sort of view, the good of racial diversity is a practical consequence of the good of the realization of certain conditions of justice, and so valuing racial diversity would simply be part of what constitutes a commitment to that conception of justice.⁸¹ Racial diversity on such a view is not good in virtue of its effects or because of its usefulness, but is good insofar as it partly constitutes the realization of a certain notion of justice and substantive equality. This is an extrinsic but non-instrumental account of the value of racial diversity.

“valuing diversity for instrumental . . . reasons and valuing diversity for intrinsic, justice reasons”).

79. Cf. SCHUCK, *supra* note 13, at 57 (describing a view of diversity as “a possible, or even probable consequence of individuals’ autonomous exercise of their wills and rights” and suggesting that on this sort of view, “the diversity that flows from these exercises of individual freedom is presumptively valid”).

80. This argument assumes the fact of racial diversity. It would go through neither in the case of a society that lacked diversity, nor in the case of a society that had such diversity but for which racial difference lacked social or psychological salience. In the latter sort of society, racial diversity might be regarded in the same way that we regard, say, diversity of eye color, and would have no practical bearing on matters of justice or equality. A society in which racial difference had no actual significance probably would have no reason to worry about distributional disparities corresponding to race, or at least no more reason than we have to worry about inequalities corresponding to eye color. I take it as given that our society is one in which racial difference does have significance as a matter of historical and present fact. For helpful discussion of this point, see Amy Gutmann, *Responding to Racial Injustice*, in APPIAH & GUTMANN, *supra* note 10, at 163, 163–76; Foster, *supra* note 166, at 127–38.

81. Cf. SCHUCK, *supra* note 13, at 57.

IV. THE IDEAL OF COLORBLINDNESS

So far, I have been discussing ways in which racial diversity might be regarded as valuable without considering any constraints that might exist on how a community or other group that lacks it might go about producing it. One might believe that racial diversity is a good thing in contexts such as education, employment, and governance, but not that the value of such diversity is sufficient to justify every possible way of bringing it about. In other words, it might be agreed that, other things equal, it is better for certain kinds of groups to be racially diverse than not, but the “other things” that must be controlled include limits on the methods employed to engineer diversity where it would not otherwise exist.

The ideal of colorblindness is, for Chief Justice Roberts, one of those limits. It is the fly in the racial diversity ointment. We might (charitably) assume that the Chief Justice agrees that racial diversity is a condition that could have instrumental or non-instrumental value in at least some contexts. Even so, he might, without logical inconsistency, take issue with the further assertion that it is permissible in those contexts to bring diversity about by methods that conflict with the constraint of colorblindness.⁸² What, then, is the nature of the conflict between the value of racial diversity and a commitment to the ideal of colorblindness?

A. Eliminativist and Procedural Colorblindness Distinguished

We need to distinguish between two varieties of colorblindness. One set of arguments for colorblindness amounts to a sort of promotion of the value of national or social unity.⁸³ The idea here is that we as a society ought to celebrate and promote that which all of us have in common—viz., a shared identity as citizens of a single nation—rather than engage in actions and policies that tend to validate and preserve the notion that racial differences mark any real

82. This position—that racial diversity is good but that we should not abandon colorblindness for the sake of producing it—is evidently one that enjoys broad popular support. See Sam Howe Verhovek, *In Poll, Americans Reject Means But Not Ends of Racial Diversity*, N.Y. TIMES, Dec. 14, 1997, § 1, at 1, 32 (“[M]ost Americans today endorse the goal of racial diversity in schools and offices, but reject some of the main methods used so far to achieve it.”).

83. See ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 17 (1998); Lawrence Blum, *Ethnicity, Disunity and Equality*, in *CONTEMPORARY DEBATES IN SOCIAL PHILOSOPHY* 193 (Laurence Thomas ed., 2008) (discussing Schlesinger’s argument).

differences of identity or community. On this sort of eliminativist or assimilationist⁸⁴ version of colorblindness, the goal of racial justice and equality should be to render racial diversity a matter of social indifference: we should not care about racial diversity at all because, for the sake of promoting national identity, we should not regard race as having any socially or politically significant meaning.⁸⁵

I am not going to address this eliminativist version of colorblindness, partly because it does not seem to feature prominently in current debates,⁸⁶ but more importantly, because the question that interests me here is the nature of the conflict between valuing racial diversity and the notion of colorblindness.⁸⁷ The eliminativist believes that there is no social value in race, and a fortiori, no value in racial diversity.⁸⁸ If one sees no value in racial diversity in the first place, then of course colorblindness follows trivially.

The far more interesting version of colorblindness is the one that allows for the recognition of the value of racial diversity. (At least a plurality, and probably a majority of the Supreme Court does believe, after all, that diversity can constitute a compelling state interest.⁸⁹) This version of colorblindness does not simply fall out

84. *Cf.* Gotanda, *supra* note 12, at 59 (“[Colorblindness implies] a belief that, ultimately, race should have no real significance, but instead be limited to formal categories of white and Black, unconnected to any social, economic, or cultural practice.”).

85. Neil Gotanda offers a sharply articulated critique of this eliminativist version of colorblindness. He argues that it “would require abolishing the distinctiveness that we attribute to Black community, culture, and consciousness” and therefore constitutes a sort of “cultural genocide.” *Id.* at 59–60.

86. *See* WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* 5 (2006) (“[O]ur commitment to diversity has redefined the opposition to discrimination as the appreciation (rather than the elimination) of difference.”). Walter Benn Michaels’s larger point is that we are in danger of allowing our commitment to racial diversity to supplant a commitment to economic equality. *Id.* at 15–20.

87. That being said, it does not seem entirely implausible to me that the sentiment behind racial eliminativism might provide motivation to *some* current proponents of colorblindness. Justice Thomas might be one such proponent. *See* *Grutter v. Bollinger*, 539 U.S. 306, 355–57 (2003) (Thomas, J., dissenting in part) (reducing racial diversity to an “aesthetic”).

88. For an illuminating anecdotal portrayal of this sort of colorblindness, see PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* 8–9 (1998).

89. *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783–85 (2007) (Kennedy, J., concurring) (recognizing that “diversity, depending on its meaning and definition, is a compelling educational goal”); *id.* at 838 (Breyer, J., dissenting, joined by

from a rejection of the value of racial diversity.⁹⁰ We might call this view procedural colorblindness. This idea of colorblindness describes a side constraint on the considerations that may be taken into account in the differential selection of individuals for a particular benefit or burden. That constraint is, of course, that the race or color of individuals not be considered in any such decision-making process. It does not speak to whether we have reason to regard racial diversity as a worthwhile goal. The version of colorblindness that interests me is a procedural constraint that restricts the ways in which we can attempt to arrive at it.⁹¹ In an important theoretical way, therefore, the value of racial diversity and a commitment to colorblindness are orthogonal rather than directly opposed.

The true opposing correlative of the procedural ideal of colorblindness is not racial diversity, then, but rather *selecting for* racial diversity by differentiating among individuals on the basis of their race. (I shall hereinafter use “selecting for diversity” as shorthand for this longer phrase.) The most obvious reason that colorblindness and diversity—though theoretically orthogonal—are practically in conflict is that in the actual circumstances of our society, meaningful racial diversity can be achieved in certain contexts only by directly selecting for it.⁹² Thus, even though a commitment to colorblindness is not logically inconsistent with regarding racial diversity as valuable, it can create a practical impediment to bringing it about.

Stevens, Souter, and Ginsburg, JJ.) (arguing that achieving racial diversity or integration in schools constitutes a compelling interest). I assume that Justice Sotomayor would also agree.

90. It is true, to be sure, that the notion of colorblindness has come to be identified with a particular political sensibility that tends to engender skepticism about the value of racial diversity and actions that are designed to promote it. But it is at least conceptually possible to value racial diversity while also favoring colorblindness.

91. Cf. Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1140 (1996) (characterizing colorblindness as a sort of “pretending”).

92. For example, in the *Gratz v. Bollinger* litigation, the University of Michigan asserted in its brief in opposition to certiorari that if it were not permitted to select for diversity, the number of minority students admitted would “drop precipitously, leaving most of [the College’s] learning contexts with very few minority students, or none at all.” Respondents’ Brief in Conditional Opposition to Certiorari Before Judgment at 9, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

B. Colorblindness as a Deontological Constraint

The question I will address with regard to colorblindness, just as I did with regard to racial diversity, is why someone might regard that procedural ideal as something good, as something that we have reason to care about. It seems relatively easy to state various reasons in favor of selecting for diversity and *sacrificing* colorblindness, given all that I have said so far. To wit: doing so may be necessary to achieve a state of affairs to which we attach positive value. We have reason to select for diversity just because and to the extent that we have reason to care about the diversity that can thereby be produced.

What sorts of reasons, then, favor the principle of colorblindness? Why should we care about it? We might begin formulating an answer by considering how our concern for it falls within the matrix of intrinsic vs. extrinsic and instrumental vs. non-instrumental value. Is the constraint of colorblindness intrinsically important? There are many familiar sorts of circumstances in which the norm of colorblindness seems to lack relevance. If we were trying to cast the role of Martin Luther King, Jr., in a dramatic production, it seems doubtful that we would have any reason to consider using a colorblind selection procedure. Similarly, if the victim of a crime states with high confidence that her assailant was a white male, the colorblindness of a particular investigative technique would not seem to provide any reason to recommend following it in the context of that particular case.⁹³ The normative significance or value of colorblindness is therefore not intrinsic. Arguments in favor of it must derive from our commitment to other things (which I will consider below), such as the value of certain predicted consequences, or a particular conception of equality of treatment implicit in the constitutional guarantee of Equal Protection.

If colorblindness is extrinsically valuable, is its value purely instrumental, or is it primarily non-instrumental in character? Let us take a step back to understand the question. In thinking about the

93. Cf. *Brown v. City of Oneonta*, 195 F.3d 111, 118–20 (2d Cir. 1999) (dismissing Equal Protection challenge against police investigation of local black students and citizens based on criminal victim's description of assailant as a black male with a cut on his hand). *But cf.* *Brown v. City of Oneonta*, 235 F.3d 769, 785–86 (2d Cir. 2000) (Calabresi, J., dissenting from denial of rehearing en banc) (arguing persuasively that police might have violated Equal Protection Clause by conducting sweeping investigation based on racial description given by victim, to the exclusion of other aspects of description that might have called for narrower investigation).

value of colorblindness, our real interest is in understanding the nature of the constraint, if any, it should place on the procedures we use in assembling groups of people in certain kinds of institutionally significant contexts (schools, workplaces, governments, etc.). According to its proponents, the value of colorblindness is not merely something that we have reason to see as good, like a healthy lifestyle or developing our talents. The reasons in favor of the ideal of colorblindness are supposed to have a more peremptory force. The principle of colorblindness espoused by Chief Justice Roberts—the version that is supposed to invalidate procedures that select directly for diversity—*demand*s compliance and renders *impermissible* those actions that violate it. We are to think of it as a source of deontological reasons.

Deontic or deontological reasons are compulsory considerations—e.g., duties, obligations, entitlements—that have the normative force of a binding command.⁹⁴ Proponents of the principle of colorblindness argue, of course, that the principle derives its authority from the Fourteenth Amendment's proscription against denial of equal protection of the laws.⁹⁵ The principle is supposed to provide conclusive reason against using procedures that select directly for diversity *whatever* the beneficial consequences of doing so might be. One cannot respect the principle of colorblindness and at the same time view it as defeasible whenever the creation of diversity would necessitate its override. If the principle is taken seriously, the beneficial consequences of violating it simply do not count as reasons for doing so,⁹⁶ except perhaps in extraordinary cases.⁹⁷

94. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 175–80 (1986); SCANLON, *supra* note 1919, at 81–87; Stephen Darwall, *Agent Centered Restrictions From the Inside Out*, in *DEONTOLOGY* 113–14 (Stephen Darwall ed., 2003). For a wonderfully insightful illustration of the force of deontological considerations based on a few simple hypothetical cases, see R. Jay Wallace, *The Deontic Structure of Morality* 1–25 (online paper), <http://philosophy.berkeley.edu/file/2/Deonticstructure.pdf>.

95. One might argue that colorblindness is also required by some fundamental moral idea of equal treatment or fairness. I raise skeptical questions about this hypothesis below and have argued elsewhere against it. See Patrick Shin, *Compelling Interest, Forbidden Aim: The Antinomy of Grutter and Gratz*, 82 U. DET. MERCY L. REV. 431 (2005).

96. See SCANLON, *supra* note 19, at 84; JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 39–41 (2d ed. 1990) (proposing the idea of an “exclusionary reason”).

97. For one recent account of how deontological constraints (like rights) might permit exceptions, see FRANCIS M. KAMM, *INTRICATE ETHICS* 26–40 (2007).

This resistance to consequentialist considerations is not unique to the ideal of colorblindness. The same applies to any deontological restriction, be it the First Amendment prohibition against the abridgment of free speech or the general moral prohibition against promise-breaking. In each case, the rule creates an obligatory duty that cannot be overridden simply for the sake of beneficial consequences that would flow from a violation.⁹⁸ This is so even when those consequences tend to support the general policies that justify the restriction in the first place.⁹⁹ For example, suppose I have promised to look after your children on Friday night so that you can go out with your spouse, and then another friend asks me at the last minute to look after her children on that same evening so that she can keep promises she made to *five* friends to take them to dinner. The fact that I could prevent five promises from being broken by breaking my single promise to you does not provide sufficient reason for me to do so; you are entitled to hold me to my promise, even though my breaking it would result in a greater number of promises being kept overall.¹⁰⁰ The constitutional constraints of the First Amendment have a similar deontological structure.¹⁰¹ The state could not justify suppressing otherwise protected speech—e.g., a book arguing that publicly expressing one’s ideas is bad—simply by proving that such suppression would result in a net increase in the number of people taking part in the public exchange of ideas.¹⁰² The

98. Cf. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 28–33 (1974) (explaining the idea of “side constraints”).

99. See NAGEL, *supra* note 94, at 178–79; NOZICK, *supra* note 98, at 30; SCANLON, *supra* note 199, at 82–83.

100. This aspect of deontological obligation is sometimes called the “paradox of deontology.” See Christopher McMahon, *The Paradox of Deontology*, 20 *PHIL. & PUB. AFF.* 350 (1991); SAMUEL SCHEFFLER, *Introduction to CONSEQUENTIALISM AND ITS CRITICS* 8–9 (Samuel Scheffler ed., 1998).

101. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992) (invalidating content-based hate crime statute under First Amendment, even though statute served compelling state interest in protecting basic human rights).

102. I do not mean to suggest that all deontological restrictions have an identical structure. In the constitutional context, at least, they do not. The First Amendment prohibition on abridgments of free speech is different, for example, from the Fourth Amendment restriction on searches and seizures in terms of the kind of justification that would permit an exception. Even those who would oppose an absolutist version of constitutional colorblindness might support a version of the rule encompassing a more flexible framework of exceptions. See Gotanda, *supra* note 12, at 66–67 (arguing against colorblindness but in favor of a constitutional restriction on the use of racial classification modeled on the religion clauses). That sort of rule would still entail a deontological restriction insofar as it remained a

point is that insofar as colorblindness is a deontological restriction, the same kinds of observations apply. For the proponent of colorblindness, the positive benefits of racial diversity simply do not register as reasons that could be sufficient to justify selecting directly for diversity.¹⁰³ And this is true even if those positive benefits would *promote* the basic policies that underlie the ideal of colorblindness in the first place.

The real question, then, is why the principle of colorblindness should be understood in this way, as a deontological restriction that invalidates procedures that select for diversity, even when those procedures would yield consequences (viz., racial diversity) that everyone has reason to value. So let us now consider both the instrumental and non-instrumental reasons that might be thought to justify the principle of colorblindness.

C. Instrumentalist Considerations

The instrumentalist or consequentialist¹⁰⁴ defense of colorblindness appeals to the value of the good consequences that we could expect to flow from adhering to a strict policy of colorblindness. Assuming a common goal of eradicating racial discrimination and improving the situation of traditionally disadvantaged minorities, a proponent of colorblindness might take the view that strict adherence to that procedural constraint is simply the *most effective means* of achieving those goals. This is one way of interpreting Chief Justice Roberts' enigmatic claim in *Parents Involved* that the "way to stop discrimination on the basis of race is

peremptory constraint that resisted override on the basis of simple, ad hoc consequentialist balancing.

103. The proponent does not necessarily believe that the principle of colorblindness must be held exceptionless. A deontological obligation can admit exceptions while retaining its deontological character, provided that the exceptions are structurally limited to a narrow range of application. See, e.g., KAMM, *supra* note 97. For example, even the proponent of colorblindness would allow exceptions for policies that pass "strict scrutiny"—i.e., policies that are narrowly tailored to serve a compelling governmental interest; and even the prohibition on intentional killing can give way to certain justified violations, such as self-defense. The larger question of the possibility and nature of exceptions to deontological restrictions is beyond my scope here.

104. In the usual language of moral theory, arguments in favor or against a particular action based on instrumental considerations relating to the action's consequences are called "consequentialist."

to stop discriminating on the basis of race.”¹⁰⁵ The reference to “discriminating on the basis of race” is tendentious in its characterization of the race-conscious selection measures used by the school districts (what I prefer to call “selecting for diversity”), but Roberts’ claim can be understood as an assertion that choosing adherence to colorblind procedures over race-conscious methods of selecting for diversity will, in the long run, tend to have the consequence of reducing the overall occurrence of race discrimination¹⁰⁶—even if it might seem obstructive or even counterproductive in particular cases.

The main difficulty with this way of understanding the basis of the commitment to colorblindness—even putting aside any disagreement one might have with the claim on its merits¹⁰⁷—is that it effectively makes the requirement of colorblindness dependent upon a rather controversial prediction of its social effects.¹⁰⁸ It seems to me implausible that such a speculative empirical hypothesis should be thought to be built into the Fourteenth Amendment’s guarantee of Equal Protection. Furthermore, the notion that the principle of colorblindness should be followed because of its expected consequences seems susceptible to the very same objection that Chief Justice Roberts levies against race-conscious methods of selecting directly for diversity. Supporters of non-colorblind procedures also argue, after all, that reduction of race discrimination is among the expected beneficial effects of such measures.¹⁰⁹ In his

105. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

106. For an interesting argument to the contrary—i.e., that the production of *racial diversity* might be useful as a means of promoting attitudes of colorblindness, see Carbado & Gulati, *supra* note 9, at 1157–58.

107. See *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring) (“Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution.” (citation omitted)).

108. Another difficulty with the claim is that it characterizes too narrowly the argument in favor of selecting for diversity: the goal of creating racial diversity is not just to “stop discrimination” but also, arguably, to create conditions of substantive economic equality and fair equality of opportunity. It is not clear why adhering to a colorblind ideal should be thought to serve those goals.

109. See *Parents Involved*, 551 U.S. at 843–44 (Breyer, J., dissenting). Some would go further to argue that colorblindness would operate to preserve certain forms of racial bias. See Elizabeth Anderson, *The Future of Racial Integration*, in CONTEMPORARY DEBATES IN SOCIAL PHILOSOPHY, *supra* note 83, at 241 (“Once we acknowledge that mental states reside at various levels of consciousness, the call for conscious color-blindness effectively amounts to a

response to Justice Breyer's call to recognize those benefits, Chief Justice Roberts accuses Justice Breyer of making an invalid argument that "[t]he end justifies the means."¹¹⁰ If social benefits do not constitute an end sufficient to justify the means of selecting for diversity, then it would seem self-contradictory to defend the value of the principle of colorblindness in terms of the same kind of beneficial effects.¹¹¹ If the value of adhering to the deontological restriction of colorblindness is based purely on its social benefits, then the adherent's charge of arguing from ends to means becomes self-defeating. Thus, if Chief Justice Roberts' assertion that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race"¹¹² is understood as a claim that colorblindness is supported by consequentialist, instrumentalist considerations, then it is not only enigmatic, but hypocritical.

D. Non-Instrumentalist Considerations: Justice Harlan's Argument

However, the proponent of colorblindness, *pace* Chief Justice Roberts, need not insist that its value lies in its expected beneficial consequences. One non-consequentialist argument is that basic principles of fairness and formal equality of treatment require colorblindness. I am not going to discuss the merits of that familiar argument here, except to note that its success ultimately boils down to the premise that an individual's race is never by itself a relevant reason for including or excluding him from certain kinds of groups.¹¹³ Here, however, I am starting from the assumption that racial diversity is something we have reason to value. Thus, we have already rejected the premise presupposed by the formal equality argument: we cannot believe that racial diversity is good without also believing that race *can* be relevant in our judgments about who should populate social groups. In other words, if we assume that

call to let unconscious racial biases operate unopposed by conscious policies that might change them.").

110. *Parents Involved*, 551 U.S. at 743 (Roberts, C.J.).

111. It might be argued that colorblindness is simply *more* effective at eliminating discrimination than selecting for diversity, but I do not think the Court could have been resting its constitutional conclusions on that baldly empirical claim.

112. *Parents Involved*, 551 U.S. at 748.

113. I have elaborated this point elsewhere. *See* Shin, *supra* note 95. The basic idea is that it is logically inconsistent to hold at the same time that race can be a relevant reason in selection decisions *and* that it always constitutes formal inequality of treatment to treat people differently on account of their race.

racial diversity has value, then we have already decided that racial difference *can* be a consideration that provides justificatory reasons for certain actions or attitudes.¹¹⁴ I do not mean to assert that it necessarily follows that differential treatment based on race is justified for the sake of creating diversity. The point is that such differential treatment *might* be justified, and so colorblindness cannot be regarded as simply falling out of a commitment to equal treatment.¹¹⁵ Of course, some proponents of colorblindness might in fact believe that race is always irrelevant and that racial diversity has no value, but my interest here, again, is in the argument for colorblindness (against selecting for diversity) that does not depend upon a prior rejection of the value of racial diversity.

The non-instrumentalist argument supporting the value of colorblindness that I do want to explore is the one originally articulated by Justice Harlan in his dissent in *Plessy v. Ferguson*.¹¹⁶ This argument invokes the fundamental, non-instrumental norm of equal respect. According to this argument, the value of colorblindness is that it represents a way of realizing that norm. Here is the familiar passage from Harlan's opinion:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when

114. This is just part of what it means, in my view, for something to be valuable. See *supra* note 19.

115. Peter Schuck observes that one practical and legal problem created by the fact of diversity is that in order for a society to conform its policies to basic principles of "equal treatment, dignity, and respect," it "must first decide which groups are similar enough that they must be treated the same, and which are sufficiently different that they fall into different categories justifying disparate treatment." SCHUCK, *supra* note 13, at 60. The implication here is that, as I also suggest, disparate treatment of members of certain different groups might not be inconsistent with a commitment to principles of "equal treatment, dignity, and respect."

116. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

his civil rights as guaranteed by the supreme law of the land are involved.¹¹⁷

I quote at length to make clear that, for Harlan, colorblindness represents a constitutional commitment to ignore the *actual* superiority and dominance of the “white race.” Colorblindness is after all, a *defect* of vision consisting in an inability to discern certain differences that really do exist.¹¹⁸ Harlan’s interpretation of the Fourteenth Amendment thus embodies a strange sort of aspirational commitment. His claim is that it should be read to contain a self-imposed blindness to the actual differences among the races as a way of realizing the racial anti-subordination principle he sees embedded in the Equal Protection Clause. Constitutional colorblindness expresses *equal respect* for the legal rights and status of individuals who, by virtue of their race, might otherwise be regarded as inferior or less deserving of legal protection.¹¹⁹

This second justification for the principle of colorblindness is non-consequentialist and non-instrumentalist in that it does not depend on the value of further effects that adherence might be expected to produce. Generally stated, the argument is that we should commit ourselves to the ideal of colorblindness because it *expresses* a moral and constitutional truth, namely, that all individuals are entitled, regardless of their race, to equal respect under the laws.¹²⁰ On this rationale, we adhere to colorblind procedures not primarily because this is a way to achieve some desired social result, but because in doing so, we affirm our commitment to a fundamental principle of equality.¹²¹

117. *Id.* at 559 (Harlan, J., dissenting).

118. That Justice Harlan believed that there were real differences between the races is reinforced by his infamous remarks later in his dissent: “There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. . . . I allude to the Chinese race.” *Id.* at 561.

119. *Cf.* Siegel, *supra* note 12, at 127 (arguing that the rhetoric of formal colorblindness “can be understood, historically and contextually, as repudiating the relevance claims of status-race talk,” i.e., ascriptions of differential social status according to race).

120. For an account of the notion of expressive action generally and of the expressive concerns embodied in the Equal Protection Clause in particular, see Elizabeth Anderson & Richard Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533–45 (2000).

121. One might ask why expressing a value through adherence to a principle should not be considered analogous to engaging in a particular action for the instrumental purpose of sending a signal. The difference is that in sending a signal, one acts for the sake of a particular communicative consequence, whereas in acting to express commitment to a particular norm,

These are powerful ideas and cannot lightly be dismissed. Their implications for how we should think about race-conscious methods for *creating diversity* in the context of contemporary controversies, however, depend upon the extent to which we can still say, as Justice Harlan suggested in the context of his day, that colorblindness expresses a principle of equal respect. That is not a proposition on which everyone will agree, but one can say at least this much: the *rejection* of colorblindness signified something far different in the context of *Plessy* than it signifies in the context of cases like *Parents Involved*. Harlan was surely justified in suggesting that principles permitting race-based classifications in his time were largely expressions of white supremacy and privilege.¹²² In that society, there was no concept of using racial preference as a means of reducing inequality; so for the state to legitimize race conscious action was tantamount to condoning existing structures of racial subordination. By contrast, in today's society no one thinks that the sort of race-conscious differential treatment at issue in *Parents Involved* entails expressing approval for any such practice. We might disagree about whether selecting directly for racial diversity is, all things considered, a good thing; but the alternative to a commitment to colorblindness for us is not, as it might have been in the eyes of Justice Harlan, endorsement of a principle or practice of racial *subordination*.

For Justice Harlan, a commitment to colorblindness constituted a necessary and uniquely powerful expression of the repudiation of official policies of racial subordination.¹²³ What I am claiming is that colorblindness no longer has that sort of expressive value. I do not think anyone could plausibly maintain in the context of our current circumstances that adherence to the principle of colorblindness is a unique expression of the repudiation of practices of racial subordination.¹²⁴ To the contrary, I believe adherence to

the action is not done for the sake of communicating that commitment (although it might of course have that effect). Rather, in order for an action to express a norm, the norm itself must be regarded as a reason for the action. Signaling is an empirical effect of action, whereas the expressive content of an action is given by a relation between the action and the norms that are regarded as guiding it.

122. See Gotanda, *supra* note 12, at 39.

123. Cf. Siegel, *supra* note 12, at 127.

124. Yet, in his concurrence in *Adarand*, Justice Thomas declared, "I believe that there is a moral and constitutional equivalence . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J.,

colorblindness has come to be identified with a certain sort of fairness or formal equality objection to policies of race-based preference (which I briefly mentioned and set aside at the beginning of this section).¹²⁵ Policies that promote racial diversity seem more aligned with ideals of substantive equality of citizenship¹²⁶ and the elimination of racial stratification.¹²⁷ Some would even argue that a commitment to colorblindness signifies views that are themselves objectionable.¹²⁸ In any case, the value of colorblindness can no longer be identified—and certainly not uniquely identified—with the fundamental norm of equal respect of which it might historically have been an expression.

What, then, are we left with? The consequentialist arguments for colorblindness seem insufficient to justify adherence to it as a deontological constraint. If we start with the supposition that racial diversity is something we have reason to care about (for any of the reasons discussed earlier), the argument that colorblindness is required as a matter of formal equality also becomes ineffectual. The most powerful defense of the principle of colorblindness might have been the argument that adherence to that norm constitutes an expression of the substantive principle of equal respect and anti-subordination embedded in the Fourteenth Amendment, but that

concurring) (internal quotation marks, brackets, and citation omitted). That remark does seem to suggest that relaxing the constraint of colorblindness is morally tantamount to racial subjugation. A few paragraphs later in the opinion, however, Justice Thomas spells out what seems to be his real concern: that race-conscious procedures have a “destructive impact on the individual and our society” because they “may cause [minorities] to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.” *Id.* at 240–41. This concern might support a consequentialist argument against race-conscious procedures, but it hardly proves a moral “equivalence” between abandoning colorblindness and policies of racial subjugation.

125. See *supra* note 113 and accompanying text.

126. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (O’Connor, J.); Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 72–73 (2004) (arguing that *Grutter’s* diversity rationale is based on an ideal of equal citizenship); Robert C. Post, *The Supreme Court, 2002 Term – Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 59–62 (2003) (discussing various broadly democratic values implicit in *Grutter’s* diversity rationale).

127. See Anderson, *supra* note 109, at 241; Siegel, *supra* note 12, at 143–48 (arguing that colorblindness discourse, historically identified with a commitment to nondiscrimination and equality, has become an impediment to the elimination of racial stratification).

128. One might argue, for example, that in today’s society, colorblindness does not express a principle of equal respect but rather expresses disregard for the problems of racial inequality that persist. Cf. Gotanda, *supra* note 12, at 62–63 (“[M]odern color-blind constitutionalism supports the supremacy of white interests and must therefore be regarded as racist.”).

argument has become anachronistic and obsolete. The deontological conception of colorblindness, for all of its basic intuitive appeal, seems to elude any ready justification.

E. The “Racial Chits” Objection to Selecting for Diversity

Perhaps there is another avenue to explore. The final argument for the value of colorblindness that I shall consider is suggested by Justice Kennedy’s concurrence in *Parents Involved*. Although Justice Kennedy explicitly distances himself from Chief Justice Roberts’ absolute commitment to an ideal of colorblindness,¹²⁹ he voices concerns about selecting directly for diversity that I think must be taken seriously. These concerns can be viewed as an indirect argument for moving in the direction of colorblindness based on a certain *negative* value attaching to the act of selecting directly for racial diversity.

While taking the position that *some* consideration of race may be permitted for the sake of creating diversity in educational contexts,¹³⁰ Justice Kennedy asserts that “[r]eduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake.”¹³¹ He suggests that it would be constitutionally intolerable for a school district to manufacture racially diverse student bodies by making assignment determinations based solely on race: “Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school’s supply and another’s demand.”¹³²

Justice Kennedy’s remarks are, in an important and perhaps surprising way, closely related to Justice Harlan’s argument for colorblindness. Justice Harlan advocated for colorblindness as a positive expression of a principle of equal respect embedded in the Equal Protection Clause. Justice Kennedy argues *against* “crude” methods of selecting for racial diversity because they express an attitude that *violates* that principle of equal respect. For Justice Kennedy, the problem with such methods is not that they express a judgment of the superiority of one race over another (which was

129. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–88 (2007) (Kennedy, J., concurring).

130. See *id.* at 797–98.

131. *Id.* at 795.

132. *Id.* at 798.

Harlan's concern in *Plessy*), but that they express an attitude that treats individuals as nothing more than countable "chits," items to be accumulated or exchanged as necessary in order to balance accounts. These methods are objectionable because they evince a failure of *respect*, a failure to treat people as individuals capable of rational choice and to whom we are morally answerable.¹³³ Whereas for Harlan, the value of colorblindness consists in the attitude it expresses, for Kennedy, the value of colorblindness (or at least some measure of it) is a function of the *disvalue* of the attitude expressed by crude methods of selecting for diversity. But their positions are related in their concern for the non-instrumental, *expressive* value or disvalue of the constitutional principles to which we choose to commit ourselves.

There are at least two possible responses to Justice Kennedy's line of argument, the "racial chits" objection. One response is on the facile side: although it may be true that certain "crude" methods of selecting for diversity express a failure of respect for individuals, this is not strictly speaking a problem of *equality*, so long as the method in question reduces *everyone* to a "racial chit." In other words, even if the "crude" methods that Justice Kennedy has in mind are objectionable in virtue of expressing a lack of respect for individuals, this is of no particular concern for the Equal Protection Clause, insofar as that constitutional command is violated only by actions that evince *unequal respect* for some classes of individuals compared to others. Thus, one might agree that the "racial chits" objection is well taken but be skeptical whether the objection is properly associated with considerations having to do with equality.

The more important response, however, requires acknowledging that certain "crude" methods for creating diversity might indeed be objectionable because of what they express about the status of the individuals who will be affected. This seems to me an important insight. But I do not think it follows that a commitment to constitutional values of equal respect requires that such methods, "crude" or not, always be rejected. The racial chits objection seems to assume that procedures that crudely select for racial diversity are at best instrumentally valuable as a means of producing racial diversity (a valuable state of affairs), but that they always express an attitude

133. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (discussing the implications of equal respect and concern for the permissibility of affirmative action).

that is inconsistent with our constitutional commitment to treating all individuals with equal respect. Thus, on this view, since our (deontological) constitutional commitment trumps the instrumental value of selecting for diversity, those selection methods are impermissible.

What the racial chits objection seems to overlook is the contingent character of the expressive content of our actions.¹³⁴ Just as we saw in the case of colorblindness, adherence to a particular principle of action may signify one thing under one set of circumstances and something different under another. Measures that reduce an individual's status to a racial category are surely demeaning and offensive when they are implemented in the service of a social order that seeks to preserve structures of racial hierarchy and stratification. But do they necessarily have that same character when in the service of a collective effort to prevent or rectify such hierarchy and stratification? What if those problems of inequality have been persistent and intractable? And what if "crude" methods of managing racial integration have offered the best hope for progress in alleviating those problems? Given the right conditions, a community's implementation of procedures that aim directly at racial integration and diversity might, I would think, express a commitment to the substantive equality of all of its members. This is not "expression" in a merely symbolic sense, but rather in a constitutive sense. By adopting procedures that select directly for racial diversity in institutionally significant settings, a community that is plagued with problems of racial inequality and stratification can perhaps *constitute itself* as a community that cares about the equal status of its members. In the right context, in other words, perhaps adopting measures that select directly for diversity just *is* what it takes for a community to treat its members with equal respect and concern.¹³⁵ If that is the case, then contrary to the racial chits

134. Cf. Anderson & Pildes, *supra* note 120.

135. Does this constitutive expressive relation between selecting for diversity and a commitment to equality depend on the actual efficacy of those selection methods in creating the envisioned equality? On the one hand, I think that to some extent, a community's decision to select directly for diversity can express a commitment to equality whether or not the selection methods actually succeed in bringing about equality. Thus, I think that selecting for diversity can express a commitment to equality even if it is empirically uncertain whether the measures in question will turn out to be effective in the long run. But on the other hand, it seems to me we must say that the expressive value of selecting for diversity must to *some* extent be derivative of the value of the diversity that is actually produced. To take the extreme case, if

objection, a commitment to the creation of diversity without procedural indirection might be seen as a realization of the values embedded in the Equal Protection Clause, rather than trumped by it.

V. CONCLUDING OBSERVATIONS

My goal has been to understand the nature of the value of racial diversity, the value of adhering to an ideal of colorblindness, and how those values come into opposition. I have mapped out what I view as the main categories of arguments. I conclude with a few observations about the implications of occupying the various value positions I have staked out.

First, although I have considered each argument for the value of diversity and colorblindness on its independent merits, it is of course possible to hold that racial diversity or colorblindness is worth caring about for a variety of reasons that span the various categories I have delineated. This simple point can have important implications. For example, insofar as we regard racial diversity in particular contexts as having *both* instrumental and non-instrumental value, we should be careful not to overemphasize the significance of ongoing empirical findings regarding whether or not cultivating racial diversity is *useful* for producing certain kinds of beneficial effects. In other words, if we do place at least some non-instrumental value on racial diversity, then negative empirical findings on the effects of diversity should not be seen as necessarily fatal to the project of promoting it.

Second, I think that the way that racial diversity is *valued* in some contexts may paradoxically *undercut* arguments for aiming directly at it in others. For example, I described an “evidential” view of the value of diversity, according to which racial diversity is good for a community in the same sense a wet nose is good for a dog: it is a sign of healthy functioning. Or, racial diversity might be regarded as an indicator that a community is committed to a certain ethos of equality or vision of justice. But if this is the best way to think about the good of racial diversity, then aiming at racial diversity for the sake of equality or justice might seem to take on a peculiar character, perhaps akin to splashing water on a dog’s dry nose for the sake of its

it became inarguably clear that racial diversity itself had *no* effect on redressing problems of racial inequality in a society, then I would think that a commitment to selecting for diversity could no longer succeed in expressing a commitment to equality.

health, i.e., treating the manifestation rather than the root cause of racial inequality or injustice. This seems to me an important worry, but not a conclusive argument against selecting for diversity and adopting a policy of colorblindness. Creating diversity is generally not easy. In the contexts where we care about it most, adopting the goal of racial diversity is itself a significant commitment, and then actually achieving it requires deep institutional resolve. Thus, it seems hard to imagine that a non-diverse community could make itself racially diverse in a way that failed to touch whatever had been the root cause of its former lack of diversity. Putting it another way, I think it is plausible that the very institutional changes required to produce racial diversity may also work to alleviate the root sources of inequalities that would explain its absence. If that is true, then even if the value of diversity is regarded as primarily evidential, there might be no illogic in aiming at it as a surrogate for the conditions of equality and justice that we really have reason to care about.

Third, I have asserted that the value of racial diversity is in important respects orthogonal to the procedural ideal of colorblindness, and that the real conflict is between a commitment to colorblindness and adopting procedures that involve *selecting for* diversity. But if the positive value of racial diversity and selecting for it stand in need of affirmative argument, then so should the value of colorblindness. One cannot simply invoke the ideal of colorblindness as a self-evident truth. Indeed, I have suggested that if one begins with the premise that racial diversity does indeed have positive value (based on any or all of the arguments articulated in the first part of this Article), it becomes rather difficult to articulate a robust argument in favor of strict adherence to the constraint of colorblindness, at least as a matter of equal treatment. (This is because colorblindness as a principle of equal treatment presupposes that race is always an irrelevant difference; but if we attach a positive value to racial diversity, it follows that race in some sense *does* matter, which undercuts the required presupposition.)

Finally, I have tried to show that in the debate about the commitment to colorblindness versus the adoption of procedures that select for diversity, a large part of the controversy may have to do with conflicting notions about the normative commitments that particular actions may properly be regarded to *express*. Proponents of colorblindness tend to argue that a commitment to that ideal is a direct expression or realization of the fundamental principle of equal

respect contained in the Fourteenth Amendment. I have asserted that the original power of the argument for colorblindness consisted in its being a unique expression of the repudiation of institutionalized white supremacy and of policies of racial subordination. In today's circumstances, however, a commitment to colorblindness does not have that same expressive value. Indeed, if living up to the ideals of the Fourteenth Amendment requires committing ourselves to making actual progress toward equal citizenship and the elimination of racial stratification, direct methods of selecting for racial diversity and producing integrated communities are arguably a more faithful expression and realization of the basic principles of equal respect and concern embodied in the guarantee of Equal Protection.